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Northwestern University School of Law

THE
FEDERAL REPORTER.

VOLUME 55.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

MAY—JULY, 1893.

ST. PAUL:
WEST PUBLISHING CO.
1893.

THE HISTORY OF THE CITY OF CHICAGO

FROM 1837 TO 1893

BY

JOHN H. COOPER, JR.,

CHIEF CLERK OF THE CITY OF CHICAGO.

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FEDERAL REPORTER, VOLUME 55.

JUDGES

OF THE

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¹Appointed Secretary of State, U. S. March 6, 1893.

²Commissioned Circuit Judge, March 23, 1893.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

SHERWOOD et al. v. NEWPORT NEWS & M. VAL. CO. et al.

(Circuit Court, W. D. Tennessee. April 8, 1893.)

No 3,086.

REMOVAL OF CAUSES—ALIEN PLAINTIFFS.

Under the judiciary act of 1887, as corrected by the act of August 13, 1888, (25 St. p. 433,) a suit brought by alien plaintiffs against corporation defendants not chartered by the state in which suit is brought may be removed to the federal court by such defendants.

At Law. Action by John Sherwood & Co. against the Newport News & Mississippi Valley Company and the Chesapeake & Ohio Railroad Company, defendants. The case was removed to the federal court on application of the defendants, and was heard on "a plea in abatement of the petition for removal," according to a stipulation of the parties. Judgment for defendants.

Statement by HAMMOND, J.:

This suit was originally commenced in the circuit court of Shelby county, Tenn. By the writ the sheriff was "commanded to summon the Newport News & Mississippi Valley Company and the Chesapeake & Ohio Railway Company, corporations organized under the laws of other states, but doing business in Tennessee by officers and agents, * * * to answer John Sherwood & Co., a firm composed of John Sherwood and Richard Thompson;" and the declaration subsequently filed avers that "the plaintiffs, John Sherwood and Richard Thompson, composing the firms of John Sherwood & Co., and Sherwood, Thompson & Co., being then engaged in the business of buying, shipping, and selling cotton in bales, with offices and places of business within the city of Memphis, Tenn., Liverpool, Eng., and elsewhere, and buying largely at said Memphis for foreign shipment, on the days aforesaid made freight engagements or contracts with the defendants, who were corporations duly organized and existing under the laws of Tennessee, or other states, and with business offices and agents in Memphis, Tenn.," while the 2d, 3d, and 4th counts of this declaration describe defendants as "corporations organized and existing under the laws of other states, with business offices and agents in Memphis, Tenn."

The suit was removed to this court by the defendants, their joint petition alleging "that they are nonresidents of the state of Tennessee, and were at

and before the bringing of this suit; that they are corporations, the said Newport News & Mississippi Valley Company being chartered and doing business under the laws of the state of Connecticut, and the said Chesapeake & Ohio Railroad Company being chartered and doing business under the laws of the states of Kentucky and Virginia, and were so at the bringing of this suit; that * * * plaintiffs are citizens and residents of the state of Tennessee, and were so at the bringing of this suit." At the term to which it was removed the plaintiffs entered their "motion to remand to state court because removal to this court from the state court not authorized by law." Subsequently, "upon argument and consideration by the court, said motion was overruled, with leave to the plaintiffs to file herein a plea in abatement, showing that they are not now, and were not at the time of the bringing of this suit, or at the time of its removal to this court, citizens of Tennessee," whereupon they filed a plea "in abatement of the petition for removal upon which this cause purports to have been removed from the circuit court of Shelby county, Tenn., to this court, and thereupon they say that it is not true, as stated in said petition, that said plaintiffs are, or ever were, citizens and residents of the state of Tennessee; but on the contrary they aver that at the time this suit was originally brought, and long before, and ever since, they are and were aliens and citizens and residents of Liverpool, Eng., and subjects of her majesty, the queen of Great Britain," etc., which plea is sworn to. In support thereof, and filed with the plea, is the affidavit of one John M. Richardson, of this city, as follows: "I am and have been the representative of the firms of John Sherwood & Co., of Memphis, Tenn., and Sherwood, Thompson & Co., of Liverpool, Eng., in their business at this point, for about four years last past. I am personally cognizant of the fact that the members of said firms are non-residents of the state of Tennessee, and are, and have been since my connection with said firms, citizens and residents of England." And the parties have filed a stipulation that the case "may now be tried on the merits contained in the plea in abatement of the defendants' petition for removal; that the said issue may be tried by the court without the intervention of a jury, and that upon said trial the affidavit of J. M. Richardson, now filed herein, shall be taken and considered as his deposition, the same being the only testimony presented by either party; and that if, upon the facts found, the court is of the opinion that, under the law, said cause shall be retained, it shall so adjudge, and if it is of the opinion, under the law, that said cause shall be remanded to the state court, it shall so adjudge."

H. C. Warimer, for plaintiffs.

Holmes Cummins and Turly & Wright, for defendants.

HAMMOND, J., (after stating the facts.) The issue of fact raised in the foregoing record by the plea in abatement is of simple solution, under the agreement, and the court has no hesitation whatever in finding that the plaintiffs, John Sherwood and Richard Thompson, are not now, and were not at the bringing of this suit, and at the time of its removal to this court, citizens of the state of Tennessee, but alien subjects of the queen of Great Britain, etc., resident in England. But defendants contend that the allegations of the plea itself show just as conclusively that the suit was removable to this court as do the averments of their petition for removal, because, they say, the federal court has jurisdiction of a suit brought to it by removal from a state court equally when "there shall be a controversy between citizens of different states" as where there is "a controversy between citizens of a state and foreign states, citizens, or subjects," under the late judiciary act of 1887. By the agreement of the parties here "if upon the facts found the court is of opinion" that the case is removable, it is to be retained as though

such facts were set out in the petition for removal, and no question is made as to an amendment of the petition so as to show the true facts. The question, therefore, is presented, whether a suit brought in the state court by alien plaintiffs against corporation defendants not chartered by the state in which the suit is brought can be removed to the federal court by such defendants; there being proper allegations as to the jurisdictional amount in controversy. The first section of our last judiciary act gives the United States circuit courts "original cognizance" of the following causes: (1) Those arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority; (2) or in which controversy the United States are plaintiffs or petitioners; (3) or in which there shall be a controversy between citizens of different states; (4) or a controversy between citizens of the same state claiming lands under grants of different states; (5) or a controversy between citizens of a state and foreign states, citizens, or subjects. And it further provides that "no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant; but, when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Section 1, Act March 3, 1887, as corrected by Act Aug. 13, 1888, (24 St. at Large, p. 552; 25 St. at Large, p. 433; 1 Supp. Rev. St. p. 611.) Section 2 of this act, so amended, provides—First, for the removal to the federal court, from the state court, of suits "arising under the constitution or laws of the United States, or treaties made, * * * of which the circuit courts of the United States are given original jurisdiction by the preceding section, * * * by the defendant or defendants therein;" and, second, that "any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state." *Id.* Section 1, above quoted, prescribes for the circuit courts their jurisdiction by "original cognizance" of suits, providing certain limitations as to parties to actions brought "by any original process or proceeding;" and, had this cause been originally commenced here, the court, probably, would have had jurisdiction of it, although not brought "in the district of the residence of either the plaintiff or the defendant," because this limitation is, by the very terms of the statute, strictly confined to such actions as are only "between citizens of different states," viz. the third class in the subdivision of section 1, *supra*. But, at all events, it does not apply in terms, nor do I think at all, by any proper construction, to controversies of the fifth class of said subdivision, viz. those "between citizens of a state and foreign states, citizens, or subjects." And although it is held by the supreme court that, under this statute, an action originally

brought in the United States circuit court for the western district of Texas by a citizen of that state, residing in its eastern district, against a Kentucky corporation doing business in the district where suit was commenced, could not be maintained where defendant challenged the jurisdiction of the court, (*Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. Rep. 44,) nor a suit so brought in the federal court of New York by a citizen of Massachusetts against a Michigan corporation, "having a usual place of business" in the district where the suit was instituted, (*Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. Rep. 935,) nor a suit originally brought in the United States court of Missouri by partners, one of whom was a citizen of that state, and the other a citizen of Arkansas, against an individual defendant who was a citizen and resident of the state of Texas, (*Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. Rep. 303, 38 Fed. Rep. 53;) yet all these were cases of "original cognizance," under the first section, and the expressions contained in the opinions can apply only to such, and not to matters of jurisdiction acquired by removal. But section 2, *supra*, deals only with the jurisdiction of the federal courts over suits removed to them from the state courts, limiting the right of removal strictly to "the defendant or defendants" therein; and its second clause further confines such defendants to "nonresidents" of the state in which the suit is brought. In the case at bar every condition imposed by this statute upon the right of these defendants to remove their cause to this court seems to exist. Although plaintiffs are aliens, it must be remembered that defendants have removed the suit, and the question here is one of their right to remove under the statute. Nor do any of the questions of defendants' personal privilege of exemption from being sued here instead of in the courts of the states where they were incorporated, nor of their waiver of any such exemption, arise, because they are themselves invoking the jurisdiction of the court. *Shaw v. Mining Co.*, *supra*; *Southern Pac. Co. v. Denton*, *supra*; *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. Rep. 905.

In *Cudahy v. McGeoch*, 37 Fed. Rep. 1, Illinois plaintiffs brought suit in the state court of Wisconsin against McGeoch, "an alien residing in" that state, and other defendants who were citizens of Illinois. Service was had only upon the alien defendant who removed the suit to the federal court, and it was remanded by Judge Gresham solely because McGeoch was a resident of the state in which he was sued. The exact question here was presented in *Uhle v. Burnham*, 42 Fed. Rep. 1, where alien plaintiffs brought two actions in the supreme court of New York against defendants, residents of Missouri, who removed the causes to the proper federal circuit court, and Judge Lacombe denied the plaintiffs' motions to remand. In *Purcell v. British, etc., Co.*, 42 Fed. Rep. 465, a citizen of Kansas commenced his suit in a court of that state against an English corporation having a place of business in Kansas, and defendant removed the cause to the federal court, and plaintiff's motion to remand was overruled; and such was the decision of Judge Brown in *Cooley v. McArthur*, 35 Fed. Rep. 372, where a citizen of

Michigan, in the state court there, sued nonresident alien defendants, who removed it to the United States court. And in *Walker v. O'Neill*, 38 Fed. Rep. 374, Judge Barr's opinion is really to the same effect; the motion to remand being sustained, as in *Cudahy v. McGeoch*, *supra*, because the defendant's petition for removal failed to allege that, although an alien, he was a nonresident of the state of Kentucky, where the suit was brought, and removed to the federal court.

Motions to remand were also overruled in the following cases: *Kansas City, etc., Co., v. Lumber Co.*, 37 Fed. Rep. 3, where both plaintiff and defendant were nonresidents of the district in which the suit was originally brought and removed. *First Nat. Bank v. Merchants' Bank*, Id. 657, where an Alabama corporation sued in the Georgia state court a Georgia corporation. Subsequently the receiver of an Ohio corporation was made a defendant, and he removed the case to the federal court, the Georgia bank being only a nominal party. *Burck v. Taylor*, 39 Fed. Rep. 581, where a citizen of Texas, residing in the eastern district of the state, sued a "resident citizen of Cook county, Ill.," who removed the case. *Stanbrough v. Cook*, 38 Fed. Rep. 369, where a citizen of New York brought suit in an Iowa state court against citizens of Vermont and Iowa, and the case was removed by certain defendants.

In no one of these cases last cited would the federal court have had jurisdiction by "original cognizance" because not brought "in the district of the residence of either the plaintiff or the defendant," and therefore not within the express limitation of the first section of the judiciary act of 1887. *Southern Pac. Co. v. Denton*, *supra*; *Shaw v. Mining Co.*, *supra*; *Smith v. Lyon*, *supra*. But the jurisdiction by removal under the second section of the act contains no such limitation, certainly as to "a controversy between citizens of a state and foreign states, citizens, or subjects," nor any other limitation that is not fully answered by the jurisdictional facts appearing in this record. With the exception of a few of the earlier cases arising under this judiciary act, such as *Yuba Co. v. Mining Co.*, 32 Fed. Rep. 183, and *Harold v. Mining Co.*, 33 Fed. Rep. 529, which have since been expressly overruled, there has been a substantial uniformity of judgment in the circuit courts on the question of our jurisdiction by removal; and in accordance with such current of decision, as well as upon my own independent judgment upon this question, which in different forms, has several times been presented to the court, I have no doubt that this suit is removable, nor of our jurisdiction here. *Insurance Co. v. Delaware, etc., Co.*, 50 Fed. Rep. 243, 257; *Brooks v. Dun*, 51 Fed. Rep. 138; *Gavin v. Vance*, 33 Fed. Rep. 88. Judgment accordingly.

NOTE.

When one party to a suit in the courts of the United States is an alien, the record must show, by proven averment, that the other party is a citizen. *Mossman v. Higginson*, 4 Dall. 12; *Piquignot v. Railroad Co.*, 16 How. 104. A controversy in the state court, by the state, upon a bond to keep the peace, against an alien, cannot be removed to the federal court, as the supreme court of the United States, only, has jurisdiction over a controversy between a state

and an alien. *Respublica v. Cobbett*, 3 Dall. 467; *Baillif v. Tipping*, 2 Cranch, 406. When both parties to a suit are aliens, the courts of the United States have no jurisdiction of it, (*Montalet v. Murray*, 4 Cranch, 46,) though it would seem to be otherwise in admiralty, as to aliens of a friendly foreign power, as in a case of salvage (*The Blaireau*, 2 Cranch, 240) or collision, (*The Belgenland*, 114 U. S. 355, 5 Sup. Ct. Rep. 860.) An alien may sue the United States in the court of claims, when the government of his own country accords to our citizens a right to sue it, (*U. S. v. O'Keefe*, 11 Wall. 178; *Carlisle v. U. S.*, 16 Wall. 147;) and a state may sue the United States in that court, (*U. S. v. Louisiana*, 123 U. S. 32, 8 Sup. Ct. Rep. 17;) and it has been held in Texas that an ejectment suit by the state to try title to land, brought in the state court against aliens, could be removed to the federal court which had jurisdiction, (*State v. Lewis*, 12 Fed. Rep. 1, 14 Fed. Rep. 65.)

HERRICK et al. v. CUTCHEON et al.

(Circuit Court of Appeals, First Circuit. February 3, 1893.)

No. 48.

APPEAL—TIME OF TAKING—DECREE—DOCKET ENTRIES.

The docket entry in an infringement suit, "Opinion—Decree for complainants," does not constitute a decree for an injunction which is required to give the circuit court of appeals jurisdiction, nor can such entry be aided for that purpose by reference to the opinion; and hence an appeal taken before any decree is drawn is premature.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. This was a suit by James C. Cutcheon and Charles S. Johnson against George W. Herrick, Frederick W. Herrick, and George H. Herrick for the infringement of letters patent No. 384,893, issued June 19, 1892, to the assignees of James C. Cutcheon, for an improvement in "beating-out machines." The court rendered an opinion (52 Fed. Rep. 147) sustaining the patent, finding that it had been infringed, and concluding with the words, "Decree for complainants." Thereupon, and before any decree was entered, defendants appealed. Dismissed.

Charles A. Taber, for appellants.

Alexander P. Browne, for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. Whatever may be the practice of the circuit court as to drawing out decrees before they become effective as such, it is plain that the docket entry in this case, containing only the words, "Opinion—Decree for complainants," does not constitute a decree for an injunction required to give this court jurisdiction, nor can the docket entry be aided for that purpose by reference to the opinion. The appeal was taken prematurely, and is dismissed.

BROWN et al. v. REPUBLICAN MOUNTAIN SILVER MINES, Limited,
et al.

(Circuit Court, D. Colorado. April 3, 1893.)

1. FOREIGN CORPORATION—REORGANIZATION—NOTICE.

A mining company was organized in England for the purpose of operating mines in the United States. Its principal office was in London, but all its property except office furnishings was in the United States, and consisted of mines and mining lands. All of its business was conducted in the United States, and four fifths of its stock was held there. A by-law of the company authorized a transfer of its property and business, or a reorganization, upon not less than one month's, and not more than three months', notice to the stockholders of the meeting to be held for that purpose. The English stockholders and officers, however, attempted to reorganize the company under a British statute providing for a preliminary meeting and a confirmatory meeting held on not less than fourteen days', nor more than one month's, notice; and a resolution to reorganize was in fact passed by the English stockholders at a meeting held pursuant to notices sent out fourteen days before, but which in fact were not received by the American stockholders until after the meeting. *Held*, that there was no conflict between the by-law and the English statute, and that the former should control; and therefore that the proceedings of the English stockholders were void for want of notice.

2. SAME—JURISDICTION OF AMERICAN COURTS.

In such case the American stockholders properly resorted to an American court for protection of their rights, and could not be required to seek their remedy in the English courts.

3. SAME—INTERNATIONAL COMITY.

The reorganization in question having been the voluntary act of the English stockholders, and not of the British courts, and having been in flagrant violation and disregard of the rights of the American stockholders, no principle of international comity required that it should be sustained.

In Equity. Bill by J. Warren Brown and another against the Republican Mountain Silver Mines, Limited, and other defendants. Heard on the merits, and decree entered for complainants.

R. S. Morrison and Willard Teller, for complainants.
Charles E. Gast, for defendants.

RINER, District Judge. This is a bill in equity by J. Warren Brown and Porter P. Wheaton, on behalf of themselves and all other stockholders, similarly situated, of the Republican Mountain Silver Mines, Limited, against that corporation and certain of its directors. The defendant company is a corporation organized under the laws of Great Britain, with its principal office in the city of London. The corporation was formed, as shown by its memorandum of association, for the purpose of purchasing or otherwise acquiring and working mines and mining rights in the state of Colorado, in the United States of America, or elsewhere, "and in particular the land, minerals, and mining rights situate on the Republican mountain, near Georgetown, Clear Creek county, in the state of Colorado, in the United States of America, with the ore houses and other buildings erected on the said land, and the plant, machinery, stock, implements, and effects used in or about or be-

longing to the said mine, mill, ore houses, and other buildings, together with the business of the mine and the good will thereof." It is admitted by the pleadings that all the property of the company, except its office furnishings in London, is situated in Clear Creek county, in the state of Colorado, the property being particularly described in the bill of complaint. It is alleged in the bill, and admitted by the answer, that the legal title to the mining property of the company in Colorado is held by one of the defendants, Horace H. Atkinson, as trustee, but that the defendant company is the equitable owner thereof, and that Atkinson has no interest in the property, but simply holds it as trustee for and on behalf of the defendant company. The proof shows that about four fifths of the capital stock of the company is held by the American stockholders, who are represented by the complainants; the other fifth being held in England.

In 1888, because of certain differences and disagreements existing between the English and American stockholders, the details of which it is unnecessary to state, Mr. Brown, one of the complainants, went to London, representing a majority of four fifths of the capital stock, for the purpose of electing a board of directors favorable to carrying out the plan of operating these mines agreed upon by the American stockholders. The record shows that at the annual meeting of that year certain concessions were made to the American stockholders. An American subboard was appointed, which it was agreed should carry out the plans of mining proposed by the American stockholders, and, in view of the concessions so made by the company respecting the rights of the American stockholders, Mr. Brown did not carry out his original purpose of electing an entire new board. A loan was made for the purpose of carrying on the mining operations, and after they had progressed for a time the English board declined to carry out the plan of operation proposed, and the loan made for the purpose of carrying on the mining operations was reduced to a judgment against the company, which judgment was brought by one of the directors of the London board, and subsequently secured by trust deed in his favor. This action taken by the English board was an end to the active operation of the company in the development of the property. By the trust deed the control of the legal title to all of this property, through the trustee, was secured to the English stockholders, who sought to control the assets of the company by threats of foreclosure.

In 1891 the English stockholders attempted to wind up the affairs of the company by a voluntary proceeding under the English statute, and to effect a reorganization of the company. To carry out this purpose, on the 8th of June, 1891, the secretary of the company sent out notices from the London office calling a winding-up meeting of the stockholders for the 16th of June, 1891. These notices were sent to the American stockholders with full knowledge upon the part of the English directors and stockholders that it would be impossible for the American stockholders to be present at the meeting, either in person or by proxy, for the

reason that the time given was not sufficient for the notice to reach the American stockholders and to enable them to be represented. In fact, the record shows that this notice was not received in America until after the date fixed for the meeting. June 17, 1891, notice for a second or confirmatory meeting, to be held July 1st, was sent out to the stockholders. The notice was in the following words:

"The Republican Mountain Silver Mines, Limited.

"Registered Office, 2 Copthall Building,
"London, E. C., 17th June, 1891.

"Notice is hereby given that an extraordinary general meeting of the members of the above-named company will be held at Winchester House, Old Bond street, in the city of London, on Wednesday, the 1st day of July, 1891, at 12 o'clock noon precisely, when the subjoined resolutions, which were passed at the extraordinary general meeting of the company held on the 16th day of June, 1891, will be submitted for confirmation as special resolutions: (1) That the company would be wound up voluntarily, and that Mr. Edward F. Tremayne, of 2 Copthall Building, London, E. C., be, and he is hereby, appointed liquidator. (2) That a general authority be, and the same is hereby, conferred on the liquidator of the company to transfer or sell the whole or any portion of the property or business of the company to another company, and to receive in compensation or part compensation for such transfer or sale shares in any such company, in whole or in part paid up, for the purpose of distribution amongst the members of the company.

"By order of the board,

E. F. Tremayne, Secretary."

This would give but 13 days exclusive of July 1st, or 14 days including July 1st, from the date of the notice until the date of the meeting, which the English stockholders knew was not sufficient time to enable the American stockholders to be represented at the meeting. The meeting was held, and a liquidator appointed, through whom a reorganization was proposed, and the following proposition was submitted to the American stockholders:

"The American shareholders have the option of paying out the English interest, and thus to take the whole property in their own hands, or coming in to subscribe to the capital of a new company according to a scheme to be put before the shareholders by the liquidator."

Thus we have one fifth of the shareholders proceeding to wind up the affairs of the company, through a liquidator selected by them, without sufficient notice to the parties holding the four fifths of the stock to enable them to be represented when this course was adopted, and without giving them an opportunity to have any voice whatever as to the manner in which the affairs of the company should be closed and its property disposed of. While it is true the corporation was organized under the laws of England, yet all of its property is situated in America, and its business is to be conducted in this country. Not only that, but four fifths of the shares of its capital stock are held in America; and the question now is, has this court jurisdiction to protect the owners of four fifths of the capital stock of the company, when the property of the company is all situated in this country, in their rights in respect thereto, or must they seek their remedy in the English courts? Article 136 of the by-laws of the company provides as follows:

"136. The company, by a resolution passed by three fourths of the votes at an extraordinary general meeting convened with notice of the object, and confirmed by a similar majority at a second extraordinary general meeting convened in a like manner, and held not less than one month, nor more than three months, thereafter, may amalgamate its business with, or transfer its property and business to, any other similar undertaking or company, or purchase or acquire the business or property of any company, partnership, or person carrying on a business similar to that of the company, upon such terms as may be agreed on in each case, and may pay for any business so acquired either in cash or in shares, to be treated either as wholly or in part paid up, or partly in cash and partly in shares, or in such other manner as may from time to time be deemed expedient to the company."

It is contended by counsel for defendant that this by-law has no application to the proceeding had by these English stockholders, and that the notice therein required was not necessary for the transaction of the business of these meetings of June 16th and July 1st, but, on the contrary, that the notice for these meetings was the notice required by section 51 of an act of the English parliament, (chapter 89,) being an act entitled "An act for the incorporation, regulation, and winding up of trading companies and other associations." This section of the English statute provides that for the second meeting notice shall be given not less than fourteen days nor more than one month from the date of the meeting at which the resolution was first passed. I think an examination of this by-law shows clearly that it was intended to cover meetings called for the very purpose of doing just what was done by these English stockholders at the meeting held July 1st. While it is true that there is a difference between the by-law and the statute as to the maximum time, yet the by-law does not conflict with the statute, as they both provided for one month's notice. My own view is that the by-law should be held to govern, for the reason that it amounts to an agreement between the stockholders that the action, such as was taken at the July meeting, should not be taken except upon at least a month's notice, thus giving all of the stockholders an opportunity to be represented at the meeting and have a voice in the business transacted.

I think an examination of this record discloses that it was the purpose of these English stockholders, in calling the meeting as they did, to deprive the American stockholders of their right to be heard as to the method of winding up the affairs of the company, for they well knew that, if the American stockholders had an opportunity to be represented at the meeting, the scheme for winding up the affairs of the company in the way in which it was attempted to be done would fail, and for that reason they purposely avoided giving the notice in sufficient time to enable the American stockholders to have representation at the meeting. Such a proceeding would not be tolerated by the courts of this country, even by a majority of the stockholders of a corporation organized under our laws, and certainly not by a minority holding but one fifth of the stock. Certainly, if there had been any disposition upon the part of these English stockholders to deal fairly with the American stockholders, they could at least have given one month's notice of the confirmatory meeting, which was authorized both by the statute and the by-law. This they did not do, and for the reason, as I think the

record discloses, that it was not their purpose to give the American stockholders any opportunity to be represented, and thereby enable the English stockholders to take an unconscionable advantage in adopting a plan for winding up the affairs of the company in a manner highly beneficial to the English interests. But it is urged that the action taken by them, which, as I have already stated, would not be tolerated in this country by a majority, should be sustained upon the ground of international comity, and because the laws of England provide that the stockholders not assenting to the proposition may appeal to the courts. Whatever might be the rule if this was an attempt upon the part of the English stockholders to wind up the affairs of the company by proceedings in court, as authorized by the English law, I do not think the action taken by the English board in this case should be sustained upon principles of international comity. This was an effort upon the part of these English stockholders to wind up the affairs of the company by their own voluntary act, without resorting to the courts of either England or this country; hence no court has given its sanction to the scheme in question. If such action had been taken by a corporation in any of our own states it would have been the duty of the courts of that state to treat it as an unlawful exercise of corporate power, and I do not think the courts of this country should tolerate or sustain an act taken by a minority of the stockholders of a company in a foreign country, which it would not sanction if the act had been done in this country, and which, if sustained, would seriously prejudice the rights of the citizens of this country in respect to property situated here. International comity can ask no such recognition. The action taken by these English stockholders was repugnant to the fundamental principles of the law of this country, and it should not be sanctioned or sustained. Neither am I prepared to say that, because the English law gives the stockholders not assenting the liberty to appeal to the courts of that country, therefore the courts of this country should deny to a citizen of this country the opportunity to litigate his rights, in respect to property, situated here, in our own courts. My own view is that the court has jurisdiction, and that the complainants are entitled to the relief prayed in their bill.

DOE v. WATERLOO MIN. CO.

SAME v. SAME.

(Circuit Court, S. D. California. April 3, 1893.)

Nos. 160, 161.

1. MINES AND MINING—CONFLICTING CLAIMS—PRIORITY—PATENTS.

N. discovered a metal-bearing lode, and on the same day erected a monument and posted a notice stating that he had "this day located and claimed" for mining purposes 1,000 feet northwesterly and 500 southeasterly therefrom, with 300 feet on each side, and claiming 20 days within which to complete his boundary monuments. Eleven days thereafter other prospectors located and set up the boundary monuments of a conflicting claim, and in so doing saw N.'s notice at a distance of 150 feet, but did not take

the trouble to go and read it. Subsequently, but before the expiration of the 20 days, transferees of part of the interest of N. (who was prevented from doing so himself by sickness) set up the boundary monuments of N.'s claim. *Held* that, in the absence of state statutes or mining rules fixing the time within which the exterior boundaries should be marked, 20 days was a reasonable time, and that N. was entitled to a patent as against the subsequent locators. *Erhardt v. Boaro*, 5 Sup. Ct. Rep. 560, 113 U. S. 527, followed.

2. SAME—BOUNDARY OF CLAIM—EVIDENCE.

One of two locators of a mining claim, while they were busy in marking the boundaries thereof, set up a corner monument which the other did not see at that time, although he wrote a notice to be put thereon. Three months later, as they went over the ground together, the former pointed out a monument bearing the notice, and stated that it was the monument he had set up when marking the boundaries, and that he had affixed the notice to it at that time. The monument was on a ledge of marked peculiarities, easy to be remembered. The man who set up the monument died before trial, and these facts were sworn to by the other locator, who also testified that he had pointed out this monument to the surveyor. The latter testified that the monument so pointed out determined the corner of the claim as represented by him on the map. *Held* that, in the absence of reasons for doubting this testimony, it was sufficient to prove that the monument had not been moved after it was first set up, and before the making of the survey.

In Equity. Suits in a superior court of California by Doe against the Waterloo Mining Company, under Rev. St. §§ 2325, 2326, to determine the right of possession of mining lands for which conflicting applications for patents had been filed. Defendant removed the causes to this court. Demurrers to the complaints were overruled, and it was held that the suits were on the equity side of the court. 43 Fed. Rep. 219. The causes are now heard on the merits. Decree for complainant in cause 160, and for respondent in cause 161.

R. S. Mesick & C. J. Perkins, for complainant.

A. H. Ricketts, for defendant.

ROSS, District Judge. These cases were argued and submitted together. Case No. 160 originated out of an application made by the Waterloo Mining Company in the United States land office at Los Angeles for a patent for a certain mining claim called the "Josephine," situate in the Calico mining district, in San Bernardino county, of this state, and a protest against such issuance, filed by the complainant, Doe; and case No. 161 had a similar origin in respect to an application by the same company for a patent for a mining claim called the "Red Jacket," situate in the same mining district. Contests having thus arisen between the respective parties in the land office, these suits were commenced by the contestant in one of the superior courts of the state, to determine the rights of the parties respecting the disputed premises, and the suits were, on motion of defendant, transferred to this court. Here the court was called upon to determine the precise nature of the suits in an opinion reported in 43 Fed. Rep. 219. The suits were subsequently brought to issue, evidence on behalf of the respective parties taken, and, after argument, submitted to the court for decision.

It appears that on the 26th of March, 1881, a man named Newbill discovered a vein of metal-bearing rock in the mountains of Calico, which he claimed, and named the "Red Jacket," on which he on the same day erected a monument, and posted a written notice on a stick placed therein, substantially as follows:

"I have this day located and claimed fifteen hundred feet on this lead or lode running one thousand feet northwesterly and five hundred feet southeasterly, with three hundred feet on each side, for running [mining] purposes. I also claim the legal time of twenty days to complete my boundary monuments."

On the 6th day of April following T. C. Warden and G. W. Yager went prospecting in the same vicinity, and on that day they located a claim called the "Mammoth," so marking its boundaries that they could be readily traced on the ground. The notice posted by Newbill was placed in a conspicuous place, and was in fact seen by Warden and Yager, although Warden's testimony is to the effect that they did not take the trouble to go to read it, though it was within 100 or 150 feet of where they stood when making the location of the Mammoth claim. The latter claim was so located by Warden and Yager as to take in a part of the ground that would be included by embracing within the boundaries of the Red Jacket 1,000 feet along the vein northwesterly and 500 feet southeasterly from the discovery monument and notice erected by Newbill, with 300 feet on each side thereof. Those boundaries were established by Parks, Wallace, and Farrell on April 12, 1881, in pursuance of the notice posted by Newbill, and for and on behalf of Newbill and themselves; Newbill, by reason of sickness, having given them an interest in the Red Jacket claim in consideration of their services in completing his location. The boundaries thus established by Parks, Wallace, and Farrell were, as a matter of course, in part within those of the Mammoth as established by Warden and Yager on the 6th of April. The complainant, Doe, is the successor in interest of Warden and Yager, and the defendant, Waterloo Mining Company, the successor in interest of Newbill and his associates. Which of these parties has the better right to the piece of ground covered by both locations, is the question for decision in case No. 161. The question, I think, is of easy solution.

Newbill was the first discoverer of the ground in question. True, upon the day of its discovery—March 26, 1881—he did not establish monuments around the exterior boundaries of the claim, and those monuments were not marked at the time Warden and Yager located the Mammoth claim, on the 6th of April, 1881. But the notice on the stake placed by Newbill at the point of his discovery notified Warden and Yager, and every one else, that Newbill had located and claimed the vein for 1,000 feet in a northwesterly direction and for 500 feet in a southeasterly direction from the discovery stake, with 300 feet on each side thereof. A less definite notice was held sufficient to protect the locator against the acts of subsequent locators by the supreme court in the case of *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560. There the discoverer on the day of discovery designated the vein or lode as the "Hawk

Lode," and posted at the place of the discovery a notice in writing as follows:

"Hawk Lode.

"We, the undersigned, claim fifteen hundred feet on this mineral-bearing lode, vein, or deposit.

"Dated June 17, 1880.

"Joel B. Erhardt, four fifths.

"Thomas Carroll, one fifth."

The supreme court, in reviewing the action of the court below, said:

"As seen by the statement of the case, the court below, in its charge, assumed that the notice on the stake, placed by Carroll at the point of his discovery, contained no specification or description of the ground claimed by the locators, because it did not designate the number of feet claimed on each side of that point, or in any direction from it. The court accordingly instructed the jury that the notice was deficient, and under it the locators could not claim any more than the very place in which the stake was planted, and that elsewhere on the same lode beyond the point of discovery any other citizen could make a valid location. In this instruction we think the court erred. The statute allows the discoverer of a lode or vein to locate a claim thereon to the extent of fifteen hundred feet. The written notice posted on the stake at the point of discovery of the lode or vein in controversy designated by the locators as 'Hawk Lode,' declares that they claim fifteen hundred feet on the 'lode, vein, or deposit.' It thus informed all persons subsequently seeking to excavate and open the lode or vein that the locators claimed the whole extent along its course which the law permitted them to take. It is, indeed, indefinite in not stating the number of feet claimed on each side of the discovery point, and must, therefore, be limited to an equal number on each side; that is, to seven hundred and fifty feet on the course of the lode or vein in each direction from that point. To that extent, as a notice of discovery and original location, it is sufficient. Greater particularity of description of a location of a mining claim on a lode or vein could seldom be given until subsequent excavations have disclosed the course of the latter. These excavations are to be made within sixty days after the discovery. Then the location must be distinctly marked on the ground, so that its boundaries can be readily traced; and within one month thereafter—that is, within three months from the discovery—a certificate of the location must be filed for record in the county in which the lode is situated, containing the designation of the lode, the names of the locators, the date of the location, the number of feet claimed on each side of the center of the discovery shaft, the general course of the lode; and such a description of the claim, by reference to some natural object or permanent monument, as will identify it with reasonable certainty. Rev. St. § 2324; Gen. Laws Colo. §§ 1813, 1814. But during the intermediate period from the discovery of the lode or vein and its excavation a general designation of the claim by notice, posted on a stake placed at the point of discovery, such as was posted by Carroll, stating the date of the location, the extent of the ground claimed, the designation of the lode, and the names of the locators, will entitle them to such possession as will enable them to make the necessary excavations and prepare the proper certificate for record. The statute of Colorado requires that the discoverer, before a certificate of location is filed for record, shall, in addition to posting the notice mentioned at the point of discovery, sink a shaft upon the lode to the depth of at least ten feet from the lowest part of such shaft under the surface, or deeper, if necessary, to show a defined crevice, and to mark the surface boundaries of the claim. Before this work could be done by the plaintiff and his colocator, the ground claimed by them was taken possession of by the defendants, the stake at the point of discovery upon which the notice was posted was removed, and Carroll was thereby, and by threats of violence, prevented from re-entering upon the premises and completing the work required to perfect the location and prepare a certificate for record; at least, the

evidence tended to establish these facts. If they existed, (and this was a question for the jury,) the plaintiff was entitled to recover possession of the premises. To the extent of seven hundred and fifty feet on the course of the lode on each side from the point of discovery he and his colocator were entitled to protection in the possession of their claim. They did not lose their right to perfect their location and perform the necessary work for that purpose by the wrongful intrusion upon the premises, and by threats of violence if they should attempt to resume possession. As against the defendants, they were entitled to be reinstated into the possession of their claim. They could not be deprived of their inchoate rights by the tortious acts of others; nor could the intruders and trespassers initiate any rights which would defeat those of the prior discoverers."

So far as the proof shows, there were in the case at bar no mining rules or regulations in existence at the time of the locations in question fixing the time within which locators in the district in question should establish the exterior boundaries of their claims, and there is no statute of California fixing such time. Locators should, under such circumstances, be allowed a reasonable time for that purpose. Such reasonable time had not expired when Warden and Yager went upon the ground on the 6th of April, 1881, and made their location of the Mammoth claim. They then saw, and should have read, Newbill's notice of March 26th, claiming the vein on which it was posted for 1,000 feet northwesterly and 500 feet southeasterly of his discovery monument, together with 300 feet on each side of it, and claiming the reasonable time of 20 days within which to mark the exterior boundaries of his claim. Warden and Yager were thereby apprised that no part of the ground embraced by Newbill's notice was open to location by them, and their act in including a part of that ground was therefore nugatory.

Speaking of a similar notice, the court, in the case of *Marshall v. Manufacturing Co.*, (S. D.) 47 N. W. Rep. 293, said:

"The notice posted notified any one coming within the limits described by that notice for the purpose of making another location that there had been a previous location, and if they attempted to occupy any portion or all of that ground described within the limits of that notice they would be trespassers."

It is suggested that the act of Parks, Wallace, and Farrell in marking the exterior boundaries of the Red Jacket claim on the 12th of April was unavailing, because one of those corners was established within the boundaries of the Mammoth claim as established by Warden and Yager on the 6th of April. To affirm that position would be to affirm that the perfecting of the right initiated by Newbill on the 26th of March could be arrested and defeated by the illegal and void act of Warden and Yager in embracing within the boundaries of the Mammoth claim ground not at the time subject to location. I think it clear that the defendant, Waterloo Mining Company, is entitled to that portion of the mining ground in dispute that is embraced by both the Red Jacket and Mammoth locations, and that complainant, Doe, has no right thereto nor interest therein.

That portion of the ground in dispute involved in case No. 160 concerns only the west end monuments of the Mammoth claim. The evidence does not show any location of the Josephine claim until April 7, 1881, which was the day after the Mammoth claim

was located. But it is contended on the part of defendant that the northwest corner of that claim as now claimed by the complainant, and as is represented by the Lewis map in evidence, is not as originally located, but has been moved within the boundaries of the Josephine claim; thus embracing a part of the ground within that location. The Mammoth claim was located, as has been said, by Warden and Yager, on the 6th of April, 1881. Some of the monuments that marked its boundaries were erected by Yager, one of them by Warden, and two of them by Warden and Yager together. The northwest corner monument was built by Yager, as were the west end center monument and the southwest corner monument. Yager was dead at the time of the taking of the evidence in this case, but Warden was a witness, and I see no reason to doubt the truth of his testimony. He says that while he did not see the west end monuments erected by Yager on the day that the claim was located, he wrote a notice, to be put by Yager in the west end center monument to mark the west end boundary of the claim, and that in July following he went with Yager on the ground; and that Yager then pointed out to him the west end boundaries he had erected, and that in the west end center monument so pointed out was the written notice that he (Warden) had written on the day of the location, April 6, 1881; that the northwest corner monument was peculiar, in that it was built by the side of a cliff of rocks, upon a sort of shelf in a rock projecting out from the cliff, and that this is the corner that he pointed out to the surveyor, Lewis, as the northwest corner of the Mammoth claim, and which Lewis testifies is represented as that corner on the Lewis map; and that the west end center monument pointed out to him by Yager, and in which was at the time the notice which he (Warden) had written, is the same west end center monument that the witness pointed out to the surveyor, and that Lewis testified is represented as that monument on his map. The physical peculiarity of the place where the northwest corner was established, according to the testimony, was such that the witness could not likely be mistaken, and, as has been already observed, I see no reason to doubt the truth of Warden's testimony. I am therefore of opinion that the piece of ground in dispute in case No. 160 was included within the Mammoth claim, the boundaries of which, according to the evidence, were established before there was a location of the Josephine; and, as a result, that the complainant is entitled to that piece of ground, and that the defendant has no right thereto nor interest therein.

Decrees in accordance with these views will be entered.

Ex parte MENSING.

CLAFLIN et al. v. SOUTH CAROLINA R. CO. et al.

(Circuit Court, D. South Carolina. April 12, 1893.)

EQUITY—PARTIES—INTERVENTION.

Where, in a suit in equity, an execution has issued, and a levy and sale have been made of certain lands, a third party, who claims to be the true owner, cannot intervene, for the purpose of moving to set aside the execution, when there is no privity of estate between him and the party against whom the execution has issued. His remedy is a bill to quiet title, or he may, in an action at law, plead the invalidity of the execution.

In Equity. Petition by Henry C. Mensing for leave to intervene in the suit of Calvin Claflin and others against the South Carolina Railroad Company and others. Denied.

C. B. Northrop, for the motion.

Mitchell & Smith, opposed.

SIMONTON, District Judge. The petitioner alleges that under an execution issuing out of the equity side of this court, in the main cause, certain lands of his were levied upon as property of the South Carolina Railroad Company, and attempted to be sold; that claiming under this sale, D. H. Chamberlain now seeks to dispossess him. He also alleges that many persons, complainants in the main cause, have died, and were dead when the alias execution under which the marshal proceeded was issued, whereby the said suit was practically suspended, awaiting the renewal of the suit, or the suggestions on the record, and that so the said execution was void. He also alleges that the execution was void because the time for the issuing of an alias execution under the law controlling this case had expired. He seeks to intervene in this case for the purpose of moving to set aside said execution, fearing that he cannot attack it in any other way. He has not alleged—in fact, he cannot allege—that he has any privity with any party to the main cause. He denies, himself, that he has any privity of estate; for he does not claim his land by or through the South Carolina Railroad Company, and on the contrary denies its title to or claim on this land. Under these circumstances, he cannot be made a party to the main case. The case cannot be res judicata as to him, or affect his rights at all, if his contention be true. He is an utter stranger to, and is not affected by, it. The only mode in which he could get into a court of equity on the grounds set up by him would be by bill to quiet title. But inasmuch as there is a suit pending between himself and D. H. Chamberlain, and about to be tried, attacking this title, and testing its validity, a bill to quiet title would not lie. Story, Eq. Jur. § 826. If, as he alleges, this execution is utterly void, he can, in his defense at law, avail himself of this, if the execution be offered in evidence as a link in the chain of plaintiff's title.

The petition is dismissed.

v.55F.no.1—2

NORTH ALABAMA DEVELOPMENT CO., Limited, v. ORMAN.

(Circuit Court of Appeals, Fifth Circuit. March 6, 1893.)

No. 101.

1. COVENANTS TO PAY ANOTHER'S DEBT—ACTION BY CREDITOR.

Where the grantee of land covenants that as part of the consideration he will pay certain notes given by his grantor for deferred payments when he purchased the land, the payee, under the laws of Alabama, may proceed at law against the covenantor; and his so proceeding is such an acceptance of the covenant as draws to him the exclusive right of action thereon. Affirming 53 Fed. Rep. 469.

2. SAME—REMOVAL TO FEDERAL COURT—JURISDICTION.

Where such proceeding, begun in the state court, is removed to the United States circuit court, it will proceed therein as an action at law, as it would have done in the state court, and the jurisdiction is not affected by stipulations between the parties.

3. SAME—CONSTRUCTION—NOTE SECURED BY MORTGAGE.

The grantee of land covenanted that as part of the consideration therefor he would pay certain notes made by the grantor. These notes recited that they were secured by mortgage on the land, and that in case of foreclosure the maker should be liable only to the extent of the proceeds of the sale, which proceeds should constitute a cancellation of the note. In the mortgage a power of sale was granted the mortgagee, the payee of the notes. Held that, since neither notes nor mortgage required a sale of the land upon default in payment, the covenantor was liable in an action at law for the face of the notes if not paid at maturity. Affirming 53 Fed. Rep. 469.

4. ATTACHMENT—GROUNDS—FOREIGN CORPORATION.

By the express provision of the Alabama Code, § 2940, an attachment may issue in an action against a foreign corporation which has property within the state. Affirming 53 Fed. Rep. 469.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Action by W. A. Orman against the North Alabama Development Company, Limited, of London, England, a corporation, originally brought in the circuit court of Franklin county, Ala., and thence removed into the United States circuit court, where a motion to dissolve an attachment issued by the state court was overruled, and judgment given for plaintiff. See 53 Fed. Rep. 469. Defendant brings error. Affirmed.

Roulhac & Nathan, for plaintiff in error.

W. I. Bullock and Milton Humes, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

McCORMICK, Circuit Judge. Defendant in error brought his actions at law in a state court in Alabama on a certain covenant in a deed from one Parish and wife to the plaintiff in error, which covenant is in these words:

"And it is hereby covenanted and agreed by the said party of the second part, to and with the said party of the first part, that the said party of the second part will assume, and does hereby assume, the full and just payment at maturity of the two notes hereinbefore mentioned, given by the said party

of the first part to said W. A. Orman for the deferred payment of and for the lands and mineral rights herein conveyed, each dated May 12, 1890, and each for the sum of \$7,245.22, and bearing interest from April 4, 1890, due respectively April 4, 1891, and April 4, 1892, which said notes and interest thereon the said party of the second part hereby covenants to pay as a part of the purchase money of said lands and mineral rights, and of the consideration of this conveyance, when the same falls due."

The notes referred to are identical in terms except as to date of maturity,—one due 4th of April, 1891, and the other due April 4, 1892,—expressed in words and figures as follows:

"\$7,245.22.

Russellville, Ala., May 12, 1890.

"On or before the fourth day of April, 1892, I promise to pay to the order of W. A. Orman the sum of seventy-two hundred and forty-five dollars and twenty-two cents, with interest from the 4th day of April, 1890. The condition of this note being that I have this day given W. A. Orman a mortgage on certain lands in Franklin county, Alabama, and, should said lands have to be sold under the mortgage, then I am only liable under this note to the amount of the proceeds of said sale, and no more. Such proceeds to constitute a cancellation of this note.

[Signed]

"A. Parish."

Attachment was sued out and levied on the general estate of plaintiff in error. The ground for asking the attachment was that the defendant in attachment, plaintiff in error here, was a foreign corporation, created and existing under the laws of Great Britain. The plaintiff in error by proper proceedings removed the action into the United States circuit court for the northern division of the northern district of Alabama. The cases were there consolidated, and the plaintiff in error moved in that court to dissolve the attachment substantially on these three grounds: (1) That the plaintiff in attachment could not proceed at law on the covenant counted on; (2) that the covenant would only warrant a special attachment on the mortgaged property; (3) the affidavit that the defendant in attachment is a foreign corporation does not authorize an attachment.

On the trial of this motion the parties filed in court the following agreement in writing:

"In the above-entitled cause it is agreed that they shall be consolidated, and that the complaint filed in case numbered 1,569 shall be considered, held, and treated as the complaint in the consolidated case. It is further agreed that said cases as so consolidated shall be submitted to the court for its decision without the intervention of a jury, upon the complaint and motion of the defendant to dissolve and discharge the attachment in the case, together with the following agreed statement of facts: (1) The original notes, as set forth in said complaint, and the original deed from Alfred Parish and wife to the defendant, set forth in the complaint. It is agreed that the said notes were given by said Parish as they purport, and that said deed was executed and delivered by him to the defendant, and accepted by it, and that said notes remain due and unpaid; and that said notes as copied in the complaint (the originals of which are offered in evidence) are the same notes that are referred to in the said deed of conveyance from said Parish and wife to the defendant. It is further agreed that if the court should overrule said motion to dissolve and discharge said attachments, then it shall enter judgment in favor of the plaintiff for the amount called for by said notes, with interest thereon. No steps have been taken by the plaintiff to sell the lands referred to in said notes under the mortgage therein also referred to. The motion of the defendant in the one case above mentioned shall apply to the other in

the same manner and to the same extent, both in this court and upon appeal or writ of error to any other court; and it is further agreed that if this court shall overrule the motion to dissolve or discharge the attachments, the defendant shall have the right to file any pleas which shall raise the questions of its liability to any suit at law by the plaintiff; its liability, if any exists, for more than the proceeds of the sale of the lands for which the notes of Parish were made to Orman, the plaintiff; and also of the jurisdiction of the court at common law to hear and determine this case; so that the judgment of the court may be upon the merits of the case, and not solely upon the ground that the present motion or rule is not the proper mode of raising the questions involved."

There was judgment for plaintiff in attachment for the amount of his demands, and an order to sell the property taken by the attachment. Defendant in attachment prosecuted this writ of error, and urges that the circuit court erred in overruling each of its grounds above stated for dissolving the attachment.

It can hardly be necessary to observe in reference to the last clause of the above-recited agreement that it did not enlarge or modify the jurisdiction of the circuit court. *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 831. We consider it to be settled by the decisions of the supreme court of Alabama that the plaintiff in these actions had a right to proceed at law on the covenant counted on, and that his so proceeding was such an acceptance of the covenant as drew to him the exclusive right of action thereon. *Huckabee v. May*, 14 Ala. 263; *Coleman v. Hatcher*, 77 Ala. 217; *Young v. Hawkins*, 74 Ala. 370, and many other cases.

Where, as in many of the states, the distinction between law and equity is not preserved, a case removed from the state court to the United States circuit court becomes an action at law or a suit in equity, or as to part the one and as to part the other, according to the nature of the cause of action and of the relief prayed. Where, as in Alabama, that distinction is preserved, it may well be doubted if a defendant in an action at law can by removal to the circuit court convert the action at law into a suit in equity; and if, by reason of the nature of the cause of action, the circuit court would not have jurisdiction to adjudge the issues joined, it would seem that the plaintiff would not lose his action, but the cause would be remanded to the court which had jurisdiction. In our opinion, there is no such element of inefficiency in the constitution of the United States circuit court as would require either that the plaintiff should lose his action in this case, or that it should be remanded to the state court. Where the cause of action is such that it can be declared on in a strictly law court of the state in which the cause of action arose and is to be enforced, and is so declared on in such state court, and then removed to the circuit court, we do not doubt the jurisdiction of the circuit court to proceed with the case at law. The parties contracted with reference to the laws of Alabama. Whether the remedy is at law or in equity is governed by the law of the forum. *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. Rep. 102; *Wilcox v. Hunt*, 13 Pet. 378; *Willard v. Wood*, *supra*.

Is the second ground urged by plaintiff in error good? Its counsel contends that, as the notes by way of recital state that Parish

had given Orman a mortgage, it was necessary to consider said mortgage and notes and the covenant declared on together as one instrument, and that, thus considered, and rightly construed, the obligor was only liable to the amount of the proceeds of the sale of the mortgaged premises if the amount named in the notes was not paid at maturity. The mortgage provided that, in case of default, the mortgagee, his heirs, executors, administrators, or assigns, shall have power to sell. It certainly does not in express terms require them to sell, and there is nothing in it to indicate that the sale under it would cancel the notes, even though the proceeds of the sale, after paying the costs provided for, did not equal the principal and interest named in the notes. Therefore the recitation of the mortgage in the notes adds nothing to the force of the condition embodied in the notes. That condition does not, in terms, require the mortgaged premises to be sold in case of default made in payment at maturity. It is urged that the parties, by the reference in the notes to the mortgage, intended that its terms should throw some light on the meaning of the conditions as to the personal liability of Parish. May it not be that, even as between Parish and Orman, this condition was the price of the power of sale granted Orman, (his heirs, administrators, and assigns,) and the guaranty that in case he sold he would make it bring the amount of the notes, interest and costs; or, if he should take it himself at his own sale, as he was authorized by the power to do, the debt should be discharged? The notes were given for two thirds of the purchase price of the land. The maker of the notes sold the same land for the same price to the plaintiff in error. One third the price was paid in cash, in this sale as in Orman's, to the seller; the remainder was to be paid to the holder of the notes in question, in installments equal to the principal and interest of each at their respective maturities. No condition is embodied in this covenant touching the effect of the sale of the property under the mortgage to Orman. Reading all the papers together, or in any way they or each of them can be read, we do not find anything on their face to limit the covenant of the plaintiff in error to pay at the maturity of the notes the full amount of the principal and interest of each, and now, that both have matured, to pay the amount of both.

We consider that the third and last ground urged by the plaintiff in error is conclusively answered by the language of the Alabama Code. By that Code attachments may issue: "(1) When the defendant resides out of the state." Section 2930. "Process of attachment may issue against foreign corporations having property in this state * * * in the same manner and subject to the same rules as in case of natural persons residing without the state." Section 2940. On the case presented to us we conclude the circuit court did not err in the matters complained of, and the judgment of that court is affirmed.

SECOND UNITARIAN SOC. v. GRANT et al.

(Circuit Court, D. Maine. February 28, 1893.)

No. 395.

TRUSTS—PURCHASE OF TRUST ESTATE—LIABILITIES OF PURCHASER.

Where a person purchases the trust estate for the benefit of the cestui que trust, having actual knowledge of an existing decree of a competent court that the trustee conveyed to the cestui que trust on being reimbursed for his expenditures in administering the trust, the purchaser stands in the shoes of the original trustee, and cannot incorporate in his deed to the beneficiary a condition not warranted by the original trust.

In Equity. Bill by the Second Unitarian Society in Portland against Josephine F. Grant, Mary E. Paine, William E. Greeley, Dorothea Greeley, and Hugh P. Greeley, to quiet complainant's title to certain real property. Hannah B. Greeley was made guardian ad litem for William E. Greeley, Dorothea Greeley, and Hugh P. Greeley. Heard on amended bill, answer, and replication. Decree for complainant.

The Second Unitarian Society in Portland, Me., held the legal title to two-thirds in common and undivided of the land occupied by it for purposes of worship, the legal title to the remaining one-third being in one Samuel Winter, who held in trust for the said society. Winter, with two others, had bought the property for the uses of the society, and given their joint note therefor. The other two promisors on the note conveyed to the society their interest in consideration of their outlay, and the administrators of Winter were decreed by the supreme judicial court of Maine to do likewise with his interest, on the same terms. William E. Greeley, a member of the parish, thoroughly familiar with these facts, was appointed, together with the parish committee, to purchase the outstanding one-third interest, which was accordingly sold to Greeley by the administrators of Samuel Winter's estate, acting under license from the probate court. The society thereupon tendered to Greeley the purchase price and his charges and costs in making the purchase, and demanded a release of all his interest in the property. He refused this, but gave a deed conditioned upon the continuous use of the property by a Unitarian society; in case of breach the property to revert to Greeley's heirs. The society accepted this deed with a formal protest, which was entered on the parish records. In the year 1890 the society allowed the property to be used as a Presbyterian church. Greeley's heirs thereupon began an action at law in this court to recover the undivided one-third interest in the property. The Second Unitarian Society now seeks an injunction to restrain the further prosecution of the action at law, and that the heirs of Greeley be decreed to execute and deliver to complainant a quitclaim deed for their pretended interest in the property.

Thomas L. Talbot, for complainant.

Edward D. Rand, for respondents.

NELSON, District Judge. By the decree of the supreme judicial court of Maine, passed in 1837, in the suit of the present plaintiff against the administrators and heirs at law of Samuel Winter, it was declared that Winter held the estate at his decease, in trust for the plaintiff, and the decree further directed that an absolute conveyance of the estate should be made by the defendants in that suit to the plaintiff upon the repayment to the administrators of the money disbursed by Winter on account of the trust. Of this decree William E. Greeley, when he took his deed from the administrators

in 1844, had not only the constructive notice arising from the record of the decree itself, but he had actual notice also, as shown by his being a pew holder and member of the society, and by his interest in and his general acquaintance with its affairs. It is apparent also for the same reasons, and more especially by his permitting the society to occupy the estate as its own property before his deed to the society, that he bought it for the society's benefit, and with the expectation and understanding on both sides that upon repayment of the money advanced for its purchase he would convey the estate to the society in the execution and discharge of the trust. He held the title under the original trust, and evidently intended so to hold it, and to stand in Winter's place as trustee. Having been paid the money advanced, with interest, and having accepted it in full discharge of his equitable lien therefor, his deed was manifestly made in pursuance of and in execution of the trust, and for the purpose of vesting in the society all the title he held as trustee, and he had no right to impose upon the estate a condition not annexed to the trust. That the society never assented to the condition is shown by its protest, entered upon its records immediately after the conveyance by Greeley, and its continual occupancy of the estate as its own under the protest. If the entry by the defendants could have the effect to work a forfeiture, they would still hold the estate under the original trust, and would be bound to convey it to the society without condition. It is therefore decided that the conditional clause in the deed is void, and not binding on the society, and that the defendants acquired no title by their entry for breach of the condition.

Decree for the plaintiff.

HEATON PENINSULAR BUTTON-FASTENER CO. v. DICK et al.¹

(Circuit Court, N. D. Illinois, N. D. July, 1892.)

No. 870.

INJUNCTION — PROCUREMENT OF BREACH OF CONTRACT — CONTRIBUTORY INFINGEMENT OF PATENT.

A bill alleged that complainant, owning patents for button-fastening machines, had sold the patented machines upon condition that they should be used only with fasteners made by complainant from the sale of which a profit was derived, and that defendants were manufacturing similar button fasteners, capable of and intended by them for use in complainant's machines, and were inducing purchasers of those machines to use such fasteners therein, to the exclusion of complainant's fasteners; and it prayed that defendants be restrained from making for sale, selling, or offering or advertising for sale, any fasteners, intended for use or capable of being used in the machines sold by complainant under such conditions, and from persuading or inducing vendees of such machines to purchase or use in such machines any fasteners other than those made and sold by complainants. On the bill and affidavit substantiating its charges, complainant moved for a preliminary injunction. Defendants demurred to the bill, and opposed the motion for injunction, but subsequently their counsel

¹Revised report. For former report, see 52 Fed. Rep. 667.

withdrew from the case. *Held*, that orders should be entered, as upon default, overruling the demurrer and allowing an injunction, pursuant to the prayer of the bill.

In Equity. Suit by the Heaton Peninsular Button-Fastener Company against Joseph C. F. Dick and others to restrain defendants from procuring or inducing purchasers of button-fastening machines from complainant to violate their contracts with complainant entered into on the purchase of such machines. Heard on general demurrer to the bill and on motion for preliminary injunction. Defendants' counsel afterwards withdrew from the case. Demurrer overruled, and injunction granted.

The facts alleged in the bill were in general purport and substance as follows: Complainant is the owner of several letters patent granted for improvements in button-setting machines, the validity of which has been sustained twice in the United States courts, and under these patents manufactures and sells button-fastening machines called "Peninsular" machines. These machines are sold outright to the users thereof, with the condition that the machines shall be used only with button fasteners made and sold by the complainant, and known as "Peninsular" fasteners. This condition is expressed on the bills of sale on tags attached to each machine, and also by a caution plate attached to each machine, which reads: "This machine is sold and purchased for use only with fasteners made by the Heaton Peninsular Button-Fastener Company, to whom the title to said machine immediately reverts upon violation of this condition of sale." The price asked and received for each Peninsular machine is an amount barely covering the cost of manufacture and transportation. The complainant seeks its royalty in the profit derived from the sale of Peninsular fasteners, and derives benefit from the patented inventions embodied in the Peninsular machines in this and no other way. The Peninsular machine was and is the only efficient machine in use capable of setting the Peninsular fastener. In 1890 the defendants entered into the manufacture of a metallic button fastener, called by them the "Shoe Dealers' Staple," identical in all essential respects with the Peninsular fastener, capable of use in Peninsular machines, and intended by the defendants for such use. The defendants, from the beginning of the manufacture of Shoe Dealers' Staples, by solicitation and advertisement, procured and persuaded large numbers of users of Peninsular machines to use in those machines the Shoe Dealers' Staple, to the exclusion of the Peninsular fastener, which by their agreement and acquiescence in the condition appended to the sale of Peninsular machines they were under obligation to use. Thus the complainant, since 1890, was deprived of the benefits accruing to it from the sale of Peninsular fasteners, and ceased to obtain the income which it should have received from the use of many Peninsular machines, while the defendants diverted to themselves the profits arising out of the use of their Shoe Dealers' Staples, which never were capable of any use except in Peninsular machines.

The bill prayed, among other things: "That the defendants may be perpetually enjoined and restrained from directly or indirectly procuring or attempting to procure, inducing or attempting to induce, or causing, any breach or violation of the contracts, or of either or any of the contracts, now or hereafter existing or subsisting between your orator and the vendees, or either or any of the vendees of button-setting machines sold by your orator, or to be sold by your orator, under condition that such vendees shall use in the button-setting machines so sold no other button fasteners than those made and furnished by your orator; and especially from directly or indirectly making or causing to be made for sale, selling or causing to be sold, or offering or causing to be offered for sale, to any person or persons, firm, or firms, corporation or corporations whatsoever, any button fasteners intended or adapted for use, or capable of being used, in button-setting machines manufactured by your orator and sold by your orator under the conditions aforesaid; from directly or indirectly persuading or inducing the vendees, or either or any of the vendees of button-setting machines, sold by your orator and held by such vendee

or vendees under the conditions aforesaid, to purchase any button fasteners designed or adapted for use in such machines, other than the button fasteners made and sold by your orator for use in such machines by the possessors thereof in conformity to the conditions aforesaid under which said machines are held; and from advertising or causing to be advertised for sale any button fasteners intended or adapted for use in button-setting machines manufactured and sold by your orator, and held by purchasers under the conditions aforesaid, other than the button fasteners made and sold by your orator to be used in such machines by the possessors thereof in conformity to the conditions aforesaid, under which such machines are held; and from publishing or causing to be published any offer, promise, or inducement, designed or intended to procure the vendees, or either or any of them, of button-setting machines manufactured and sold by your orator, and held and used subject to the conditions of sale aforesaid, to use or to purchase for use in such button-setting machines, in violation of the contracts, or either or any of them, wherein such vendees have been and are bound to your orator as aforesaid, any button fasteners other than those made and furnished by your orator for use in the said button-setting machines."

Upon the bill, and upon affidavits stating facts substantiating its allegations of fact and charges in detail, complainant moved for a preliminary injunction. Defendants demurred to the bill generally, and opposed the motion for injunction.

Hamlin, Holland & Boyden, (James H. Lange and Odin B. Roberts, of counsel,) for complainant.

(1) Action lies for maliciously procuring a breach of contract, whereby a contracting party is injured. Any one who interferes with a contractual relation, to benefit himself at the expense of the contracting party, does so maliciously, within the intent and meaning of the law. *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333; *Haskins v. Royster*, 16 Amer. Rep. 780; *Bixby v. Dunlap*, 22 Amer. Rep. 475; *Walker v. Cronin*, 107 Mass. 555; *Gunter v. Astor*, 4 Moore, C. P. (N. S.) 12; *Sheperd v. Wakeman*, Sid. 79; *Keeble v. Hickingall*, Holt, 14, 17, 19; *Carrington v. Taylor*, 11 East, 571; *Tarleton v. McGawley*, Peake, 270; *Green v. Button*, 2 Comp. M. & R. 707; *Hart v. Aldridge*, Cowp. 54; *Dudley v. Briggs*, 141 Mass. 582, 6 N. E. Rep. 717; *De Fransesco v. Barnum*, 39 Wkly. Rep. 5; *Benton v. Pratt*, 2 Wend. 385. The only case not in harmony with the doctrine as expressed is *Chambers v. Baldwin*, (Ky.) 15 S. W. Rep. 57.

(2) A patentee may parcel his monopoly in any way he sees fit according to the natural subdivision of his monopoly into the three exclusive rights to make, to sell, and to use. It rests with the patentee to define the limitations under which he allows others to enjoy his invention. *Dorsey*, etc., *Rake Co. v. Bradley Manuf'g Co.*, 12 Blatchf. 202; *Adams v. Burke*, 17 Wall. 453.

(3) When a patented article is sold subject to an express restriction as to its use, disregard of such limitation is an infringement of the patent, and all assignees or vendees of the article are charged with constructive notice of the restriction. *Hawley v. Mitchell*, 4 Fish. Pat. Cas. 388, affirmed 16 Wall. 544; *Burr v. Duryee*, 2 Fish. Pat. Cas. 275.

(4) The circumstance that the structure embodying the patented invention is sold absolutely by the patentee is not inconsistent with a continuing control over the use of the structure, to be exercised by the patentee. *Tie Co. v. Simmons*, 3 Ban. & A. 320; *Tie Supply Co. v. Bullard*, 4 Ban. & A. 520; *Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. Rep. 52; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 40 Fed. Rep. 577.

(5) It is generally true that if by contract or covenant a condition or servitude is attached to the ownership of property which is the subject-matter of the covenant, and which is of such peculiar value that the covenantee can invoke the aid of a court of equity to enforce the contract or covenant specifically as against the obligor or covenantor, then to that property in the hands of a purchaser from the obligor or covenantor, with notice of the condition of servitude, the equity raised in favor of the covenantee by the cove-

nant adheres, and prevails against such a purchaser. *Tulk v. Moxhay*, 2 Phil. Ch. 774; *Western v. MacDermott*, L. R. 2 Ch. App. 72; *Whitney v. Railway Co.*, 11 Gray, 339; *Clements v. Welles*, L. R. 1 Eq. 200; *De Mattos v. Gibson*, 4 De Gex & J. 276; *Clark v. Flint*, 22 Pick. 231.

(6) The complainant's licensees, the users of Peninsular machines, by dealing with those patented machines in a manner contrary to the conditions and limitations of the license, infringe the patents for the inventions embodied in the machines. *Cohn v. Rubber Co.*, 3 Ban. & A. 568; *Starling v. Plow Works*, 32 Fed. Rep. 290; *Fetter v. Newhall*, 17 Fed. Rep. 841; *Willis v. McCullen*, 29 Fed. Rep. 641.

(7) One who assists in an infringement of patent rights by designedly furnishing to the actual infringer the means by which his infringement is effected, and for the intended purpose of promoting such infringement, is a contributory infringer, and is liable to the extent of his contribution to the infringement. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 40 Fed. Rep. 577.

(8) Any act, done with intent to contribute directly to an infringement of patent rights, is wrongful, and will be enjoined by a court of equity, although in itself, and considered apart from its intended purpose, such act might be lawful. *Wallace v. Holmes*, 9 Blatchf. 65; *Holly v. Machine Co.*, 18 Blatchf. 327, 4 Fed. Rep. 74; *Bowker v. Dows*, 15 O. G. 510; *Travers v. Beyer*, 26 Fed. Rep. 450; *Willis v. McCullen*, supra; *Celluloid Manuf'g Co. v. American Zylonite Co.*, 30 Fed. Rep. 437; *Alabastine Co. v. Payne*, 27 Fed. Rep. 559; *The Supply Co. v. McCreedy*, 4 Ban. & A. 588; *Boyd v. Cherry*, 50 Fed. Rep. 279.

Dyrenforth & Dyrenforth, for defendants.

(1) The remedy of a party to a contract, in case of breach, is against the other party thereto. The law gives this mode of redress, and, though the breach of contract may be induced by a third party, yet the act of breach is not his, and the injured party has no cause of action against such a third party.

(2) By the restriction placed upon the use of its Peninsular machines, the complainant seeks to establish a monopoly of the manufacture of unpatented articles, namely, the button fasteners. This is unconscionable, in restraint of trade, and the alleged contract is void. *Machine Co. v. Earle*, 3 Wall. Jr. 320; *Wilcox & Gibbs Sewing-Mach. Co. v. Gibbens Frame*, 17 Fed. Rep. 623; *Manufacturing Co. v. Gormully*, 12 Sup. Ct. Rep. 632.

Before the expiration of the time allowed for the submission of briefs by defendants' counsel, they withdrew from the case.

JENKINS, District Judge, directed an interlocutory decree to be entered as follows, as upon a default: "An order will be entered overruling the demurrer, and requiring an answer by the first Monday of August. An order will also be entered allowing an injunction pendente lite to issue pursuant to the prayer of the bill."

Subsequently the defendants submitted to a final decree making the injunction perpetual.

CITY OF BOSTON v. BEAL.

(Circuit Court of Appeals, First Circuit. February 8, 1893.)

No. 39.

NATIONAL BANKS—STATE TAXATION OF SHARES—INSOLVENCY.

Pub. St. Mass. c. 13, §§ 8-10, provide that shares of stock in all banks, state and national, shall be taxed to the owners thereof, to be paid in the first instance by the bank itself, which, for reimbursement, shall have a lien

on the shares and all the rights of the shareholders in the bank property. *Held*, that no suit for this tax can be maintained against the receiver of an insolvent national bank where the property represented by the shares has disappeared.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Bill by the city of Boston against Thomas P. Beal, as receiver of the Maverick National Bank of Boston, to recover the sum of \$12,096 for taxes due October 1, 1891. The assessment was made under Pub. St. Mass. c. 13, §§ 8-10, which, in effect, provide that shares of stock in all banks, state and national, shall be taxed to the owners thereof, to be paid in the first instance by the bank itself, which, for reimbursement, shall have a lien on the shares and all the rights of the shareholders in the bank property. The circuit court dismissed the bill. See 51 Fed. Rep. 306. Complainant appeals. Affirmed.

Thomas M. Babson, for appellant.

Edward W. Hutchins, Henry Wheeler, and Frank D. Allen, U. S. Atty., for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

The decree of the court in this case was entered as follows:

"Judges PUTNAM and WEBB concurring, and Judge NELSON dissenting, the decree of circuit court is affirmed."

DIAMOND PLATE GLASS CO. v. MINNEAPOLIS MUT. FIRE INS. CO.

(Circuit Court, D. Indiana. June 29, 1892.)

FOREIGN INSURANCE COMPANY—SERVICE OF SUMMONS.

The summons in an action against a foreign insurance company upon a liability incurred by doing business in the state of Indiana may be served upon the auditor of state, if there is no agent in the county where the suit is brought, though the company has never been licensed to do business in the state, and has never filed with the auditor of state a written consent to such service of summons. Elliott's Supp. §§ 993, 994. Ehrman v. Insurance Co., 1 Fed. Rep. 471, followed.

Statement by WOODS, Circuit Judge:

The plaintiff brought this action against the defendant upon a policy of insurance to recover a loss by fire. The defendant filed a plea to the jurisdiction of the court. Upon a trial of the issue joined upon the plea, it appeared from the evidence that the plaintiff is an Indiana manufacturing company, owning a plate-glass factory at the city of Kokomo; that the defendant is a Minnesota insurance company doing business in the state of Indiana, but that it has never been licensed to do business in the state, and has never filed with the auditor of state a written consent to the service of process upon him in actions against the company. The company never had an agent residing in the state; but it did business in the state through traveling solicitors residing in Chicago, at which city its policies were issued. The summons in the case was served upon the auditor of state under "An act concerning foreign insurance companies," approved March 5, 1883. The first and the second sections of this act (Elliott's Supp. §§ 993, 994) are as follows:

"993. Service of process. Section 1. Be it enacted by the general assembly of the state of Indiana, that it shall not be lawful for any insurance company chartered, organized, or incorporated in any other state or nation to do business in the state of Indiana until such company shall file with the auditor of state a certified copy of a vote or resolution of the board of directors of such company, consenting that service of process in any suit against such company may be served upon any authorized agent of such company in the state of Indiana, with like effect as if such company was chartered, organized, or incorporated in the state of Indiana, and agreeing that any process served upon such agent shall be of the same legal force and validity as if served upon said company, and agreeing that such service may be so made, with such effect, while any liability remains outstanding against such company in this state, and agreeing further that, if, at any time, there should be no authorized agent of such company in the county where any suit shall be brought, service may thereafter be made upon the auditor of the state of Indiana, with such effect as if made upon an authorized agent of such company.

"994. Service by duplicate. Sec. 2. Service of process in any action against any insurance company not having an agent in that county, where any suit shall be brought, shall be made upon the auditor of state by duplicate copy, and such service shall be deemed, in all respects, the same as if such company was chartered, organized, or incorporated in the state of Indiana: provided, however, that a writ against the auditor of state, in such case, shall not be returnable until thirty days after service. It shall be the duty of the auditor of state, upon such service, to promptly send one copy of such summons, by registered letter, to the president of such company, at the home office of the company, or if such company shall be chartered, organized, or incorporated in a foreign country, and shall have a principal office in the United States, the auditor shall send such copy to such principal office in the United States. The auditor shall file the other copy of summons in his office."

Blacklidge, Shirley & Moon, Bell & Purdum, and Duncan & Smith, for plaintiff.

M. H. Beach, Keith, Evans, Thompson & Fairchild, and Elliot & Overton, for defendant.

Before WOODS, Circuit Judge, and BAKER, District Judge.

WOODS, Circuit Judge, (after stating the facts as above orally.) The facts in this case are essentially the same as in the case of *Ehrman v. Insurance Co.*, 1 Fed. Rep. 471, and the statute of Indiana, under which the summons against the defendant was served upon the auditor of state, is similar to the statute of Arkansas construed in that case. We quote from the decision, (page 476:)

"The citizen insuring his property in this state is not required to search the files of the auditor's office for the purpose of ascertaining whether the company has filed the required stipulation, and otherwise complied with the statute. The receipt of the premium, and the execution and delivery of the policy, by the company, are equivalent to an assertion by the company that it has complied with the requirements of the statute to entitle it to do business in the state; and, as between the assured and the company, the latter is estopped, upon the soundest principles of law and morals, to say that it has not done so."

In the more recent case of *Berry v. Indemnity Co.*, 46 Fed. Rep. 439, the principle which governs the question is thus stated:

"The laws referred to were enacted for the benefit of the state, and the protection of policy holders. By failing to comply with them, the defendant and its agents incurred the prescribed penalties; but such failure does not

affect the validity of its policies, or in any manner operate to the prejudice of policy holders. By the fact of doing business in the state, it asserts a compliance with the laws of the state, and after enjoying all the benefits of that business, and receiving the money of the assured, it will not be heard to say that it never submitted 'to the jurisdiction of the state.' It can reap no advantage from its own wrong."

That the stipulation was not in fact filed with the auditor is therefore of no consequence, if the company has done those things which imposed upon it the obligation and duty to file it. The law deduces the agreement on the part of the company to answer in the courts of the state, on service made upon the auditor, from the fact of its doing business in the state; and the presumption, from that fact, of assent to service in the mode prescribed by the statute, is conclusive. No averment or evidence to the effect that it had not intended to come under the law of the state is admissible to defeat the jurisdiction. The reason of this rule is that the obligation to file the stipulation is imposed for the protection of the citizen dealing with the company; and when, by its own act, its obligation to file the stipulation is perfect, as between the company and the citizen, it will not be permitted to relieve itself from a liability which the written stipulation would have imposed, by pleading its own failure, whether negligent or willful, to comply with the statute. In such cases the law conclusively presumes that to have been done which ought to have been done. The maxim that no man shall take advantage of his own wrong is as applicable to corporations as to natural persons, and to agreements of the kind under consideration as to any other. The defendant must answer to the merits of the action.

In re LYMAN.¹

(District Court, S. D. New York. March 28, 1893.)

1. COURT ROOMS—NEW YORK FEDERAL BUILDING—TREASURY DEPARTMENT—ALLOTMENT OF ROOMS—POWERS LIMITED.

The United States district court for the southern district of New York derives its right to the occupancy of its rooms in the New York post-office building directly from congress, under the acts passed to provide "permanent accommodations" in New York for the post office and the United States courts. The treasury department never had any power to allot rooms, except an implied power incidental to its duty to adopt plans of construction, so as to accommodate both the courts and the post office under one roof; and that power ceased with the completion of the building and the allotment and occupancy in accordance with such plans. The treasury department has now no power arbitrarily to dispossess either from the occupancy of any of the rooms thus permanently appropriated for its uses. The "control" of the treasury department referred to in the appropriation acts relates solely to care, custody, repair, furnishing, etc., as a custodian for the benefit of the courts and post office, and includes no right of dispossession.

2. THREATENED DISPOSSESSION—PUBLIC OFFICE—INJUNCTION—CONTEMPT.

An unlawful ousting of this court, its officers and records, from their rooms, would be a contempt; and a threatened attempt so to do may be properly enjoined, on the matter being brought before the court by petition of the clerk.

¹Reported by E. G. Benedict, Esq., of the New York bar.

**Special Proceeding Restraining Dispossession of the Court.
Statement by BROWN, District Judge:**

Order to show cause why the custodian of the United States court and post-office building, his agents, etc., should not be restrained from taking possession of room 114-115, in said building, now occupied by the petitioner as clerk of this court, and from interfering with his possession and use thereof.

The petition, dated April 30, 1892, stated that the said room had been occupied by the clerk, with other rooms, for keeping the records and file papers of the court ever since his accession to office; that of the several rooms formerly occupied by him, he had yielded one room at the marshal's request for the use of the grand jury; and afterwards in 1889, at the request of the post-office department, he had also yielded a room on the fifth floor for the use of the United States postal railway service, under the expectation that additional case room would be supplied in the remaining rooms of the clerk through the action of the treasury department, which, however, has not been supplied; and that there now remains barely sufficient room for the proper safe-keeping and preservation of the files of papers and records of the court; that room 114-115 contains books and files of papers under the United States bankruptcy acts, records of equity suits, and cases arising under the United States internal revenue acts; that these files of papers involve the title to much property in New York; that they are accumulating; and that there is no other accommodation for such books, files, and papers, except in the room where they now are.

That he has been notified in writing by the custodian of the building that said room 114-115 has been "assigned" to Gen. Sharpe, United States appraiser, and that the custodian would forthwith deliver possession of said room to said Sharpe, notwithstanding the clerk's refusal to deliver the same until other room had been offered to be provided for the court records; that no other suitable room in said building had been offered or is available therefor; and that if he is deprived of said room, there will be no room or conveniences essential to the safe-keeping and preservation of a large part of the said bankruptcy records and other papers above stated.

That this building was built upon land deeded to the United States government by the city of New York, upon condition that the building should at all times be used and occupied exclusively as and for a post office and courthouse and for no other purpose; and that if otherwise used, the property should revert to the grantor as absolute owner of the premises.

That the reason why said room is now wanted for said Sharpe is, because said Sharpe, who formerly occupied room 108-109, had been in February last forcibly ejected therefrom, and his papers put out and left in the hall, in order to install in said last-named room the United States supervising inspector of steam vessels, who now occupies that room, without any legal right and in violation of said deed.

On this petition an order was made directing the custodian and said Sharpe to show cause why they should not refrain from interfering with the clerk's possession of the room, with a restraining order meantime. At the hearing Mr. Sharpe appeared in person and filed an affidavit submitting his rights to the disposition of the court, and stating that he had been informed by the custodian that he would be put in possession of room 114-115, and that the key thereto had at his request been delivered to the marshal before the service of the order, but that no use thereof had since the order been attempted to be made.

The custodian submitted an affidavit not controverting any of the material facts stated in the petition, but averring that it has never been the intention of the custodian to deprive the clerk of his possession of the records and files of papers contained in said room 114-115, but that he has always been ready and willing to do everything in his power to facilitate their removal to any of the other rooms now occupied by the clerk, or to such other room as the custodian may under instructions from the treasury department be authorized to assign to him; that the custodian, upon Mr. Sharpe's request for a room (after his expulsion from room 108-109) had been authorized by the treasury department, upon the custodian's suggestion, to assign said room 114-115 to

said Sharpe, and had accordingly done so; that Mr. Sharpe is one of the board of United States general appraisers to whom the circuit court has referred the taking of additional testimony on appeals in customs cases, pursuant to section 15 of the act of June 10, 1890, (26 St. at Large, p. 138, c. 407,) and that said Sharpe acts in such matters as an officer of said circuit court, and desired said room for taking testimony as such referee.

A letter from the secretary of the treasury to the custodian, dated May 7, 1892, was annexed to the affidavit, as setting forth fully the position of the treasury department on the subject; reference was also made to the correspondence with the marshal and the attorney general in July, 1891, in regard to rooms for the United States circuit court of appeals, as evidence that the law department "acquiesces in the claim of the treasury department to the exclusive control of the [United States court and post-office] building."

The letter from the secretary of the treasury of May 7th asserts that the instructions to the custodian to assign the said room to Mr. Sharpe were given "by virtue of rights and privileges vested in the secretary of the treasury;" that "the acts of congress for acquiring the site and erecting the building, and the acts making appropriation for repairs and preservation thereof and pay of assistant custodians and janitors" show the will of congress "that said building should be under the control and within the jurisdiction of the secretary of the treasury exclusively;" that all court officials make applications for assignments in public buildings for their use, through the department of justice, to the secretary of the treasury, and "that it is the legally vested right of the secretary of the treasury to exercise whatever discretion he may deem proper in regard to such cases;" that the assignment of the room in question to Mr. Sharpe was by instruction of the secretary of the treasury, "who exercised his legally vested discretion and rights in the case;" that the clerk of the district court, as a subordinate of the attorney general, is not vested with any authority to act in such a case; that no application to the secretary of the treasury for any reversal of the instructions (to assign room 114-115 to Mr. Sharpe) had been made by the attorney general, or by the judge of this court through the attorney general, or by the clerk through said judge and attorney general; and that the attorney general had been requested "to take such action as will require Mr. Lyman to act in his subordinate capacity, that is, under instructions from the department of justice, instead of upon his own responsibility."

In the letter of the secretary to the attorney general of the same date (May 7th) the former complains that the clerk as petitioner had acted on his own authority, resulting in "an attempt to interfere with the legally vested rights and privileges of the secretary of the treasury," and that "such action is at least reprehensible and such as should receive the censure of the attorney general;" it is added that "the [treasury] department will be pleased to give due consideration to any application, statement, or communication from the attorney general, in regard to the assignment of rooms in said building, but submits that the matter of such assignments is one exclusively within the jurisdiction of the secretary of the treasury."

The affidavit submitted by Mr. Lyman in reply to the above states that on March 22d last he wrote to the attorney general stating among other things that the custodian, claiming authority from the secretary of the treasury, was proposing to take possession of one of the record rooms occupied by him as clerk, which was indispensable to him; and suggesting that a protest be entered against it; that he received from the attorney general an answer thereto dated March 24th, of which letter a copy was annexed, stating that the petitioner's letter had been received, and "referred to the attention of the secretary of the treasury, with a remonstrance" against taking the room away from him.

R. D. Benedict, for petitioner.

Jas. T. Van Rensselaer, Asst. U. S. Dist. Atty., opposed.

BROWN, District Judge, (after stating the facts as above.) The room in question is one of a suite of rooms along the northwest part of

the corridors of the third and fourth floors of the United States court and post-office building. They are immediately contiguous to the principal district court room used for the trial of causes, and separated from it only by a hall. They are used for the chambers of the judge, and as the clerk's offices for the transaction of the court business, and for the care and preservation of the books and files of the court, and for the necessary consultation of them by the officers of the court and by the public. These rooms not only communicate with each other, but they are connected together by an interior stairway, for greater convenience and economy in use; and they have been occupied by this court for the above-named purposes ever since the completion of the building, some 18 years ago. Room 114-115 is directly over the chambers of the court. It is necessary for the proper custody and safe-keeping of the court books, papers and records, and is already closely filled. In proposing to dispossess the court from the use of it, no other room is offered as a substitute, nor any increased accommodations in its other rooms. It is proposed to dispossess first, and not to consider the question of other accommodations until afterwards, if at all; and no provision is to be made for the convenient care and use of the records in the mean time. The removal is not sought for any temporary purpose, such as the care, preservation or repair of the building; but to oust the court permanently from its possession, for the benefit of a new occupant.

The appraiser, for whose use the room is sought for the purpose of taking testimony in customs appeal cases, though "an officer of the court," does not sit *in court* in the taking of such testimony; he acts only as a referee, whose duty it is "to take the evidence and *return it to the court.*" 26 St. at Large, p. 138, § 15. As a mere referee, he would not be entitled to demand room for his use in this building, unless the other two appraisers when similarly appointed, and all other referees appointed by the court in other causes, as well as all receivers, masters, and commissioners, are each to be held similarly entitled to a room; since all such appointees are equally "officers of the court," and in a precisely similar sense. The duties of the appraisers as referees, are, however, so intimately related to the business of the circuit court in customs appeal cases, that that court may doubtless direct their sessions to be held in the rooms of that court; and for that purpose, if its accommodations are at present insufficient, that court may rightfully demand additional accommodations from among any of the other rooms in the building not already otherwise lawfully appropriated. The question here, however, does not relate to the appropriation of unoccupied rooms, or even of rooms temporarily used by persons having no permanent lawful right therein; it relates to the right to dispossess this court of a part of the rooms allotted to it, and occupied and held by it, from the beginning, and, without contradiction, necessary for its uses.

The power of the treasury department over the use and occupation of the entire building, whether already lawfully occupied or not, is claimed to be exclusive and discretionary; and so completely so, that upon this hearing it was denied that any inquiry could be made into the attending circumstances; such as whether the change pro-

posed was necessary or unnecessary; whether Mr. Sharpe was entitled to a room at all; or if entitled, why he was ejected from the room he formerly occupied; or whether the supervising inspector, for whose benefit Mr. Sharpe was ejected, and who was installed in Mr. Sharpe's former room, has any legal right there; or whether there are not other rooms in the building occupied by persons having no lawful right in them, which might be appropriated to Mr. Sharpe, leaving this court unmolested. All these matters, it is claimed, are subject to the determination of the treasury department alone, and not subject to question or review elsewhere.

As the power over the occupation is claimed to be discretionary, so, it is said, there was no need of any prior notice or hearing to be given to the occupant. There was none given in this case. There was no prior inquiry or consultation of the court, or of the clerk, as to their need of the room, or of the practicability of parting with it. The first notice was in effect a notice to quit. Even a right to address the treasury department directly on the subject, is denied. That is allowable, it is said, through the attorney general alone, whose remonstrances, however, have no force except such as the treasury department may choose to give them; that is, in this case, none at all.

The power claimed is exclusive in its nature, and arbitrary and despotic in practice. If valid, the tenure of the United States courts and of the post-office department in the building which the government has built expressly for them and for no other uses, is inferior to that of any other class of tenants known to the law. The most summary of civil proceedings to dispossess the humblest tenant at will, provides for at least some notice, some hearing, and some rule of law that regulates dispossession. Even military discipline has courts-martial. It is only appointees, agents or servants, who have no tenure at all, that are liable to removal at discretion and without notice. Is that the relation of the United States courts and the post office to the treasury department, as respects their occupation of the building expressly built by the government for them alone? Do they hold possession at the mere discretion of the treasury department, and without any permanent tenure?

If the different courts can be ousted from one room or another at discretion without notice and without appeal, it is plain they have no fixity of tenure, nor any tenure at all, save by the mere grace of the treasury department. So far as respects any legal guaranty of protection in their occupation, they might be turned out of room after room, under pretext of the public needs, according to the views entertained by the treasury department, or by the subordinate who might wield its powers, until their functions were crippled or paralyzed. Such a dominating power over the court, lodged in an executive officer merely, would not only be novel and extraordinary, but a standing menace to the independence of the judiciary, and involve a violation of one of the fundamental principles of the distribution of the powers of the three great departments.

The respect of the community and the due influence of the judiciary department are in no small degree affected by the external conditions of the courts. Among these their stability and permanency are by no means unimportant; and it cannot be doubted, I think, that in the erection of the numerous buildings throughout the country for their use during the last 30 years, congress has had in view, not questions of economy alone or chiefly, but that fixity and permanency of tenure which not only best subserve the convenience of the community and of the courts, but comport with the dignity of the judicial functions. The intent to make their tenure permanent, is seen both in the acts providing for the erection of this building, and in the prior act of August 2, 1854, contemplating "permanent accommodations," (10 St. at Large, p. 333,) to which reference will be again made hereafter.

It seems, therefore, scarcely credible that congress, after having devoted large sums of money in order "to provide permanent accommodations" for the United States courts and the post office, should have proceeded to destroy all permanency of tenure by lodging in any executive officer an indefinite and irresponsible power of dispossessing at discretion either the courts or the post office of their rooms, or to turn out one and put in another at pleasure.

A further objection to the power claimed is that the assertion of an exclusive jurisdiction over questions concerning the right of use and occupation would involve the exercise of judicial functions. The occupation of the building is expressly limited by the deed of conveyance to the uses of the courts and post office. Such uses as are not accessory to these are prohibited. Such persons as fall within these classes have the right to the use of the building, and to the whole of it, as against all others, howsoever they may have come into occupation. The determination of what is, and what is not, within the permitted uses is in the last resort a purely judicial question, which the secretary of the treasury can have no discretionary power to determine as a finality. See *Kilbourn v. Thompson*, 103 U. S. 168, 192, 193.

There is no statute that gives to the treasury department the authority it now asserts. Its claim thereto is based upon inference from,

(1) The acts providing for the construction and "completion of the building" "upon contracts and plans approved by the secretary of the treasury" and "under his direction;" and

(2) Various clauses in the appropriation acts passed since 1872, in which divers sums of money have been appropriated "for the care, preservation and repair of building and furniture," "pay of assistant custodians and janitors," etc., in the "customhouses, courthouses, post offices, marine hospitals and other public buildings, *under the control of the treasury department.*" See Rev. St. § 3684; 26 St. at Large, p. 953; 17 St. at Large, pp. 352, 353; 18 St. at Large, pp. 229, 395, 396; 26 St. at Large, p. 967, etc.

I have diligently examined all the statutes to which I have been referred on these subjects. I fail to find in them any authority given to the treasury department to dispossess the court of any of

the rooms allotted to and occupied by it, upon the completion of the building, in accordance with the plan for its erection; or any power conferred on any subsequent secretary of the treasury to change the plan of allotment of the different parts of the building as then made.

Before considering the statutes referred to, a brief glance at the previous mode of supplying rooms for the courts will be useful, as showing that the secretary of the treasury has never been charged with any duty, or had any general authority, in providing rooms for the courts, save only in adopting plans for the erection of the buildings.

The duty of providing rooms for the courts, including proper offices for the clerks, devolved at first upon the marshal alone, the expense of which was included in the "reasonable contingencies" provided for by the act of May 8, 1792, (1 St. at Large, p. 277, § 4.) U. S. v. Cogswell, 3 Sum. 207. By the act of February 26, 1853, (10 St. at Large, p. 165, § 2,) the allowance to the marshal for rent of court rooms was limited to \$50 per year, except upon prior submission of estimates to the secretary of the interior, and instructions from him. This check upon the marshal's expenditure was afterwards transferred, not to the secretary of the treasury, but to the attorney general, with whom it still remains, (Rev. St. § 830;) and now the *renting* of rooms for the use of the United States courts, where they are not accommodated in the government buildings, is vested in the marshal under the supervision of the department of justice, through which the appropriations therefor are made. See 25 St. at Large, p. 978; 26 St. at Large, pp. 410, 882, 883, 987; 27 St. at Large, p. 609;

By the act of February 2, 1854, (10 St. at Large, p. 266,) the secretary of the interior was authorized "to provide by *lease* from year to year, or for a term of years, or at his discretion, rooms in the city of New York for the United States courts and the United States attorney, marshal, and clerks of the circuit and district courts." By the act of August 2, 1854, § 1, (10 St. at Large, p. 333,) the *president* was empowered "to provide necessary accommodations for the courts of the United States and the officers connected with them in the district of Massachusetts, and in the cities of New York and Philadelphia, by fitting up and leasing the same *until permanent accommodations can be provided*;" and by section 2 of the same act the president was "authorized to procure by purchase or otherwise suitable sites for buildings to be used as courthouses and post offices in the cities of Boston, New York and Philadelphia." Under the above acts apartments were from time to time rented at New York in College place and in Chambers street for the use of the federal courts in the immediate vicinity of the present building, until the latter was built and ready for occupancy.

Meantime a commission had been constituted for the purpose of procuring a suitable site in New York, whose report was approved by the joint resolution of January 22, 1867, (14 St. at Large, p. 563;) and the same commission was thereby appointed to purchase the site "for a building to accommodate the post office and United States

courts" in the city of New York, in accordance with their report; and plans and estimates for a suitable building were directed to be submitted to the postmaster general and secretary of the interior. Under this act the site was obtained for \$500,000 by deed from the city of New York to the United States, dated and recorded April 11, 1867. The deed conveyed the premises for the exclusive use of a post office and courthouse, and under an express covenant that if used for any other purposes, the premises should revert to the grantor. In 1869 \$200,000 were appropriated for laying the foundation and commencing the building. 15 St. at Large, p. 305.

By the act of April 20, 1870, (16 St. at Large, p. 85,) one million of dollars was appropriated "for continuing the building for a courthouse and post office in New York city, provided that no part of this sum beyond five hundred thousand dollars, or any other sum appropriated for this purpose, shall be expended until a contract or contracts for the completion of the entire building in conformity with plans to be approved by the secretary of the treasury and postmaster general, and at all times under their direction, shall be entered into." By the act of July 15, 1870, (16 St. at Large, p. 295,) \$500,000 were appropriated for the same purpose and upon the same conditions, except that the secretary of the treasury alone was thereby authorized "to enter into contracts for the completion of the building," and "to adopt plans previously approved by him." Subsequent payments were authorized for the same purposes in the appropriation bills from year to year under the headings of "Treasury Department," "Public Buildings," until the act of March 3, 1875, where under the same head, (18 St. at Large, p. 395,) appears the appropriation of \$388,160.08 "for completion of building for United States post office and courthouse, New York, including the cost of heating and ventilating apparatus, and the cost of area along the park front, as per report of the supervising architect of the treasury." In May, 1875, this court entered into possession of the room in question, with its other rooms, in accordance with the plan of the building and the allotment thereby made by the secretary of the treasury.

1. Such are the acts of congress for the construction of this building, and the only powers given by those acts to the treasury department. Many other buildings for similar purposes elsewhere have been since erected under similar acts, always upon plans required to be first prepared and approved. These acts do not purport to give to the treasury department any authority or control over the *use and occupation* of the building after it has been completed, or any right to change the occupants at pleasure; still less, any authority to change the uses to which the building was devoted, by assigning rooms to persons not within the terms of the act, or of the deed of conveyance;¹ or to oust either the court or the post

¹This subject was in 1878 under investigation by the United States senate and its judiciary committee, whose report, through Mr. Conkling, was on April 29th of that year printed as follows:

"Report. The committee on the judiciary having been instructed by the following resolution of the senate:

"Resolved, that the committee on the judiciary be instructed to inquire for

office from any room of which it was lawfully in occupation, in accordance with the plans adopted and the possession taken upon the completion of the building. These acts show, on the contrary, that the treasury department was but the mere servant and agent of congress to adopt plans for the permanent accommodation of the courts and post office, and to see that the building was built in conformity therewith.

what purposes the post-office building in the city of New York may lawfully be used, and whether any occupation of said building exists, or is proposed, not authorized; and meanwhile, the secretary of the treasury is requested to take no action in regard to the occupation of said building until said committee shall report,'

"—report:

"The title of the United States to the property referred to was acquired by deed, dated the 11th of April, A. D. 1867, from the mayor, aldermen, and commonalty of the city of New York.

"Following the grant is the following condition:

"Upon the express condition, however, that the premises above described, and every part and parcel thereof, and any building that may be erected thereon, shall, at all times hereafter, be used and occupied exclusively as and for a post office and courthouse for the United States of America and for no other purpose whatever.

"And upon the further consideration that if the said premises shall at any time or times cease to be used for the purposes above limited, or for some one of them, or if the same shall be used for any other purposes than those above specified, the said premises hereby conveyed, and all right, title, and interest therein, shall revert to and be reinvested in the said parties of the first part, their successors or assigns. And the said parties of the first part shall thereupon become the absolute owners of the said premises and every part thereof, with the appurtenances, and they may then re-enter the said premises and forever thereafter use, occupy, or alien the said premises and every part thereof, in the same manner and to the same extent as if these presents had not been executed.'

"This grant having been accepted by the United States with its conditions, the resulting rights were, in the opinion of the committee, as follows:

"The grantee had the right to erect, as it did erect, a building of dimensions and character adequate and adapted to the fullest accommodation of its postal and judicial services; it has the right of perpetual occupation of the premises for these purposes.

"To devote the premises of any part of them to uses having no relation to the objects denoted in the deed, would in the opinion of the committee, be violative of the terms and spirit of the transaction.

"The restriction is not merely technical or formal. The site is in the densest portion of a great city, and persons of both sexes, resorting to the post office and the courts, have an interest, as others have, in restricting the use of the building, in preventing its being thrown open to all the numbers and classes having occasion to visit revenue offices and the various other offices known in the different branches of the public service.

"Having regard to all the consideration bearing on the question, it is believed by the committee that it would not be expedient or warrantable to assert, on behalf of the United States, any claims to occupy the building or land in question save for the two branches of the public service specified in the deed.

"In expressing this opinion the committee does not mean to affirm that a mere casual temporary use of some portion of said premises, not interfering with the uses prescribed in said deed, would work a forfeiture of the estate."

Efforts were made from time to time to induce the city and state authorities to release the condition of the above deed, but failed.

In adopting plans to accommodate both the courts and the post office under one roof, there was doubtless a duty imposed on the treasury department to ascertain the respective needs of both, and to provide properly for each. As the needs of each were to some extent different, the adoption of proper plans, so as to accommodate all, involved an appropriation of different parts of the building to the uses of each, and the secretary of the treasury had, therefore, for the time being an incidental power of allotment to that extent. But as the power of allotment was a mere incident to the adoption of plans for the building to accommodate all, that power necessarily ended when the building was finished and the allotment made in conformity with the plans adopted, and the parties had entered into possession accordingly. The construction acts gave a special, not a perpetual power. They conferred no authority on subsequent secretaries to undo what the former secretaries had completed. They gave no more power to reallocate rooms previously designed and set apart for each and occupied accordingly, than to change any other parts of the former plans, or to tear the building down and build anew.

The plans of the building have not, indeed, been produced by the treasury department. It is said that they have been lost. But as this court entered upon possession of its rooms, including the room in question, upon the completion of the building, and has occupied them ever since, there is not the least doubt that they were a part of the building specifically appropriated to this court in the plan of construction, and provided for this court in that plan, and occupied in accordance therewith. And such is the recollection of those conversant with the facts. No question is made on this point; and I have not the least doubt that the plans, if produced, would show this appropriation. It is the same with the rooms appropriated to the use of the circuit court and of the post-office department, respectively.

The entry into the rooms thus built for them, and their tenure of those rooms, were not by any mere permission or authority issuing from the secretary of the treasury. Their tenure is directly under the act of congress, which devoted the building to their use. The tenure of each is that "permanent accommodation" contemplated by the act of August 2, 1854, and is as fixed, permanent and secure, in the rooms appropriated to them respectively, as if those rooms had been built as a separate building for each. The question is to be treated in precisely the same manner as if the rooms appropriated by the plans to each, constituted separate buildings, under separate roofs. Neither can be ousted therefrom except by some authority proceeding from congress alone.

2. Appropriation acts. It is urged that various clauses found in the appropriation acts, import a grant of this power by implication. As a fair example of the language used in a score or two of these acts during the last 20 years, the following may be cited from the act of March 3, 1891, (26 St. at Large, p. 953:)

"For repairs and preservation of public buildings, repairs and preservation of customhouses, courthouses, post offices, marine hospitals and other public

buildings, *under control of the treasury department*, two hundred and fifty thousand dollars."

The same phrase "public buildings under control of the treasury department" is used in the same way, in the same act, in appropriating moneys for "pay of assistant custodians and janitors;" for "furniture and repairs of furniture;" for "fuel, lights and water for public buildings;" for "heating apparatus for public buildings;" for "vaults, safes and locks for public buildings."

From this phraseology in numerous acts, it is urged that the secretary of the treasury has control over the *use and occupation* of such buildings, and may reassign, and change the occupants, at pleasure. This inference is unwarranted; it is a violation of the canon of legal construction that requires statutes to be interpreted according to the subject-matter. The subject-matter of those acts is not the *use and occupation*, or the occupants of the buildings; but solely the care, maintenance and repair of the buildings. The "control" referred to, therefore, so far as any inference is to be drawn from such acts, is a control as respects care and maintenance alone, that is, as custodian and caretaker, having no reference to any power over the permanent use and occupation. In all these acts, moreover, not one of the passages cited purports to grant to the treasury department any power at all. The language is used by way of description only. So far as it has any force, it is simply by implication of some control already existing. Any such implication cannot possibly extend beyond the subject-matter under consideration in the act, viz. care, equipment, maintenance and repair.

Considered with reference to other parts of the appropriation acts, it is seen that the phrase "public buildings under control of," etc., is merely employed to indicate the class of buildings for which the particular sum of money named is designed to be expended. Some such general description was necessary in order to distinguish the buildings intended from other buildings in charge of the war department, the department of the interior, or the department of justice, etc., for which other appropriations were made for similar purposes. In the act first above cited (26 St. at Large, p. 953) and in many other acts also, there were like appropriations, including janitors and watchmen, for "court rooms under the department of justice," (26 St. at Large, pp. 410, 987; 27 St. at Large, p. 609; 25 St. at Large, pp. 545, 978; 24 St. at Large, pp. 254, 542; 23 St. at Large, pp. 224, 511;) the rented court rooms being, as above stated, under the general supervision of that department.

Examination of the various statutes using this phrase, shows also that it is used merely in the sense of "in charge of" or "under," with which latter word it has been used interchangeably. Thus in the act of June 10, 1872, where I have first found the phrase in question, the two expressions are used as synonymous on successive pages. 17 St. at Large, pp. 351, 352. The last of those two provisions (page 352) was transferred to the Revised Statutes, (section 3684,) but with "under the control of," instead of the word "under" simply. Both expressions manifestly mean the same thing. So

the act of March 3, 1873, (17 St. at Large, p. 514,) on one page uses the phrase "under control of" for similar appropriations for care, repair, etc., and on another (page 523) it speaks of "public buildings *under* the treasury department." In the act of June 23, 1874, (18 St. at Large, p. 229,) while the phrase "under control of" is repeatedly used as respects repairs, etc., those items altogether are placed under the general head of "Public Building *under* the Supervising *Architect* of the Treasury Department." In all these places the words "under" or "under control of" mean "in charge of," and nothing more. No power or authority to control the *use and occupation* of the buildings was conferred or intended to be conferred on the treasury department, or on the supervising architect. The "control" referred to in all the acts is simply a control as respects repairs, care, maintenance, etc., which were the subject-matter of the clauses referred to.

Had congress had an intention to give the treasury department authority to dispossess the courts or post office of any of the offices built and appropriated for their permanent accommodation, or to change their occupancy from time to time, it is not credible that that intent would have been expressed in any such indirect mode, and by recital merely, as in the phrases quoted, instead of by some direct grant of power.

Further evidence that congress had no such intent, is supplied by the act of March 3, 1891, establishing the United States circuit courts of appeals. Section 9 of that act requires the marshal "under the direction of the attorney general and with his approval to provide such rooms in the *public buildings of the United States* as may be necessary" for the courts of appeals; or if that cannot be done, then that "with the attorney general's approval, he lease such rooms as may be necessary." Here is no reference to the treasury department as having any authority whatsoever over the use and occupation of the same public buildings over which that department now claims exclusive control. Had congress ever conferred such an authority, or intended to confer it in the frequent and familiar use of the word "control" in the appropriations for repairs, it is not credible that the direction to supply rooms for the courts of appeals in those same buildings would have been addressed to the marshal and the attorney general, while the treasury department was wholly ignored. That department is not noticed, because after the allotment as fixed in the final plan of construction, it never had any authority to control or to change the use and occupation of the parts of the building allotted to each, and never had any duties or responsibilities (aside from construction) in supplying the courts with rooms, or any power to interfere therewith. Section 9 of the act of 1891 is in precise harmony with the laws and usages of the government from the beginning; nor could the treasury department lawfully have set up any authority against the action of the marshal and the attorney general under the above-cited act of 1891, ~~as~~ respects any rooms available for the courts of appeals.

It is urged that the control over the courthouse and post-office

building must be vested somewhere, since there are three courts to be provided for, besides the post office; and that amid the growing demands for room, in no other way could confusion and collision be avoided.

But the power claimed would, on the contrary, most directly tend to produce collision, instead of avoiding it, by unsettling all permanent right of occupation; and, by making every room liable to change without notice or hearing, it would open the door to perpetual intrigue, change and dissatisfaction.

Nor, so far as I can learn, has there been any previous practice which would lend color for the exercise of the power now claimed by the treasury department, to oust either the court or the post office from any rooms allotted to them in the construction of the building. The papers submitted by the respondents do not allege any such grounds. If, with the lapse of time, the growth of the courts or of the post office is such as to need additional accommodations, it is for congress to provide for the necessary room, as congress did provide in the act of 1891 for the new courts of appeals, as above cited. The remedy from congress is always obtainable. There is no occasion for the assertion of novel and arbitrary powers; nor is the plan of the structure for the "permanent accommodation" of each to be upset, or the rooms of the whole building be made subjects of perpetual strife, simply because the post office may, after some 20 years of occupancy, have become cramped for room; though that is not the origin of the present difficulty. Upon the argument contended for, the treasury department might not only permit unauthorized persons to use such rooms as they please, after dispossessing the courts thereof, but upon the plea of the needs of other occupants, it might oust the courts from the possession of all the large rooms expressly designated for the hearing of causes, crowd them into smaller and insufficient rooms, and convert the larger rooms to such other uses as the treasury department might choose. Any such claim of power seems to me an unwarrantable assumption, manifestly contrary to the letter and spirit of the act of congress for the erection of this building. Between such a power and that claimed in the present case there is no dividing line.

The respondents' contention assumes that the treasury department, instead of congress, is to remedy any supposed inadequacy of room for the courts or for the post office that may arise with the lapse of time. But no responsibility in that regard has ever been imposed on the treasury department. Its only duty and power in relation to this building, as implied from the appropriation acts, is to attend to its proper care, custody and maintenance; and as respects any unoccupied rooms, or rooms occupied by persons having no legal right therein, to conform to the will of congress by turning over such rooms, as the custodian thereof, to either one of the courts, or to the post office, whenever either of them may need such rooms and make known its requirements. This the department is bound to do, not as having any arbitrary authority of its own, but as a simple custodian or caretaker, yielding the keys to the de-

mands of a rightful occupant. In the improbable case of conflicting demands at the same moment, a delivery of the keys to either would be lawful. Such is not the present case, nor is any such case likely to arise, if unauthorized persons are not sought to be introduced or kept in occupation. Such unauthorized use is the sole cause of the present difficulty, which could not have arisen, had the department entertained no demands except such as proceeded from the courts or the post office, and assumed no powers and responsibilities, except such as belonged to it.

As between the different courts all needful changes have hitherto been easily effected by voluntary readjustments. The papers upon this application show that the same accommodating spirit has been also extended to the post office, by surrendering to its use, for the time being, such room as for the present could be spared. It is not averred, nor do I think it true, that any rooms that could for the time being be spared by either, have been refused for the use of any lawful occupant. There is not, and never has been, any occasion for the exercise of any such arbitrary power as that claimed; and the avoidance of confusion and discord is to be attained by observing the provisions of the law, that the building is for the courts and the post office, and the uses incident thereto. Only discord, injury and confusion could result from the grant, or the assertion, of an arbitrary power of interference, such as is claimed in this instance.

3. Holding for the above reasons that the treasury department has no legal authority to interfere with the occupancy of rooms of this court, the propriety of the order to show cause, with the accompanying restraining order, seems to me so clear that little need be said in that regard. The decisions with reference to injunctions in actions are not applicable, since this is not an action.

The acts threatened would constitute, if committed, a contempt of court, as an unlawful interference with the rooms, books, papers and records in the possession of the court through its officer, the clerk; just as an interference with any other property in the custody of the court through its other officers, such as receivers or assignees, would constitute a contempt. In *re Doolittle*, 23 Fed. Rep. 544; *U. S. v. Kane*, Id. 748; In *re Higgins*, 27 Fed. Rep. 443; In *re Steadman*, 8 N. B. R. 319. The clerk is a necessary adjunct and part of the court. His possession is the possession of the court. Considering also that such papers and records are essential to the administration of justice and to the preservation of the rights of multitudes of persons, any unlawful interference with them, is "misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice," within the provision of section 725, Rev. St. Per Mr. Justice Brown, in *Re May*, 1 Fed. Rep. 737, 742; *People v. Barrett*, 56 Hun, 351, 9 N. Y. Supp. 321.

The power to punish for contempt is inherent in every court, and has always been sustained as necessary for the maintenance of its authority, and to protect itself from attack and injury. *Anderson v. Dunn*, 6 Wheat. 204; *Ex parte Burr*, 2 Cranch, C. C. 379, 393; *Ex parte Terry*, 128 U. S. 289, 303, 307-309, 9 Sup. Ct. Rep.

77; *In re Neagle*, 39 Fed. Rep. 854-858. Contempts are not dealt with by action; but by summary proceedings. The practice to be adopted in reference to particular contempts, whether committed or threatened, is to some extent a matter of discretion with the court, provided due notice and opportunity to defend are afforded. The same grounds that justify punishment for a contempt after it is committed, must also be sufficient to restrain its commission, when its commission would be productive of permanent injury. Considering that the grounds for dealing with contempts at all are the maintenance and defense of the authority of the court, it would be most illogical to hold that while a party might be summarily punished for a contempt committed, the court could do nothing to prevent commission of the injurious act, not even by issuing its previous note of warning and restraint.

Restraining orders may be issued against the publication by newspapers of injurious comments pending the trial. *Reg. v. Parnell*, 14 Cox, Crim. Cas. 474; *Coleman v. Railway Co.*, 8 Wkly. Rep. 734; *Kiteat v. Sharp*, 31 Wkly. Rep. 228. In the latter case Fry, J., says:

"I consider that I have jurisdiction to prevent contempt of court by injunction. If it were not so, see what would be the result. The court would be powerless to prevent an interference with justice, which it knows to be probable, and to secure the fair trial of the action. The very reason of the court's existence is to secure the fair and unprejudiced trial of actions. An example of the exercise by the court of the jurisdiction which I am now asked to exercise is to be found where, in the case of wards of court, persons not parties to the proceeding are restrained from committing what would be a contempt of court."

See, also, *In re Neagle*, 135 U. S. 1, 59, 10 Sup. Ct. Rep. 658. In some cases where the act would not be a contempt, a writ of inhibition may be issued, as on an appeal, in order to make the disobedience punishable as a contempt. *Penhallow v. Doane*, 3 Dall. 54, 87.

In a case like the present, where a disputed claim of right was involved, and it was the duty of the court to protect its possession and its records from assault, it was eminently proper that a notice and citation should be issued before the commission of the injurious act, in order that there might be previous judicial hearing and determination of the controverted question. No harm, but good alone, was thereby done to the respondents; while the interests of justice and of all concerned, made it specially proper that that mode of proceeding should be adopted. It was the duty of the clerk, on whom the safe-keeping of the papers and records of the court are imposed by law, and to the faithful performance of which he is sworn, as the appointee and officer of the court, to make known to the court the threatened unlawful interference and expulsion from one of its rooms. The issuing of a restraining order in reference to such a threatened contempt, is as "agreeable to the principles and usages of law," as the issuing of a writ of attachment after a contempt committed, and equally within the provision of section 716 of the Revised Statutes. *Voss v. Luke*, 1 Cranch, C. C. 333; *U. S. v. Williams*, 4 Cranch, C. C. 372.

In what has been said above, I have had no reference to those merely occasional and temporary uses of rooms, by persons or committees for special purposes, which, while not interfering with the requirements of the courts, or of the post office, and assented to by them, may by courtesy be properly allowed, as a tenant or a custodian may entertain a guest.

For the reasons previously stated I think the order to show cause and the restraining order meantime, were properly granted. But as the hearing has furnished opportunity for full consideration of the legal questions involved, and for a deliberate adjudication by the court upon the merits, that the treasury department has no lawful authority to interfere with the court's possession of the room in question, it is probably unnecessary at the present time that any further order should be made in the matter; should any necessity therefor arise, it may be applied for.

BYRNE v. KANSAS CITY, FT. S. & M. R. CO.

(Circuit Court, W. D. Tennessee. February 19, 1893.)

No. 3,214.

1. CHAMPERTY — DEATH BY WRONGFUL ACT — AGREEMENT BETWEEN ADMINISTRATOR AND BENEFICIARY—TENNESSEE STATUTE.

An attorney suing as "administrator" to recover for a death by wrongful act, under Mill. & V. Code Tenn. §§ 3130, 3134, may be guilty of a champertous agreement with the beneficiaries, which may be pleaded as a defense to the suit under sections 2445-2458, investing courts of law with equity powers for the purpose of discovering and preventing the offense.

2. SAME—CONSTRUCTION.

The Tennessee statutes against champerty were enacted with a view to the peculiar circumstances of the early settlement of that state, particularly the common practice of speculation in defective land titles, and therefore the English statutes and decisions on this subject, made under wholly different circumstances, are not controlling in Tennessee as to the interpretation of the statute.

3. SAME—FEDERAL COURTS—FOLLOWING STATE PRACTICE.

Although federal courts might give effect to state statutes against champerty by disbarment of the guilty person, or by other means consistent with their jurisdiction and procedure, yet the provision of Mill. & V. Code Tenn. § 2452, allowing the champertous agreement to be set up in a plea in abatement in the action to which it relates, not being a rule of property nor of practice and procedure within the meaning of acts of congress requiring federal courts to follow state practice in such matters, is not binding on federal courts, since their jurisdiction cannot be limited by state legislation.

At Law. Action by Francis J. Byrne, administrator, against the Kansas City, Ft. Scott & Memphis Railroad Company to recover for a death by wrongful act of defendant. Heard on demurrer to plea in abatement. Demurrer sustained.

Adams & Trimble, for the demurrer.

Francis J. Byrne, opposed.

HAMMOND, J. This is a suit for personal injuries. There is a plea of champerty under our Tennessee statute, and a demurrer

to it. The plaintiff is an attorney at law, and the averment is that he has entered into a contract with the sole distributee or heir at law of the intestate for one half of the recovery as his fee, contrary to the statute in that behalf. Mill. & V. Code Tenn. §§ 2445--2458.

It is insisted that the case does not fall within the statute, since the plaintiff cannot make a champertous agreement with himself for the prosecution of the suit; and since his recovery will become assets in his hands, to be strictly accounted for in the court of administration, where he can be allowed only his commissions; and, moreover, whatever may be paid to him by the distributee upon whatever contract is necessarily a payment taking effect after the recovery and after a distribution by the court of administration.

Plausible as this may seem, I do not think the statutes against champerty can be so evaded. It is like our pension laws, which forbid the attorney to take more than a fee of \$10, but, the money being in fact all paid to the pensioner, and his absolute dominion thus established, so that he might do what he pleased with his own, if he choose voluntarily to recompense his attorney with a larger sum, this would not be against the statute, it has been often contended. But the courts have not taken that view, and men have gone to the penitentiary for reliance upon it.

But there is another answer to this contention. Our statute giving damages for death by the negligence of another gives the recovery to the widow or next of kin in their own right, and they may sue for it in their own names. Mill. & V. Code, §§ 3130-3134. It is true that the administrator may also sue, but the recovery is not assets in his hands, either for creditors or distributees, except, possibly, in the very barest technical sense. Id. §§ 3130, 3133. His relation to the ownership of the fund is more like that of a trustee for the beneficiaries, or of a statutory agent, than that of administrator, which he is merely in name. A little thought upon this distinction brings out quite clearly the unsubstantial character of the suggestion that he cannot bargain champertously with himself as plaintiff. Besides, a court of equity would quickly get behind this technicality in a court of law, and it is to be observed especially that our Tennessee statute against champertous agreements invests the courts of law with the powers of a court of equity for the purpose of discovering and punishing the offense. It is, in substance and in fact, as we have the question here, a contract by the attorney with the owner of the right of action to share the fund recovered, and is to all intents and purposes champertous, according to the statute.

But the statute does not and cannot in its entirety apply to the federal courts. It is not within the competency of the legislature of Tennessee to direct when the federal courts shall dismiss a suit pending there, either as a penalty for a statutory offense or otherwise. I state this proposition broadly, and think it will find a ready assent with every one; but it is not the broader proposition of the plaintiff that this statute has no application in the

federal courts, and that they have no law of champerty. The supreme court has never decided that, I think. For clearly it is within the authority of the states to regulate this subject, and, so far as their legislation can operate, it will be not only effectual in the federal courts, but they will do all that should be done to enforce it, whatever they may think or have expressed as to the policy of such laws. In one sense, the federal courts have no law of larceny as the state courts have it, and yet in some ways they give effect to the state laws against it. No convicted thief would be allowed to practice law in the federal courts. They would declare void any thief's claim of ownership of property he had stolen where the question arose within their jurisdiction. They would restore the stolen goods whenever the proper process was available in their jurisdiction. And if the state statutes to suppress larceny should declare some statutory rule of property, or should disfranchise from civil or political rights the convicted thief, or even if they should invent some new legal or equitable remedy of a civil nature, hitherto unknown, for the suppression of the trespass on property rights involved in the commission of the offense, the federal courts would give effect to such statutory declarations, and use the new remedies, if possible to adjust them to their jurisdiction and procedure. In the same way they will give effect to these laws against champerty, and this necessitates a scrutiny into their character, in order to determine just what relation they may have to the federal jurisdiction, which relation, I find, necessarily perhaps, somewhat complicated. But I have no doubt the plaintiff is mistaken in saying broadly that they are not binding on us, or that the federal courts discountenance laws against champerty, and do not recognize them.

At common law, or under old English statutes that ordinarily pass for common law with us, there were the kindred offenses of common barratry, maintenance, and champerty, which were punished by disbarring or "disabling" the offender, if an attorney, by fine and imprisonment, transportation, forfeiture of money, treble damages, etc. 4 Bl. Comm. 134. The offenses there described did not perhaps include that which has been set up in the plea we have in hand. It is not necessary to do more than refer to the disputed question whether an agreement by an attorney to take for his fee a percentage of the recovery, or to measure his fee by a percentage of the recovery, was champerty at common law, for it may be conceded here that it was not. Since then the Tennessee legislation has superseded the common law in this state, and it is only to that we need look. Undoubtedly, under the Tennessee statute, an agreement by the attorney, such as is set out in this plea, is champerty. Very early in the history of this state—indeed contemporaneously with its beginning as a state, and before that in the mother state—those "pests of civil society that are perpetually endeavoring to disturb the repose of their neighbors and officiously interfering with other men's quarrels," as they are described by Blackstone, afflicted our pioneer ancestors, especially in the fierce struggle that went on over the occupation rights and other titles pertaining to the settlement of the new lands

that were being taken up. And largely these "land sharks" were lawyers, or were in league with lawyers, searching for infirmities in titles, and taking advantage of them to stir up litigation. These statutes were intended to suppress those evils, and had a purpose somewhat different from the English acts, or rather a somewhat different cause for existence than those about which so much has been said by counsel, following some expressions of the supreme court of the United States in relation to the change of conditions which provoked the English acts of parliament. They are modeled on the English law, but are radically different in their origin as to the conditions of society which produced them. It was no fear of nobles or great men, or their influence with courts and juries, that produced these Tennessee statutes, for as a fact the courts and juries could be relied on for action against the purchasers of these titles; but it was the hostility of public sentiment to the "land sharks" who were speculating in litigation over defective titles, and particularly to lawyers lending themselves to this speculation for profit, which provoked statutes seeking to enlarge the English acts just because they did not reach the evil sought to be suppressed. Hence what is quoted so extensively by counsel from the supreme court as to the champerty of the common law and English statutes is quite inapplicable in the consideration of our Tennessee Code on this subject. *Roberts v. Cooper*, 20 How. 467; *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. Rep. 865; *Stanton v. Embrey*, 93 U. S. 548; *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. Rep. 441; *Thalhimer v. Brinckerhoff*, 3 Cow. 623; 3 Stubbs, Const. Hist. 532-541; 3 Steph. Dig. Crim. Law, 236-238.

Not more under our Tennessee statute than under the Missouri laws considered in *Burnes v. Scott*, *supra*, can the making of a champertous contract between counsel and client "be set up in bar of a recovery in the cause of action to which the champertous contract relates." That was what was decided in that case. Now, our Tennessee statutes, while greatly enlarging the English acts, do not at all attempt to operate on the cause of action to which the champertous agreement relates, except that the court is required to dismiss the suit brought upon the cause of action under the champertous agreement. Mill. & V. Code, § 2452. But any other suit may be brought where no champertous contract has been made. The statute makes the champertous contract void, and this would seem to be sufficient; and there may be something of mere vindictive sentiment in dismissing a suit because of a void contract about it when the parties, by revoking the void contract, or the plaintiff, by employing another attorney, with whom no such contract has been made, may bring a new suit; but this is one of the penalties of the statute, in addition to the others. It closes the court to that suit by requiring it to be dismissed because of the wrongful and criminal conduct of the parties in making a champertous agreement about it. That is the full extent of the penalty. It is perfectly plain, to my mind, that the Tennessee legislature cannot thus control, direct, or in any way prescribe a rule of dismissal or closing of the court in another jurisdiction over which it has no dominion. It is not a rule of property in any sense; therefore our acts of congress requiring the fed-

eral courts to administer the rules of property prevailing in the states do not apply. Neither is it in any sense a rule of practice or procedure in the conduct of the suit at law, to which our conformity practice act applies. Superficially it might seem a rule of practice, but it clearly is not in the sense of the act of congress. It is a somewhat sentimental penalty or punishment for making the champertous agreement, and possibly involves nothing more serious than the costs of the abortive suit; but, no matter how serious it be, or what may be said if its efficiency, it is a condition attached to the right of standing in the courts which the state legislature cannot impose on those resorting to the federal courts.

Perhaps it is not within the competency of the legislature, under our constitutional limitations, to have annulled the cause of action to which the champertous contract relates by forbidding any and all suits to be brought upon it because of the offense, thus, in effect, destroying it, or at least impairing it; but it will be sufficient to consider that question when the legislature undertakes to do that which it has not yet undertaken. If it be within the power of the legislature to pass such a law, it might then be a rule of property which the federal courts would enforce; but that, too, is a question not arising here. Closing the court to that one suit is not even pro tanto a rule of property, but, as before suggested, only a penalty of costs, at most.

Yet, as to the other penalties of this statute, they might be enforced in the federal courts, or rather find effect there. The champertous agreement itself would be held void as a rule of property, perhaps. The attorney bringing such a suit in a state court could be disbarred for five years, but it is to be observed that the penalty is limited to disqualification to practice in any of "the courts of this state." If so disqualified by being "stricken from the list of attorneys," he could not, probably, practice in the federal courts, for, congress having never undertaken to license, regulate, or declare the qualifications of attorneys, we make up our list from the state list, and, being disqualified there, he might be disqualified here, at least until congress regulates the privilege in some way of its own, instead of leaving it to the states, as has been done. Or possibly, if a motion were made here to disbar an attorney for committing an offense against the laws of the state, this court might say that one so conducting himself should not practice in this court; but as the statute does not, in terms, apply except to suits brought in a state court, and it is for bringing them there that the penalty of dismissal is attached, and this seems more doubtful than the other suggestions above made. But, however these things be, it is going too far to say that these statutes are not binding in the federal courts, and we only hold that so much of the penalties prescribed as direct that a suit brought in pursuance of the champertous agreement shall be dismissed, not being a rule of property, nor a matter of practice or procedure, but a condition, cannot apply to this court, for the simple reason that only an act of congress can impose such a condition upon its courts or give them such a command. Demurrer sustained.

DANIELSON v. NORTHWESTERN FUEL CO.

(Circuit Court, D. Minnesota, Fifth Division. February 15, 1893.)

1. JUDGMENT—FINALITY—EXECUTION.

Where a motion for a new trial is made and duly filed with leave after judgment is entered, according to the practice of some districts, the judgment does not become final, so as to authorize the issuance of execution, until the motion is disposed of.

2. SAME—NEW TRIAL.

Where an order denying a motion for a new trial is signed by the judge at chambers, in vacation, it does not become effective, so as to render the judgment final, until the order is filed of record in the clerk's office.

3. SAME—EXECUTION—WHEN ISSUABLE.

Under Rev. St. § 1007, providing that until the expiration of 10 days an execution shall not issue "in any case where a writ of error may be a supersedeas," Sundays are to be excluded in the computation of time.

At Law. Action by Karl Danielson against the Northwestern Fuel Company. Hearing on motion to quash an execution. Granted.

Statement by NELSON, District Judge:

The judgment in this cause was entered in the fifth division of this district October 17, 1892, and on that day an order was entered, staying the issue of execution thereon, and a motion was made, before the stay expired, for a new trial. This motion was heard at chambers, and taken under advisement, and on January 18, 1893, an order was signed by the judge, denying said motion, which order was sent to the clerk's office of the court in the fifth division for record, and was filed and entered of record therein on January 21, 1893. On January 30, 1893, an execution was issued by the clerk, but retained by him till January 31, 1893, and was received by a deputy United States marshal on the same day, but no levy was made, under and by virtue of the same, until February 2, 1893. On the 2d day of February aforesaid a citation was duly issued, a writ of error duly filed, and a supersedeas bond duly approved and filed. A bill of exceptions had been settled, signed, and filed before the latter day. A motion is now made to quash the execution, and set aside all proceedings that may have been done under the same.

Draper, Davis & Hollister, for the motion.

John W. Arctander, opposed.

NELSON, District Judge, (after stating the facts.) No execution could issue until a final judgment is rendered. The judgment became final at the time when the motion for a new trial was determined. See *Woods v. Lindvall*, 48 Fed. Rep. 73, 1 C. C. A. 34.

Although the order denying the motion for a new trial was signed by the judge in vacation, and at chambers, upon January 18, 1893, it was not effective, so that the judgment became final, until the order was filed of record in the clerk's office in the division in which the judgment was entered, which was on January 21, 1893.

Under section 1007, Rev. St. U. S., as interpreted by the United States supreme court, (*Doyle v. Wisconsin*, 94 U. S. 52,) the legislative intent is to be determined by looking at the old law as it existed before the revision; and when this is done it is found that, until the expiration of the term of 10 days, "execution shall not issue in any case where a writ of error may be a supersedeas;" and the term of

10 days also excludes Sundays. See, also, *Kitchen v. Randolph*, 93 U. S. 86, and *Danville v. Brown*, 128 U. S. 503, 9 Sup. Ct. Rep. 149.

Motion to quash execution is granted.

BALTIMORE & O. R. CO. v. PARRETTE et al.

(Circuit Court, S. D. Ohio, E. D. March 10, 1893.)

No. 622.

1. EMINENT DOMAIN—PARTIES—RIGHTS OF LESSEE.

A judgment condemning lands for public use does not affect a lessee's right of possession when he is not made a party.

2. RES JUDICATA—SUITS AT LAW AND IN EQUITY.

Where a lessee who was not made a party to condemnation proceedings brings suit to enjoin a city from opening a street through the leased premises, a decree finding that the equities are with the defendant, and dismissing the bill, does not bar the lessee from maintaining a subsequent action at law to assert his legal right of possession.

At Law. Action of ejectment by the Baltimore & Ohio Railroad Company against Thomas F. Parrette and others. Judgment for plaintiff.

J. H. Collins, for complainant.

Joseph Hidy and Ace Gregg, for respondents.

SAGE, District Judge. This is an action in ejectment against Thomas F. Parrette, Lewis C. Mallow, and Henry Fulton, commissioners of Fayette county, Ohio, and against Addison Hays & N. B. Hall, partners as Hays & Hall, to recover possession of a strip of land 28 feet wide and 50 feet long, on the southwest side of the complainant's main track, a short distance northeast of its passenger depot at Washington court house, Fayette county, Ohio. The petition was filed on the 23d day of August, 1892. It sets forth that the defendants, on or about the 14th day of August, 1892, in the night season, entered upon said strip of land, and erected thereon a wooden structure of trestles, sills, flooring boards, and other material of similar character; that said entry was unlawful, wrongful, and without any right or title; and that they had remained in possession and were in possession thereof. The plaintiff, setting up its own title and right of possession, prays for judgment.

The defendants deny the complainant's ownership, and its right to the exclusive possession of said property, or that they have remained in possession of said premises ever since the 14th day of August, 1892, or that they were in the possession of the same on the 23d day of August, 1892, or have been at any time since that date, or that they have kept plaintiff out of possession. They admit that the plaintiff has a limited and qualified ownership in the premises, and that the defendants, on the 14th day of August, 1892, entered upon the same, and erected thereon a bridge across Paint creek; but they deny that the entry was unlawful or wrongful, and assert their full right to do what they did do. They further

answer that said premises lie within the limits of a public street in the city of Washington, Ohio, known as "Millikan Avenue," and are part of said street, over which said city has a right to exercise all the dominion and control vested in municipal corporations in Ohio over public streets. They admit that the plaintiff was and is entitled to use said premises, jointly with the public use thereof as a street, for the purpose of operating its railroad; but they say that the plaintiff has in fact never made any use thereof for that or any other purpose, but that said premises lie almost wholly within the channel of a natural water course known as "Paint Creek." They further say that the defendants Parrette and others, commissioners of Fayette county, in their official capacity, did, before the 14th of August, 1892, upon the request and petition of citizens of said city and of its council, let to the defendants Hall & Hays a contract for the erection of a bridge over Paint creek, within the limits of said avenue, and that the defendants Hall & Hays, in pursuance of said contract, on or about the 14th day of August, 1892, entered upon said premises, and erected said bridge, which is the structure complained of in the plaintiff's petition; that the same was constructed expeditiously, and without any interference with the plaintiff in the use of its tracks or grounds; and that, as soon as the same was completed, possession thereof was surrendered by the defendants to said city, and the defendants have never since been in possession thereof.

For a second defense, they set up that said Millikan avenue was, by ordinance duly passed by said council in December, 1889, established and ordered to be opened upon and over the premises described in the plaintiff's petition; and that on the 19th of January, 1890, in pursuance of provisions of said ordinance, said city caused proceedings to be instituted in the probate court of Fayette county, Ohio, to appropriate said premises for the purpose of opening and establishing said avenue, and to assess the compensation and damages for said appropriation. Said proceedings were instituted against the Columbus & Cincinnati Midland Railroad Company, to whom it is averred said premises then belonged; and that on the 21st of January, 1890, a jury was impaneled in said court to assess the compensation and damages for said appropriation, and that it proceeded to do so, and reported to said court its assessment, which was by said court approved and confirmed, and it was ordered that, upon the deposit by said city of the amount thereof, said Columbus & Cincinnati Midland Railroad Company should surrender quiet possession of said premises, and of other premises embraced in said proceedings, to said city; and that said deposit was made by said city, and said city proceeded to take and hold possession of said property pursuant to the order of court. On the 1st of February, 1890, said Columbus & Cincinnati Midland Railroad Company gave bond as required by law, and appealed said proceedings to the court of common pleas of Fayette county, Ohio. Afterwards, on the 26th day of May, 1890, the plaintiff herein, then, as now, claiming to be the owner of said premises, filed its petition in the court of common pleas of Fayette county, Ohio, against said city, alleging, among

other things, that said Baltimore & Ohio Railroad Company was the owner and in actual possession of said premises, including those described in the petition in this case, on and after the 1st day of January, 1890, and that it was not a party to said proceedings to appropriate said property, nor bound by the same; that said city was proceeding to take possession of said premises for the purpose of opening and establishing said avenue across and over the tracks and yards owned and occupied by said Baltimore & Ohio Railroad Company. The prayer of the petition was for an injunction to prohibit its so doing, or interfering in any way with the use of the same by said railroad company. Said city, by its answer, denied the possession and the title of said Baltimore & Ohio Railroad Company, and claimed the right, by virtue of the proceedings aforesaid in the probate court, to take possession of, use, and occupy said premises for the purpose of opening and establishing said street. At the April term, 1892, of said court of common pleas said cause came on to be heard, and said court then rendered its judgment against the said Baltimore & Ohio Railroad Company, which judgment is in full force unreversed and unmodified; and the defendants say that the right of the public to use said premises as a public highway, and the title of said city of Washington to said premises, and its right to the possession, the dominion, and control thereof as a public street, was fully adjudicated and determined in that action, and that the entry by the defendants on the premises described in the petition was made at the request of said city, and in assisting in opening and fitting said street for public use, and it was for that temporary purpose merely, and that defendants do not claim, and never have claimed, title in or right to the possession of said premises, as against said city or the plaintiff, except the rights enjoyed by the public in the same as a public street.

The plaintiff, by its reply, put in issue every averment of new matter in the answer contained. It appears as matter of fact that the defendants were in possession of the premises described in the petition when the petition was filed, and for a short time afterwards, but that they then turned the premises over to the city of Washington, and have not since been in possession.

The Baltimore & Ohio Railroad Company was, at the time when the proceedings for the appropriation of said premises were instituted by the city of Washington, and has ever since been, the owner of a perpetual lease of said premises, executed and delivered by the Columbus & Cincinnati Midland Railroad Company to the Central Ohio Railroad Company, and assigned by that company to the plaintiff. The plaintiff's right and title was not in any way affected by the appropriation proceedings against the Midland Company, and it was therefore, when this suit was instituted, entitled to the possession, unless the court of common pleas of Fayette county, by its decree in the injunction case, referred to in the answer, adjudicated the right of the public to use said premises as a highway, and confirmed the title of said city of Washington thereto, and its rights to the possession and control thereof. The record in that case was introduced in evidence. The proceeding was under the

Ohio Code. The only prayer of the petition was that the city be enjoined from proceeding to open or occupy said premises as a street, or in any way interfering with the use of the same by the plaintiff, and that, upon final hearing, the injunction might be made perpetual. The decree of the court was that the equity of the case was with the defendant, and that the petition be, and the same was, dismissed, and the temporary injunction allowed in the case dissolved. An appeal was taken to the circuit court, where the plaintiff moved to dismiss the action without prejudice to a new action, but the court overruled the motion. On the same day counsel for the plaintiff announced in open court that the plaintiff refused to further prosecute the action, and thereupon, on motion of the defendant, the appeal was dismissed for want of prosecution, and the case remanded to the court of common pleas for execution. From that judgment of the circuit court the plaintiff instituted proceedings in error in the supreme court of Ohio, but it does not appear that any bond was filed or supersedeas granted. However they may have been, the judgment of the court upon the application for an injunction is no bar to the prosecution by plaintiff of its legal right to the possession of said premises. It was held in *Chamberlain v. Sutherland*, 4 Ill. App. 494, where an interlocutory injunction had been allowed, but the bill was afterwards dismissed for want of prosecution, that the final order of dismissal did not operate as *res judicata* upon the questions involved. In this case there was a decree of dismissal by the court of common pleas upon the hearing, and the dismissal of the appeal by the circuit court left the judgment of the court below in full force, with the mandate of the circuit court to carry it into effect; but the decree related only to the equities of the parties, and created no estoppel whatever against the assertion of its legal rights by the Baltimore & Ohio Railroad Company.

The judgment in this case must be for the plaintiff; but as the defendants have, since the petition was filed, left the premises, and are no longer in possession, the judgment will be only for costs.

UNITED STATES v. JACQUES.

(Circuit Court, S. D. New York. April 13, 1893.)

ELECTIONS—FRAUDULENT REGISTRATION—DEFECTIVE INDICTMENT.

An indictment under Rev. St. § 5512, against a voter, for fraudulent registration, in falsely stating his place of residence, is fatally defective in failing to aver that such statement was made to the inspectors of election at the time of registration.

At Law. Indictment against Zachariah Jacques for fraudulent registration. Demurrer to indictment sustained.

John O. Mott, Asst. U. S. Atty.

Henry D. Hotchkiss, for defendant.

BENEDICT, District Judge. This case comes before the court upon a demurrer to the indictment. The indictment is found under

section 5512, by which it is made an offense against the United States for any person to fraudulently register at a registration of voters for election of representative in congress. The portion of the indictment here in question charges that the defendant did "unlawfully, knowingly, and fraudulently register as a voter at the place of registry in the third election district of the twenty-seventh assembly district in the city of New York, he, the said Zachariah Jacques, then and there not having a lawful right so to do, which said registration was then and there false and fraudulent, in this: that said Zachariah Jacques, at the time he so registered as aforesaid, stated that his residence was at Randall's Island Hospital, New York city, whereas, in truth and in fact, as he, the said Zachariah Jacques, then and there well knew, he, the said Zachariah Jacques, had no residence at Randall's Island Hospital, New York city, which entitled him to register as a voter, as aforesaid." To this averment, two objections were taken: First, that it is fatally defective because the false statement alleged to have been made by the defendant is not charged as having been made under oath; a statement to the inspectors of election, under oath, being required of every applicant for registration in the city of New York, by the law of the state of New York. The second ground of objection is, it is nowhere averred that the statement was made to the inspectors of election.

Without passing upon the first objection, I am of the opinion that the indictment must be held bad for omitting to aver that the false statement set forth was a statement made to the inspectors of election. The indictment does not say to whom the statement was made. The averment is simply that at the time of registering the defendant made the false statement. For all that appears upon this indictment, the statement might have been made to a policeman or a bystander. This indictment would be proved by evidence showing that, at the time the defendant registered, he falsely stated to a bystander that he resided at Randall's Island, but such a statement would not make the registration fraudulent, within the meaning of the statute.

There must be judgment for the defendant on the demurrer.

In re WHITE.

(Circuit Court of Appeals, Second Circuit. February 20, 1893.)

1. INTERSTATE EXTRADITION—FUGITIVES FROM JUSTICE—PURPOSE OF FLIGHT.

Under Rev. St. § 5278, providing for interstate extradition, a person is a fugitive from justice when he has committed a crime within a state, and withdraws from the jurisdiction of its courts without waiting to abide the consequences, and it matters not that some other cause than a desire "to flee" induced such withdrawal. *Roberts v. Reilly*, 6 Sup. Ct. Rep. 291, 116 U. S. 80, followed.

2. SAME—HABEAS CORPUS—EVIDENCE.

Where extradition proceedings are brought to remove a person from New York to Wyoming for the theft of certain shares of stock, it is not competent for such person, on habeas corpus, to show that the shares

were pledged to him by the person charging the theft; for, while it is proper to inquire as to the prisoner's identity, and as to whether he was within the demanding state when the alleged crime was committed, the question of his guilt or innocence cannot be inquired into. *Leary's Case*, 6 Abb. N. C. 43, followed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Petition by Charles A. White for a writ of habeas corpus to release him from the custody of James Vallely and Alfred D. Kelley, sheriff, by whom he was held for extradition to Wyoming to answer a charge of grand larceny. The circuit court remanded the prisoner, and dismissed the writ. The prisoner appeals. Affirmed.

W. M. Safford, for appellant.

Purdy & McManus, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. This is an appeal from an order of the circuit court for the southern district of New York, dismissing a writ of habeas corpus. The petitioner and appellant was arrested on the 15th day of October, 1892, pursuant to the mandate of the governor of the state of New York, as a fugitive from justice from the state of Wyoming. The mandate recites a demand by the governor of the state of Wyoming for the return to that state of one Charles A. White, charged with grand larceny, and further recites that the demand of the governor of Wyoming was accompanied by certain papers duly certified by said governor to be authentic, which recitals are not disputed. A hearing was had before the governor of the state of New York, who, after such hearing, directed that White should be returned to the state of Wyoming in the custody of the agent named in the requisition of the governor of that state. Thereupon a writ of habeas corpus was issued out of the United States circuit court for the southern district of New York to inquire into the cause of the restraint and detention of White. The return of the officer having him in his custody set up the mandate of the governor of New York. Argument was had upon said writ and return, the petitioner introducing copies of the papers produced before the governor of New York at the time demand was made for White's return. There was no question raised as to the identity of the petitioner. The court decided that the writ should be dismissed, and the prisoner remanded. Thereupon a writ of error was sued out to this court for the purpose of reviewing such decision. With the demand for White's return, there were produced the following documents:

"The State of Wyoming, County of Laramie—ss.

"Before Justice of the Peace W. P. Carroll, Cheyenne Precinct.

"The State of Wyoming vs. Charles A White.

"Criminal Complaint.

"Walter R. Stoll, of the county of Laramie, in the state of Wyoming, being duly sworn according to law, deposes and says that one Charles A. White, late of the county aforesaid, on the first day of September, A. D. 1892, at

and in the county of Laramie, in the state of Wyoming, three hundred and fifty shares of the capital stock of the Ogalalla Land and Cattle Company, a corporation duly organized and existing under and by virtue of the laws of the state of Wyoming, of the value of forty-five dollars each, of the goods, chattels, and personal property of one Emma J. White, then and there being; three hundred and forty-one shares of the capital stock of the Union Mercantile Company, a corporation duly organized and existing under and by virtue of the laws of the state of Wyoming, of the value of one hundred dollars each, of the goods, chattels, and personal property of the said Emma J. White, then and there being; and twelve bonds of the Penn Cattle Company, a corporation duly organized and existing under and by virtue of the laws of the state of Pennsylvania, of the value of one thousand dollars each, of the goods, chattels, and personal property of the said Emma J. White, then and there being,—feloniously did steal, take, and carry away, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Wyoming.

“Walter R. Stoll.

“Subscribed and sworn to before me this 11th day of October, A. D. 1892.

[Signed]

“W. P. Carroll, Justice of the Peace.

“State of Wyoming, County of Laramie—ss.

“I hereby certify that the above and foregoing is a true and correct copy of the original complaint now on file in my office in the above and foregoing entitled case, together with all the indorsements thereon.

[Signed]

“W. P. Carroll, Justice of the Peace.”

Affidavit.

“State of Wyoming, County of Laramie—ss.

“Robert W. Breckons, being duly sworn, deposes and says that he is the duly-appointed assistant county and prosecuting attorney of the county of Laramie, state of Wyoming; that on the 11th day of October, A. D. 1892, one Walter R. Stoll made a criminal complaint before Justice of the Peace W. P. Carroll, of the county of Laramie, of Cheyenne precinct, charging one Charles A. White with the crime of grand larceny; that the said justice of the peace thereupon duly issued a warrant for the arrest of the said Charles A. White; that the offense of grand larceny, in this state, is a felony; that affiant is reliably informed that the said Charles A. White left the city of Cheyenne, county of Laramie, and state of Wyoming, on the 6th day of September, A. D. 1892; that he is likewise reliably informed that the said Charles A. White is at present in the state of New York; he believes the said Charles A. White to be in the state of New York for the reason that he has been so informed by prominent and reliable citizens of the county of Laramie, who have recently seen him there; that the said Charles A. White is a fugitive from justice from the state of Wyoming; that he requests a requisition upon the governor of the state of New York for the purpose of bringing the said Charles A. White to the county of Laramie to try him for the crime above named; that the object of having the said Charles A. White brought to the county of Laramie from the state of New York is that he may be punished for the crime with which he is charged in said county, and not for the purpose of bringing against him any civil claim, suit, action, or proceeding, or for any purpose whatever except to have him answer for the crime charged against him.

[Signed]

“Robert W. Breckons.

“Subscribed and sworn to before me this 11th day of October, A. D. 1892.

[Signed]

“Anna Morley, Notary Public.”

[Seal.]

The regularity of the proceedings is to be tested by the provisions of section 5278, Rev. St. U. S., which reads as follows:

“Sec. 5278. Whenever the executive authority of any state or territory demands any person, as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state

or territory, charging the person demanded with having committed treason, felony, or other crime certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of his arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged."

The appellant contends that the affidavits produced are insufficient; that he was not a fugitive from justice, within the meaning of the section; and that the court below erred in refusing to receive the evidence offered by him to overcome the presumption that he was such fugitive, arising from the issuing of the warrant of removal by the executive of the state to whom the demand was presented. The criminal complaint sworn to by Walter R. Stoll is in all essentials an affidavit, and charges the petitioner with stealing shares of stock and corporation bonds of sufficient value to constitute the offense of grand larceny, which offense the affidavit of Breckons shows to be a crime under the laws of Wyoming. The affidavit of Breckons also shows that White left Wyoming five days after the day on which the offense is alleged in Stoll's affidavit to have been committed, and came to New York. Such a showing is quite sufficient to warrant the conclusion that petitioner was a fugitive from justice from the state of Wyoming. The evidence as to the circumstances of his departure from Wyoming, offered by his counsel, was irrelevant and immaterial. The offer was to prove that White came from Wyoming to New York on legitimate business at the suggestion of his wife, from whom it is alleged he stole the stocks and bonds, and of Stoll, who swore to the complaint; that he came to put his son at school in Poughkeepsie, and to organize a coal company as agent for his wife. Proof of these facts, however, would in no respect alter the situation. A person is a fugitive from justice when, having committed a crime within a state, he withdraws himself from the jurisdiction of its courts without waiting to abide the consequences of such act, and it matters not that some other cause than a desire "to flee" induced such withdrawal. As stated by the supreme court, (*Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291,) it is not necessary that the party charged should have left the state "for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constituted a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another."

Petitioner also offered to prove that the affiant Stoll had no personal knowledge of the matters alleged in his criminal complaint, and that all of the securities alleged by said Stoll to have been stolen were pledged to Charles A. White in and by a promissory note which is in the handwriting of said Walter R. Stoll. Substantially, this was a proposition to go into proof as to the guilt or innocence of the accused. No authority cited upon the argument goes to any

such extent. In *Ex parte Reggel*, 114 U. S. 651, 5 Sup. Ct. Rep. 1148, it was held that the petitioner "was entitled, under the act of congress, to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process." In *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. Rep. 291, the question whether or not Roberts was a fugitive from justice was considered solely in reference to the date when he left the state of New York, in which it was alleged that the offense had been committed. In *Ex parte Cook*, 49 Fed. Rep. 833, the sole question was as to the date of the prisoner's departure from the state, relatively to the date upon which the alleged crime was consummated. Nor, upon principle, and in the absence of controlling authority, should the statute be construed as authorizing an inquiry into the guilt or innocence of the prisoner in the tribunals of the state where he is found. As stated in the elaborate and able opinion of Judge Choate, (*Leary's Case*, 6 Abb. N. C. 43,) extradition between the states is in the nature of a national police regulation, for securing the persons of those as to whom there is probable cause to believe they are offenders against the laws, for trial in the locality where the alleged offense was committed. To the extent provided for in the constitution, the states gave up their independent sovereignty, and pledged themselves, each to the others, that it would become to that extent an agency as to the administration of the laws of the others against treason, felony, or other crime. The constitution (article 4, § 2) provides for the return of "a person charged with treason, felony, or other crimes," and the statute uses similar language. When the executive of the state in which the alleged offender is found is furnished with proof that he is so charged, the demand of the state from the jurisdiction of whose tribunals he has absented himself should be complied with, and the courts will not go behind the "indictment" or "affidavit," if regular in form, and specifically charging the commission of the offense within the jurisdiction of the demanding state, to try the question whether a crime was in fact committed, though identity will always be investigated, and it is proper to inquire whether the prisoner was in fact within the demanding state when the alleged crime was committed; for, if he were not, it could not be properly held that he had fled from it. On neither of these points, however, was there any question in this case.

The order of the circuit court, dismissing the writ, is affirmed.

UNITED STATES v. LONG HOP.¹

(District Court, S. D. Alabama. February 8, 1892.)

1. CHINESE EXCLUSION—ACT OF 1888 OPERATIVE.

The Chinese exclusion act of September 13, 1888, (25 St. at Large, p. 476,) has a field of operation despite the nonratification of the proposed treaty of March 12, 1888, between the United States and China, and is

¹Reported by Peter J. Hamilton, Esq., of the Mobile, Ala., bar.

now in force excepting sections 2-4 and 15. U. S. v. Jim, 47 Fed. Rep. 431, followed.

2. SAME—PROCEDURE UNDER EARLIER ACTS.

The Chinese exclusion acts of 1882 and 1884 provided no procedure, and it rested with the president to direct the course to be pursued in removing a Chinese person found to be unlawfully in this country.

3. PRACTICE—RETURN OF PROCESS UNDER EXCLUSION ACTS.

In general, process is not returnable in a different district from that of its issue, but the Chinese exclusion act of 1888 alters this rule so far as relates to inquiry into the right of a Chinese person to be in the United States.

4. EVIDENCE—PASSENGER LIST.

Evidence of the contents of a ship list of Chinese passengers is inadmissible unless the list is shown to be authoritative, and a certified copy produced.

5. CONSTITUTIONAL LAW—DUE PROCESS UNDER EXCLUSION ACTS.

Under the Chinese exclusion acts, due process of law requires that the United States, when prosecuting, should show that the defendant is unlawfully in this country, and not that he should show a right to be here.

Appeal by Long Hop, a Chinese person, from commissioner's order of committal, for being unlawfully in the United States. Defendant discharged.

M. D. Wickersham, U. S. Dist. Atty.
Browne & Tucker, for defendant.

TOULMIN, District Judge. My opinion is that the act of September 13, 1888, became a law from and after the date of its approval, and that section 13 of that act became effective from that date. Parts of the act were made to depend upon the ratification of the pending treaty relating to Chinese, and, as that ratification has not taken place, there is no field of operation for them. They are sections 2-4 and 15. The law exists, but there is nothing for it to operate on. But the rest of the act, including section 13, has a field of operation. It is not necessarily dependent upon the provisions of either the first or fifteenth sections. Section 5 provides that from and after the passage of the act no Chinese laborer shall be permitted, after having left the United States, to return thereto, except under certain conditions thereafter stated. Judge Hanford, of the district court of Washington, in his opinion in the case of U. S. v. Jim, 47 Fed. Rep. 431, has so clearly expressed his views on the subject, and in them I so fully concur, that I adopt what he there says as my opinion on the question now under consideration. Judge Hanford is sustained by Judge Wheeler, of the district court of Vermont, and by Judge Swan, of the district court of Michigan, in cases reported in 47 Fed. Rep. 433, (In re Mah Wong Gee,) and 878, (U. S. v. Chong Sam,) and I have found no contrary ruling.

But, besides this, if section 13 of the act of September 13, 1888, is not in force, then the proceeding under which defendant has been tried and convicted is null and void, and, while the result would be a dismissal of the appeal, a habeas corpus would lie, and the defendant be discharged. There is no authority elsewhere to be found in the statutes for such a proceeding as that taken in this case. There is no other statute that I have found that authorizes a warrant to

be issued upon complaint under oath by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner, or before any United States court, and that provides for a conviction of the person found unlawfully in the United States. The former acts simply provided for the removal of a Chinese person found unlawfully in the United States after being brought before some justice, judge, or commissioner, and found to be one not lawfully entitled to be in the United States. No mode of proceeding was prescribed, and no process provided for upon which said removal should be made. Clearly, under the acts of 1882 and 1884, the president alone, as the chief executive of the government, had the authority to prescribe and direct the proceeding and the mode of procedure in the removal of the person so unlawfully found in the United States. And, again, if the arrest was to be made under the process of any court or officer, such process could only be executed within the jurisdiction of such court or officer, and made returnable there. In this case the complaint was made before a United States court commissioner in Louisiana, and a warrant issued by him returnable before a United States court commissioner in Alabama, and directed to be executed by the marshal in Alabama. Now, I take it that a commissioner in Louisiana, independently of the act of September 13, 1888, would have no authority to issue a warrant to be executed in Alabama, and be made returnable before a commissioner in Alabama. I am sure it would not be contended that this court, or the judge thereof, could here issue process to be executed and made returnable before the district court or judge in Louisiana; and it would hardly be contended that a commissioner has greater powers than the court from which, it may be, he receives his commission and authority. But the act of September 13, 1888, by giving it a liberal construction, obviates all this. Congress, obviously seeing the *casus omissus* existing under the former legislation on the subject, has provided for it in the act of September 13, 1888. Without that act this proceeding must fail. Being of opinion, then, that the defendant has a right of appeal, the motion to dismiss the appeal in this case is denied.

I will now briefly consider the merits of the case on the proof submitted. The effect of a conviction of the defendant is to deprive him of his liberty in this country, and he cannot be convicted and removed without its being shown that he is unlawfully here. If the evidence fails to establish beyond a reasonable doubt that he is unlawfully in the United States, then the judgment of the commissioner must be reversed, and the defendant be discharged. Objection is made to certain parts of witness Brodie's testimony as illegal and inadmissible. The testimony objected to includes some hearsay, which, however, is not material, and a statement that the witness saw defendant's name on a list of 56 Chinese at New Orleans in transit through from San Francisco to Cuba. The objection to the testimony about the list is well taken (1) because it is not shown who made the list; that it was an authorized list; that it was the list required by law to be made by the customs officials at San Francisco on the arrival of the Chinese there, or the list of the shipmaster re-

quired by law to be made; and (2) because, if it was either of such lists, a certified copy of the same should have been produced, as the only legal evidence of the contents thereof in the absence of the original. While the witness Brodie, in his testimony, says that he is confident the defendant was one of the 56, he qualifies this statement by saying it is his opinion that he was, but that he cannot positively swear that he was. Now, excluding the illegal testimony referred to, the substance of the evidence in the case is that the defendant was in the United States for many years, at least six or eight, before the passage of the act of September 13, 1888, and was doing business in New Orleans, and that he left New Orleans, saying to two or three of the witnesses that he was going to China. The testimony as to the time when he left New Orleans is not harmonious. Some of the witnesses say that he sold out his business,—that of a laundry,—and left New Orleans in the spring of 1890; others say that it was in 1889; and one of them, the man who purchased the laundry, testified that it was about a year ago, which would fix the time about the last of 1890, or early in 1891. The testimony is without conflict that he was in New Orleans in May or June, 1891, and has been there and in Mobile ever since that time. It appears that, when he left New Orleans, he said he was going to China, and one witness testifies that defendant told him last July that he sold his laundry to go to China in 1889; that he went to China in 1889, and came back to the United States in 1891. The defendant testifies that he did not go to China when he left New Orleans; that he went to California in 1890, and remained there until he returned to New Orleans, in May, 1891; and that he has not been out of the United States since he came here, more than 10 years ago. Certain it is that he did not go to China in 1889, as the proof is overwhelming that he was in New Orleans in 1889, and as late as the spring of 1890. Now, no one saw him leave the United States. No one saw him enter the United States on his return from China. No passenger list from the vessel on which he is supposed to have entered the United States as a passenger is produced. No list required by law to be kept by the customs officials at the port where he is supposed to have entered the United States is produced, and from which it could be ascertained if a Chinese person of his name had entered there. It was in the power of the government to have produced these lists or certified copies of them. The law requires them to be made and kept by the government officers, and it is presumed that they performed their duty in the premises. Now, the only evidence we have that tends to show that the defendant left the United States and went to China is that he left New Orleans, and said he was going to China; that he was absent some time from New Orleans, and returned there in 1891; and that, on his return, said to one of the witnesses that he went to China in 1889, and had just returned. Whatever his statements to the witness may have been, the proof is that he was in New Orleans in 1889, and as late as the spring 1890, and he could not have been in China at that time. But, as I have said, the defendant testifies that he did not go to China; and, as suggested by one of the counsel, a circumstance, small though it

be, corroborative of this statement of defendant, is the fact that he said nothing to his fellow countryman and old friend Charles Emanuel, when he met him in June, 1891, shortly after his return to New Orleans, about China, or that he had been to China. It seems to me it would have been most natural for him to have spoken to his friend about their country if he had in fact just returned from it. Due process of law requires that the government should show that the defendant is unlawfully in the United States, and not that he should show a right to be here; but, whatever the truth may be, I cannot, from the evidence before me, say that he is in the United States unlawfully. It is my judgment, therefore, that the decision of the commissioner must be reversed, and that the defendant be released and discharged; and it is so ordered.

LOEWER et al. v. C. P. FORD & CO.

(Circuit Court, N. D. New York. April 8, 1893.)

No. 6,033.

PATENTS FOR INVENTIONS—NOVELTY—SOLE-CUTTING MACHINES.

Letters patent No. 407,735, granted July 23, 1889, to Henry Loewer and Barton L. Blair, were for an improved sole-cutting machine, consisting of a stationary frame carrying a rapidly revolving shaft on which are a cutter and a guide wheel, together with a swinging frame, moving to and from the stationary one, carrying a shaft on which are mounted clamps opposite the cutter, for holding the leather blanks, and others opposite the guide wheel, for holding the pattern. In operation, when pattern and blanks are clamped in position, the latter frame is moved forward and its shaft slowly revolved, so that the edges of the blanks come in contact with the cutter, and are pared down to the precise size and shape of the pattern, the edge of which strikes against the guide wheel, and thus limits the depth of the cut. *Held*, that while the principle is old, having been embodied in a lathe invented by Thomas Blanchard over 70 years ago, the application of it to this purpose, and the construction of the mechanism necessary therefor, involved invention, and the patent is valid.

In Equity. Suit by Henry Loewer and George Schelter against C. P. Ford & Co. for the infringement of a patent. Decree for complainants.

George B. Selden, for complainants.

E. E. Wood, for defendant.

COXE, District Judge. This is an infringement suit founded upon letters patent No. 407,735, granted, July 23, 1889, to Henry Loewer and Barton L. Blair, for an improved sole-cutting machine. The patent is now owned by the complainants. The object of the inventors was to construct a machine which should cut from leather blanks one sole, or several soles, to the exact size and shape desired. This is accomplished by means of a stationary frame provided with a rapidly revolving shaft which carries a cutter and a guide wheel. A second swinging frame, which moves to and from the stationary frame, is provided with clamps, opposite the cutter, for holding the leather blanks, and other clamps opposite the guide

wheel, for holding the pattern. These clamps are mounted on a shaft. When the blanks and pattern are clamped in position the second frame is moved forward and, as its shaft is slowly revolved, the edges of the blanks come in contact with the cutter and are pared down to the precise size and shape of the pattern, the edge of which strikes against the guide wheel, thus limiting the depth of the cut. The claims involved are as follows:

"(1) In a sole-cutting machine, the combination, with the revolving cutter C and its shaft, of the revolving sole clamps E E', their supporting shafts, the movable carriage, and a revolving form operating to vary the relative positions of the cutter and the sole clamps, substantially as described."

"(4) In a sole-cutting machine, the combination, with the revolving cutter C and its shaft, and guide s, of the revolving sole clamps E E', clamp plates z z', removable form F, and suitable supporting shafts, substantially as described."

"(5) In a sole-cutting machine, the combination, with the revolving cutter C and its shaft, and guide s, of the revolving and traveling sole clamps E E', form F, suitable supporting shafts, and movable blank guide T, substantially as described."

"(6) In a sole-cutting machine, the combination, with the revolving cutter C and its shaft, and guide s, of the revolving and traveling sole clamps E E', suitable supporting shafts, and movable blank guide T, provided with adjustable plate y', substantially as described."

"(9) In a sole cutting machine, the combination, with the main frame A A', supporting the revolving cutter C and its shaft, and the guide s, of the movable frame D, carrying the revolving sole clamps E E' and form F, and mechanism adapted to secure the simultaneous revolution of the sole clamps and the form, substantially as described."

"(14) In a sole-cutting machine, the combination, with the revolving cutter C and its shaft, provided with the spring guard S, of the guide s, and the revolving sole clamps E E', form F, and the suitable supporting shafts, substantially as described."

The defendant, a corporation engaged in manufacturing shoes, at Rochester, N. Y., uses a machine covered by letters patent No. 472,399, granted to Simon Ross, Jr., April 5, 1892. It is alleged that this machine infringes the above-named claims of the complainants' patent. The defenses are lack of novelty and invention and noninfringement.

The patent was granted without reference. The principle underlying the invention is unquestionably old. Over 70 years ago Thomas Blanchard invented an automatic lathe by which irregular forms were turned by means of a revolving cutter and guide wheel mounted on a stationary frame, the stock and pattern, opposite the cutter and guide wheel, being mounted on a swinging frame. In 1884 David F. Hartford patented (No. 309,850) an ingenious machine in which the leather blank was clamped to the pattern and cut to the desired shape by a knife which traveled around the pattern. Besides these the records show many machines for cutting and trimming the heels, and channeling and grooving the soles, of boots and shoes, and many improvements in lathes for turning lasts and other irregular forms. It is unnecessary to discuss the various exhibits in detail, for neither alone nor aggregated do they show the combinations of the claims. An army of ingenious mechanics and inventors had the Blanchard lathe before them for over half a century, yet the idea of utilizing it in the sole-rounding industry

never seems to have occurred to one of them. It did not occur to men of undoubted ingenuity, like Stevens, Hartford, Helms, King, and Joyce, to round the soles of shoes to the desired shape by a rotary cutter and guide wheel on a stationary frame and revolving clamps for holding the pattern and blanks on a movable coacting frame.

That the patented machine is a valuable contribution to the art cannot be doubted. It does the work better and faster than the best of the prior machines. It is stated in the record that the daily capacity of the Hartford machine is from 600 to 800 pairs of outsoles per day, while that of the patented machine is from 4,000 to 6,000 per day. To construct such a machine required invention. The arrangement of its complicated and ingenious mechanism is not the work of mechanical skill alone. The fact that during the many years of fierce competition in this art the idea never occurred to any of the men of genius who were striving to improve all kinds of labor-saving devices in the shoe industry, creates a strong presumption that it was not the kind of a contribution to be expected from one who is a mechanic and nothing more. Although the complainants have not made a pioneer invention, in the broad sense of that term, they are entitled to a construction liberal enough to cover a machine, which, in the same art, performs the same work in manner almost identical. There are differences between the complainants' and the defendant's machines, but they are of form and relate only to minor details. The defendant's machine may be in some particulars an improvement, but that it has adopted all the essential features of the patented machine there can be no doubt.

The complainants are entitled to the usual decree.

ELECTRIC GASLIGHTING CO. et al. v. FULLER et al.

(Circuit Court, D. Massachusetts. April 13, 1893.)

No. 2,518.

PATENTS FOR INVENTIONS—INFRINGEMENT—ELECTRIC GASLIGHTING.

Letters patent No. 232,661, granted September 23, 1880, to Jacob P. Tirrell, for an electric gaslighting apparatus, was for a device in which the actuating arm, opening the gas cock, and bringing together the points producing the igniting spark, is moved by hand, and then remains at rest, subject to no tension, and not requiring to be held in position, and is afterwards moved by hand to its former position. In letters patent No. 116,054, issued to Heyl and Diehl, the same arm is moved and held in place by hand, and when released is drawn back by a spring. *Held*, that the Tirrell patent is so limited by the earlier patent that it is not infringed by a device in which the arm, when drawn to open the gas cock, is held in place by engaging a pin with a recess in the arm, under the tension of a spring, which, when the recess is released from the pin, restores the arm to its former place.

In Equity. Suit by the Electric Gaslighting Company and others against Charles E. Fuller and others for infringement of a patent. Bill dismissed.

Edward P. Payson and Edwin H. Brown, for complainants.
W. K. Richardson, for respondents.

CARPENTER, District Judge. This is a bill in equity, praying an injunction against an alleged infringement of the first claim of letters patent No. 232,661, issued September 28, 1880, to Jacob P. Tirrell, for electric gaslighting apparatus. The claim is as follows:

"(1) In combination with a gas-burner, A, the fixed insulated arm, I, attached thereto, and terminating in a metallic point, the gas cock and the arm attached to the stem thereof, and a device for actuating the said arm, and thereby turning the gas cock, said arm being also connected with and arranged to actuate the vibrating arm, B, with its contact point, G; the whole so constructed, combined, and arranged that the oscillation of said arm shall conjointly turn on the gas, and bring said points in contact, to produce an igniting spark near the tip of the burner, all substantially as and for the purposes specified."

The device used by the respondents is shown in the drawings attached to letters patent No. 382,001, issued May 1, 1888, to Charles W. Holtzer, for electric gaslighter. The method of lighting described in the claim is old, so far as the igniting device itself is concerned, and is also old so far as it calls for a device to turn on and light the gas at the same time. This appears from a comparison of the various prior patents shown in the record. The novelty in this patent consists in the actuating mechanism whereby the devices above referred to are brought into play. With reference to the question specifically raised in this case, I find that there are two classes of such mechanism. The first is represented by the patent to Heyl & Diehl, No. 116,054, issued June 20, 1891. This is not an apparatus for use with illuminating gas, but it might be easily used as such, without bringing in any of the elements of the claim here in dispute. The arm or lever which sets free the gas is moved by the hand, held in place by the hand, and, on being released, is brought back by a spring. In the patent in suit the actuating arm is moved so as to open the passage for the gas, and remains at rest at that point, subject to no tension, and not requiring to be held in position, and is afterwards moved by hand to its former position. It seems to me clear that the device of the respondents belongs to the class represented by the former patent. The actuating arm is drawn to open the gas cock, and is there held in place by engaging a pin with a recess in the arm, and is so held, under the tension of a spring, which, when the recess is released from the pin, restores the arm to its former place. In other words, the Heyl & Diehl patent seems to me so to limit the patent in suit that the respondents do not infringe.

The bill, therefore, must be dismissed, with costs.

v.55F.no.1—5

JOSLIN v. NORTHERN PAC. R. CO.

(Circuit Court, D. Minnesota, Third Division. April 3, 1893.)

PATENTS FOR INVENTIONS—LIMITATION OF CLAIMS—CAR COUPLERS.

Letters patent No. 337,780, issued to Charles Mueller, March 9, 1886, for an improvement in car couplings, was for an improvement in that class of drawheads in which the strain is received upon a reciprocating plate held in place by a spring, the object of the invention being to strengthen those parts on which there is a great amount of friction in order to retain them in place. The claim was as follows: "In combination with the draft bars and the follower plates, the wearing plates provided with bent ends entering the draft bar, and provided with slots or openings, and the lugs provided with tenons entering the slots in the plates, and the bolts passing through the said lugs, wearing plates, and draft bars." *Held*, that the patent, to be valid, must be strictly limited to the combination described in the claim, and is not infringed by a device wherein the plates are bent in towards the center of the car, and do not enter the draft bar.

In Equity. Suit by Benjamin J. Joslin against the Northern Pacific Railroad Company for the infringement of a patent. Decree for defendant.

C. E. Joslin, for complainant.

Banning, Banning & Payson, for defendant.

NELSON, District Judge. This is a suit brought by complainant to recover from the defendant damages for an infringement of letters patent No. 337,780, issued to Charles Louis Mueller, March 9, 1886, for improvements in car couplings. The complainant is the owner of the patented device, by proper instrument of assignment. The defenses set up are (1) want of novelty; (2) noninfringement. The patent in controversy is granted for an improvement in a car-coupling device. The invention, as described in the letters patent, relates particularly to that class of drawheads in which the strain imparted in drawing the cars, or in receiving the impact of adjoining cars in coupling, is received upon a reciprocating plate held in place by a spring, and the object of the invention, as stated in the specification, "is to produce a drawhead in which these parts upon which there is any great amount of friction or wear shall be strengthened, in order to retain the different parts in their proper places, and to successfully withstand the hard usage to which drawheads are usually subjected." The patentee has reinforced the durability of the wooden draft bars by iron plates secured by the mode described. At the place where the wooden draft bars require protection from the movement of the follower plates in contact with them, and by the peculiar form of the wearing plates and their disposition, they not only protect the bars, but prevent displacement of the parts resting thereon; and the various details of the construction are such that the parts are retained in their proper relative positions.

In his specification he refers to the drawings of the patent, showing the devices of his invention, and states that—

"A drawhead made in accordance with my invention will be much more durable and reliable in operation, by reason of the fact that the parts will always be retained in their proper positions, and are not liable to become displaced by being worn, for the reason that the plates, A, upon which most of the wear comes, may be readily removed, and replaced by others, while in the ordinary form of drawheads the wood of the drawheads is exposed, and soon becomes worn, causing a displacement of the operative parts."

He then sets forth the claim:

"In combination with the draft bars and the follower plates, the wearing plates provided with bent ends entering the draft bar, and provided with slots or openings, and the lugs provided with tenons entering the slots in the plates, and the bolts passing through the said lugs, wearing plates, and draft bars, substantially as described."

The patentee uses in connection with the old and usual drawhead found upon freight cars wearing plates with bent ends entering the draft bars, to prevent the follower plates from wearing out or impairing the wood, and he also provides slots or openings or lugs having tenons entering the openings in the plates and bolts passing through the lugs, wearing plates, and the wooden draft bars, so as to prevent not only wear, but also to strengthen those parts upon which there is any great amount of strain and friction, and to retain the different parts in their proper places, and by means of the wearing plates and the openings, lugs and bolts, and other features described, to enable the drawheads to withstand hard usage.

There is certainly no novelty in putting an iron-plate covering over a wooden surface to prevent wearing of that surface by the friction of another piece of iron moving on it; so that, if the patent is valid, it must be limited to the peculiar combination described in the claim and specification in detail, and cannot be broadened to include any mode of covering of the wooden draft bars by iron wearing plates. The patentee describes the wearing plates as follows:

"The ends of these plates are bent at right angles, and form the projections, a, which enter the draft bars, and aid in retaining them in place on the same."

The proceedings in the patent office show that it rejected some of his original claims for wearing plates attached to the draft bars, and gave him the one claim which is set forth above, which provides for wearing plates with bent ends entering the draft bars as an element of the combination.

The patentee, in his testimony, states that he claims protecting plates with bent ends entering the draft timber, and nothing else. His expert, in his testimony, states that one of the elements of the combination is wearing plates having the bent ends entering the draft bar, and provided with slots, and the lugs provided with tenons entering the slots. True, he says, that he finds in the draft rigging used by defendant substantially the same elements of the Mueller combination, with the exception that the position of the wearing plate is reversed with the bent ends pointing inward towards the center of the car, instead of being imbedded in the draft bars, as in the Mueller patent; and the defendant's expert says in his testimony that the wearing plates in defendant's rigging are entirely different

in structure and form from Mueller's, and that the bent ends of defendant's plates perform no such function as the bent ends of Mueller's plates, which are let into the timbers, and the sole object of that was to present a larger resisting surface. I agree with the view taken by this witness, that the structures are different.

The defendant uses a drawhead having iron covering plates with the ends bent inward, which do not enter the wooden draft bars or timbers. Its plates are gained into the timbers the thickness of each plate, and have a flange on the upper side turned inward, which serves as a support to the edges of the follower plates, and a crossbeam is also inserted between the draft bars at the inner ends of the plates. These plates are substantially different from the Mueller plates in their construction and operation. They certainly are not supported in the same way, and their ends are not bent and inserted into the bars to aid in retaining it in place. The inner ends of the defendant's plates, by butting against this crossbeam between the draft bars, prevent in some degree the plates from moving endways in "buffing," but not like the Mueller plates with bent ends entering the draft bars, which prevent them from moving endways in "buffing" and drawing. The same function is not performed by defendant's construction. The patentee, to fulfill his combination, must have the ends of the plates forming projections inserted into the draft bars.

It is true the plates of the defendant are gained into these bars, but no bent ends enter them. Clearly, flat plates fastened upon the surface of the wooden draft bars, used in combination with the old and ordinary draft rigging, would not infringe the patentee's claim unless the ends were bent and inserted into the timber; and so wearing plates with the ends bent inward towards the center of the car, and not entering the draft bars, and having no connection with the draft bars except as they form a part of the plates, do not infringe, for the function performed by the bent ends is not the same as when entering the bars. The wearing plates with bent ends entering the draft bars are material elements of the Mueller combination.

The doctrine of equivalents does not broadly apply, as the patentee was not the first inventor of a car-coupling device. His invention is an improvement, denominated a "secondary" invention; and, the claim being limited to a combination having a peculiar form of wearing plates entering the draft bars, before he could get his patent it must be strictly construed. See *Lubricator Co. v. Wurster*, 38 Fed. Rep. 429. As said in that case, "the patentability of complainant's combination was, in view of the state of the art, extremely doubtful." There is no infringement, and the decree must be for the defendant. It is so ordered.

CHRISTIE v. SEYBOLD.

(Circuit Court of Appeals, Sixth Circuit. March 22, 1893.)

No. 53.

1. PATENTS FOR INVENTIONS—INTERFERENCE—BILL IN EQUITY TO SECURE LETTERS PATENT—ESTOPPEL.

The failure of a party in an interference proceeding in the patent office to raise the question whether his opponent's invention includes the issue declared in the interference does not estop such party to raise that question in an equity suit, under Rev. St. § 4915, to determine his right to a patent.

2. SAME—BOOKBINDER'S PRESS.

Letters patent No. 450,882 were issued April 21, 1891, to W. H. Christie, for a bookbinder's press in which the platen could be quickly run up by hand without moving the power-driving mechanism. The patent was granted after a decision in Christie's favor upon an interference with an application by Charles Seybold. In the Seybold invention the pressure was obtained by a vertical screw, and transmitted to the platen by means of removable pipes of different lengths to suit the size of the bundle. In the Christie invention the power was obtained by a lever and pawl operating in connection with a ratchet wheel, pinion, and rack bar. In both inventions the platen was balanced by weights. The interference was declared on a claim for a "platen detachably connected with the power-driving mechanism and provided with a counterbalancing weight," which language was taken from the Christie claim. In the Christie invention, however, the point of disconnection was between the ratchet wheel and the lever pawl. *Held*, that this construction was fairly within the language of the claim and interference, notwithstanding that the point of disconnection was not immediately at the platen proper; and that there was an interference between the two inventions.

3. SAME—PRIORITY OF INVENTION—REDUCING TO PRACTICE.

The man who first reduces an invention to practice is *prima facie* the first inventor under Act July 4, 1836, (5 St. p. 117,) but the man who first conceives the invention may date it back to such conception if he uses due diligence in reducing it to practice, and he must use such diligence before, as well as after, the second conception of the invention. *Reed v. Cutter*, 1 Story, 590, followed.

4. SAME—DUE DILIGENCE—WHAT CONSTITUTES.

The person who first conceived a comparatively simple improvement in power presses for bookbinding made a rough sketch of it within a few months. Three years after his first conception he had working drawings made, and six months thereafter a machine was manufactured. He excused the delay by asserting that he could neither afford to buy the necessary tools sooner nor use them in his small shop. His reason for not having the machine made at another shop was that he would have made no profit on machines made by others according to his invention. *Held*, that he did not use due diligence so as to entitle him to a patent as against one who conceived the invention later, but reduced it to practice sooner, than himself.

5. SAME—SKETCH OF MACHINE.

A rough sketch of an invention is not such a reduction to practice as to make its author the original inventor, within the meaning of the patent laws.

6. SAME—CLAIM THAT THIRD PARTY WAS INVENTOR.

Under Rev. St. § 4915, the only question the court can consider is whether the complainant is the first inventor of a patentable device. Whether respondent or a third party was the inventor of the device for which respondent has received a patent should not be inquired into either by the court or by the commissioner in interference proceedings between the same parties.

Appeal from the Circuit Court of the United States for the District of Kentucky.

In Equity. Bill by Charles Seybold against William H. Christie to obtain the issue to complainant of letters patent which had been refused after a decision against him on an interference. A decree was entered for complainant. Respondent appeals. Reversed.

Statement by TAFT, Circuit Judge:

This was an appeal from a decree of the circuit court of the United States for the district of Kentucky, directing the commissioner of patents to issue a patent to Charles Seybold, the appellee and complainant below, for a device in a power press used in bookbinding, whereby the platen is "detachably connected with power-driving mechanism and provided with a balancing weight." The bill was filed below under section 4915 of the Revised Statutes, which provides as follows: "Whenever a patent, on application, is refused, either by the commissioner of patents, or by the supreme court of the District of Columbia upon appeal from the commissioner, the applicant may have remedy by bill in equity, and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear; and such adjudication, if it be in favor of the right of applicant, shall authorize the commissioner to issue such patent, on the applicant filing in the patent office a copy of the adjudication and otherwise complying with the requirements of law. In all cases where there is no opposing party a copy of the bill shall be served on the commissioner, and all the expenses of the proceedings shall be paid by the applicant, whether the decision is in his favor or not."

The appellant, Christie, who was respondent below, secured a patent, one claim of which covered the device which Seybold averred that he first invented. Seybold filed his application June 6, 1889, and Christie, his, June 7, 1889. An interference was declared between them in the patent office, on the following claim: "In a power press a platen detachably connected with the power-driving mechanism and provided with a counterbalancing weight." The commissioner decided the interference proceeding in favor of Christie, and issued a patent to him, rejecting Seybold's application. Christie lives in Kentucky, and Seybold therefore began proceedings against him in that district.

The invention in controversy was an improvement in presses used by bookbinders for compressing the signature bundle into a solid form, about which is applied the cover to make the complete book. The platen is the upper plate of the press. As the signature bundles vary much in size, it is of advantage to move the platen up and down in the press quickly in order to give space for the insertion of the bundle under it. The mechanism used for producing a strong pressure, whether it be a screw or other means, has a slow movement. If the platen is rigidly connected with this power-pressure mechanism, it cannot be moved upward or downward to release the bundle or readjust the space for a different bundle with much greater rapidity than when pressure is being applied. The improvement was in so detaching the platen from the power-pressure mechanism as to allow it to move up and down independent of that mechanism, and, by means of counterbalancing weights, to render its movement very easy.

Seybold's device consisted of a top cast portion, A, and a base or bottom, B, which are connected by suitable stay rods, C, three on each side, which form a frame rack for the support of the top plate and screw rod. The top plate was provided with the central screw-thread hole, through which the screw, D, operated. The platen, H, was suspended between the stay rods, C, by means of suitable chains passing over suitable pulleys secured in brackets attached to the top plate and attached at the other end to the balancing weights, which were adapted to slide up and down on the outside of the stay

rods. The platen was guided by the stay rods in its movement up and down. Screw, D, was moved by a hand wheel and a lever, and the end of the screw, D, was connected with the platen by the connecting pipe, I, which served to communicate the pressure from the screw to the platen, and was merely an extension of the screw. A number of such connecting pipes, of different lengths, were provided to suit the size of the bundle. The pipe, I, was easily removable. By taking it out, the platen, H, might be moved up or down freely and easily by reason of the counterbalancing weights, and its height adjusted to leave the proper space between the platen and the base.

Christie's patent consisted of a press frame with a platen moving up and down between the sides of the frame as guides, and having rigidly attached to its upper side a rack bar, which, extending up through the top of the press frame, engaged above with a pinion or small cogwheel mounted upon a shaft journaled in two upright brackets fixed to the top of the press frame. To the same shaft were keyed ratchet wheels, which, by means of pawls and a lever, were rotated, driving the pinion, forcing downward the rack bar, and bringing the required pressure on the platen. On top of the rack bar was a cross bar, to the ends of which were attached cords passing up over pulleys journaled in upright posts supported on the top of the press frame, and carrying counterbalancing weights equal to the weight of the platen. The pawls which were engaged with a ratchet wheel to produce a rotary motion, forcing down the platen, might be thrown out of engagement with the ratchet wheel, and then the platen might be moved up or down easily by the aid of the counterbalancing weight. In doing so, of course, the pinion and ratchet wheels turned with the movement of the rack bar, but offered no obstruction to the upward or downward movement of the platen. The facts with reference to the invention by the two parties were as follows:

Seybold conceived of his invention in October, 1885, and made a rough sketch of it, which he showed to several persons in January, 1886. He was a machinist and inventor, and engaged in manufacturing numbering machines, perforators, cutting machines, index cutters, pasting machines, glueing machines, wood-staining machines, graining machines, polishing machines, sand-paper machines, and general repair work. At the time of his conception he says that he did not have the proper tools in his shop to make the machine. It would have required a planer, a long lathe, and a boring mill. He did not have the requisite tools until he moved into his new shop, on Webster street, in the month of March, 1889. From October, 1885, until October, 1888, he did nothing towards reducing his machine to practice. At the latter date he had full-sized drawings made, and his first machine was made in April, 1889. He applied for a patent June 6, 1889. The only reason which Seybold gave in the interference proceedings in the patent office for the delay in reducing his machine to practice was that he did not have the necessary tools or room in his shop. On the hearing below, another deposition was taken, in which he gave an additional reason. His evidence was as follows:

"Question. Please state why you did not have the proper tools, or why you did not secure them in the early part of 1886. Answer. Because my financial condition was such that I could not possibly buy those tools.

"Q. 4. Is there any other reason you can give? A. Yes, sir.

"Q. 5. Please give it. A. It would have been possible for me to order the press built by some other party; but as it has been my object to construct this press to be put on the market, and knowing the prices of presses built by my competitors, I found it impossible to build the press at the competition figure if ordered to be built in outside shops.

"Q. 6. The reason, then, that you did not have a press built shortly after you had invented the same, was because there would have been no profit in it for you? Is this correct or not? A. Yes, sir."

Christie claimed to have conceived of his invention in the summer of 1886. He had working drawings made and patterns ordered for the production of his press in the spring and early summer of 1888, and his press was completed about July 12th. of that year. The machine was set up and put in operation in the Methodist Book Concern of Cincinnati about that date, and continued in operation until the bill herein was filed. A second machine was built in

October, and put in operation in that building. He filed an application for a patent June 7, 1889.

The court below held that Seybold was the first and true inventor of the machine, and entered a decree directing the commissioner of patents to issue a patent to him. The decree was based on the finding that while Seybold's device disclosed, "in a power press, a platen detachably connected with the power-driving mechanism," Christie's device did not.

Wood & Boyd, for appellant.

O. M. Hill, for appellee.

Before JACKSON and TAFT, Circuit Judges, and HAMMOND, District Judge.

TAFT, Circuit Judge, (after stating the facts.) The questions arising in this case, covered by the assignments in error, are two: First, does Christie's invention or device show, "in a power press, a platen detachably connected with the power-driving mechanism and provided with a counterbalancing weight?" and, second, if it does, which one of the two, Seybold or Christie, was the first or true inventor, within the meaning of the patent laws?

It is contended by appellant that it was too late for the complainant to raise the question, in the court below, whether Christie's device includes "a platen detachably connected with the power-driving mechanism," because it was not raised in the interference proceeding in the patent office. It is said he is thereby estopped to make it. We do not concur in this view. The interference issue is drawn up by the patent-office examiners, and the interference is declared, before either party has access to the specifications of the other, and the claims made with respect to the issue are submitted before the specifications are disclosed. Subsequently, perhaps, the question might be raised, but we do not think that a failure to raise it in the patent office prevents its being brought to the attention of the court in a proceeding like this by independent bill.

The fact, if it be a fact, that the invention of one of the parties does not include the issue declared in the interference, is apparent on the record. In one of the two cases considered by the supreme court under this section it was held that the court of its own motion must declare that the issuable device in the interference proceeding was not patentable for want of invention, and could therefore dismiss the bill, although the question had not been raised either in the patent office or by the parties in the court below or in the supreme court. *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. Rep. 228. We do not see why the court has not the same power with reference to the present question. The fact, if it be a fact, that Seybold did not raise it in the patent office, may, of course, affect the weight of his present objection, but it has no force as an estoppel.

Coming now to the question whether the Christie device embodies that which is described by the issue framed in the interference proceedings, we find that the issue was adopted by the patent office from the language of the first claim of Christie's patent,

and the question presented is really whether Christie's specifications entitle him to his first claim. In his specifications Christie says:

"My invention refers to an improvement in a press especially adapted for bookbinders. It relates more especially to a press platen which is made detachable from the power-driving mechanism and suspended by the counterpoise weight. The object of my invention is to provide ready means for raising and lowering a press platen by hand, without having to manipulate the power-driving mechanism, the various features of which will be set forth in the description of the accompanying drawings. * * * I preferably employ a rack bar and pinion driven by a ratchet lever to obtain power for compressing the platen, as it is rapidly and easily manipulated. The power is conveyed as follows: 13 represents the teeth of the rack bar, which engage with pinion, 14, mounted upon shaft, 15, which is journaled in ears of brackets, 16. * * * On the opposite side of the ratchet wheels I provide a duplex holding pawl, 31, which engages with the respective ratchet wheels. This pawl is nominally held in engagement with the ratchet teeth by means of the spring, 28, which presses them up, and they are held out of engagement by the wedge, 29, which is operated by the lever, 30. When lever, 30, is depressed, the wedge, 29, is raised up, and the spring, 28, presses the pawl, 31, into engagement with the teeth of the ratchet wheel. When said lever is raised up, it pulls the wedge, 29, down in between the holding pawl, 31, and the rear edge of the rack bar, 6, which prevents the engagement of the holding pawl, 31, with the teeth of the ratchet wheels. When lever, 18, stands in its normal position (shown in figures 2 and 4) the pawls are also in disengagement with the ratchet driving wheels. The press platen, 5, is therefore free to move up and down by extraneous means, so as to be adjusted to any desired height. * * * The above driving mechanism, with the shipping and unshipping connections, is the preferred form of construction, but I do not limit myself to said means, except where they are made special features of claims herein; but the importance of sustaining the platen by counterbalance weight, and having it readily detachable from the driving mechanism, so as to be raised independent thereof, is the special feature of invention. * * * The principal object to be accomplished by the above-described invention is the ready arrangement of the press platen by hand, without manipulating the same by the power lifting and depressing mechanism,—as, for instance, in a bookbinding or other similar use, the rapid operation of the press is a very important feature, and is accomplished by means to disengage the platen from the power-driving mechanism and suspending it by a counterpoise weight, allowing it to be readily raised or lowered, as the case may be; and the within-described mechanism I believe to be the best, and is claimed herein as of my invention."

Then follow the claims, the first of which is:

"In a power press, the platen, 5, detachably connected with the power-driving mechanism and counterbalanced by the weight, to hold the same in any adjusted position, substantially as specified."

The court below held that the power-driving mechanism consisted of the lever, the pawls, the ratchet wheels, the pinion, and the rack bar; and that as the ratchet wheel and pinion were fixed in their relation to the rack bar, and the rack bar was fixed to the platen, the power-driving mechanism was not detachably connected with the platen.

We think this construction too narrow. The expert for the complainant below testified that he had never heard the expression "detachably connected with," but that in this view it must mean that all the mechanism used to transmit the pressure to the platen should be capable of being detached from the platen. The patent

office took the expression from the specifications and claim of Christie, and it is only fair, therefore, in construing the meaning of the term, if ambiguous, to look into Christie's specifications to see what, in fact, is meant by the term "detachably connected with the power-driving mechanism." Of course Christie's specifications cannot be used for this purpose, if by so doing we are taken out of the Seybold invention, but if the issue framed by the patent office, by a fair construction, will include a feature present in both inventions, then it is the duty of the court to lean to that construction rather than to give it a strict and narrow one which will describe something present only in one. We are very clear that the two inventions have a common feature, viz. the easy elevation and lowering of the platen, secured by a counterbalancing weight and a device for the disengagement of the platen from the power-pressure mechanism and consequent independence thereof.

The amount of power required to compress the bundle makes necessary a somewhat cumbersome and slow action in the power-pressure mechanism. The object of both inventions is to temporarily free the platen from connection with the slowly-acting mechanism while the bundle is being put in the press. A device which unships the machinery conveying the great pressure power to the platen, so as to permit a free movement of the platen unrestrained by its connection with that machinery, makes the connection between the platen and the power-driving mechanism "detachable," within the meaning of Christie's specifications and the issue framed in this case by the patent office. It may be true that in a certain sense the pinion and the ratchet wheels and the rack bar are part of the power-driving mechanism when in action, though our impression is that, as the power is applied first on the lever, the machinery conveying the power to the platen beyond the lever is power-transmitting mechanism, and that the lever and pawl only may be properly called the "power-driving mechanism." But, whichever is the correct view, it is certain that, as soon as the pawls and lever which communicate the power to the ratchet wheels are unshipped, the ratchet wheels and the pinion are free to move without opposing any obstruction whatever to the easy up and down movement of the platen. When thus detached they are certainly no part of the power-driving mechanism. The result is exactly the same as if they were removed from their connection with the rack bar, because they make no resistance to the movement of the rack bar and platen. The specifications do not limit Christie to this one mode of applying the power, but the lever, pawl, and ratchet are described by him as the preferable mode. There are many well-known equivalents, and were at the time of this invention, of this power-driving mechanism, notably the screw described in Seybold's invention. For these reasons we are unable to agree with the learned judge below in respect to the ground upon which he placed his decision. We are therefore brought to consider the question which, in the view he took of the case, he did not find it necessary to pass upon,—

that is, who was the first and true inventor of that feature which we have found to be common to the two devices, and which is here the subject of controversy?

The patent statutes have always required such particularity of description in the applications for a patent as to leave no doubt that in the eye of the law he is the first and true inventor who first reduces the conception of a new invention or discovery to practical and operative form. In *Bedford v. Hunt*, 1 Mason, 302-304, Mr. Justice Story said:

"The first inventor who has put the invention into practice, and he only, is entitled to a patent."

And again, on page 305, he says:

"The intent of the statute was to guard against defeating patents by the setting up of a prior invention which had never been reduced to practice. If it were the mere speculation of a philosopher or a mechanician, which had never been tried by the test of experience, and never put into actual operation by him, the law would not deprive a subsequent inventor, who had employed his labors and his talents in putting it into practice, of the reward due to his ingenuity and enterprise."

So in *Agawam Co. v. Jordan*, 7 Wall. 583, Mr. Justice Clifford states the rule as follows:

"The settled rule of law is that whoever first perfects a machine is entitled to a patent, and is the real inventor, although others may have previously had the idea, and made some experiments towards putting it in practice. He is the inventor, and is entitled to the patent, who first brought the machine to perfection, and made it capable of useful operation."

So in *Whitely v. Swayne*, 7 Wall. 685, 687, Mr. Justice Nelson said:

"He is the first inventor and entitled to the patent who, being an original discoverer, has first perfected and adapted the invention to actual use."

This is the general rule, and had no exception under the statutes in force down to the act of July 4, 1836, (5 St. p. 117.) The fifteenth section of that act, in specifying the defenses which a defendant might set up in an action for infringement, permitted him to plead that the patentee "had surreptitiously and unjustly obtained the patent for that which was in fact invented or discovered by another who was using reasonable diligence in adapting and perfecting the same." The effect of the change made by the act of 1836 was considered by Mr. Justice Story in the case of *Reed v. Cutter*, 1 Story, 590, where, referring to the words "was using reasonable diligence in adapting and perfecting his invention," he said:

"These latter words were copied from the fifteenth section of the act of 1836, c. 357, and constitute a qualification of the preceding language of that section; so that an inventor who has first actually perfected his invention will not be deemed to have surreptitiously or unjustly obtained a patent for that which was in fact first invented by another, unless the latter was at that time using reasonable diligence in adapting and perfecting the same. And this I take to be clearly the law; for he is the first inventor in the sense of the act, and entitled to a patent for his invention, who has first adapted and perfected the same to use; and until the invention is so perfected and adapted for use it is not patentable. An imperfect and incomplete invention, existing in mere

theory or in intellectual notion, or in uncertain experiments, and not actually reduced to practice, and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, is not, and indeed cannot be, patentable under our patent acts, since it is utterly impossible, under such circumstances, to comply with the fundamental requisites of those acts. In a race of diligence between two independent inventors, he who first reduces his invention to a fixed, positive, and practical form would seem to be entitled to a priority of right to a patent therefor. *Woodcock v. Parker*, 1 Gall. 438. The clause now under consideration seems to qualify that right by providing that in such case he who invents first shall have the prior right, if he is using reasonable diligence in adapting and perfecting the same, although the second inventor has, in fact, first perfected the same, and reduced the same to practice in a positive form. It thus gives full effect to the well-known maxim that he has the better right who is prior in point of time, namely, in making the discovery or invention."

Reed v. Cutter is a leading case, and has been followed by Mr. Justice Clifford in *White v. Allen*, 2 Cliff. 224, 2 Fish. Pat. Cas. 440, and in later cases.

It is obvious from the foregoing that the man who first reduces an invention to practice is *prima facie* the first and true inventor, but that the man who first conceives, and, in a mental sense, first invents, a machine, art, or composition of matter, may date his patentable invention back to the time of its conception, if he connects the conception with its reduction to practice by reasonable diligence on his part, so that they are substantially one continuous act. The burden is on the second reducer to practice to show the prior conception, and to establish the connection between that conception and his reduction to practice by proof of due diligence. It has sometimes been held, in the decisions in the patent office, that the necessity for diligence on the part of the first conceiver does not arise until the date of the second conception; but this, we think, cannot be supported on principle. The diligence of the first reducer to practice is necessarily immaterial. It is not a race of diligence between the two inventors in the sense that the right to the patent is to be determined by comparing the diligence of the two, because the first reducer to practice, no matter what his diligence or want of it, is prior in right unless the first conceiver was using reasonable diligence at the time of the second conception and the first reduction to practice. The language of the statute, (section 4920,) in the use of the imperfect tense, "was using reasonable diligence," shows the legislative intent to confer a prior right on a first conceiver in a case where, after his mental act of invention, and pending his diligent reduction to practice, another inventor enters the field and perfects the invention before his rival. The reasonable diligence of the first conceiver must be pending at the time of the second conception, and must therefore be prior to it. Reasonable diligence by the first conceiver, beginning when his rival enters the field, could only carry his invention back to the date of the second conception, and in the race from that time the second conceiver must win because of his first reduction to practice. See *Rob. Pat. §§ 384-386*; *Millward v. Barnes*, 11 O. G. 1060. The elaborate opinion of the commissioner of patents, Mr. Mitchell, in the interference proceeding be-

tween Christie and Seybold, reported in 54 O. G. 957, cites all the authorities, and is quite convincing on this point. We fully concur therein. As Christie reduced the invention to practice nearly a year before Seybold's press was made, the burden is on Seybold to show that from the time of his original conception, which antedated that of Christie, he was using reasonable diligence in adapting and perfecting his idea to practical use. Has he sustained that burden? It is quite clear to us that he has not. The question of reasonable diligence in any case depends, of course, upon all the circumstances. A complicated invention, requiring many experiments and much study to give it practical form, would reasonably delay a reduction to practice after the first conception for a greater length of time than where the idea and the machine embodying it were of a simple character. *Bradford v. Corbin*, 6 O. G. 223. Then, too, the sickness of the inventor, his poverty, and his engagement in other inventions of a similar kind are all circumstances which may affect the question of reasonable diligence. See *Webster v. Carpet Co.*, 5 O. G. 522; *Cox v. Griggs*, 1 Biss. 362, 2 Fish. Pat. Cas. 174; *Munger v. Connell*, 1 O. G. 491; *Proctor v. Ackroyd*, 6 O. G. 603; *Cushman v. Parham*, 9 O. G. 1108.

In this case, Seybold's first conception was in October, 1885, and he did not reduce his machine to practical form until April, 1889, three years and a half later. He made a rough sketch in January, 1886, which he subsequently lost. In October, 1888, three years after his first conception, he had working drawings made, and six months later a press was manufactured. His excuse for his delay is that until the spring of 1889 he could not afford to buy the necessary tools for the manufacture of the press, and, if he had been able to do so, his shop was not large enough to permit the use of them. He does not say, however, that he had not the means to have the press made at some other shop, where the proper tools were to be had, but, on the contrary, intimates that he might have done so, but for the fact that there would have been no profit for him to sell machines made by others according to his invention. Now, we do not think this a good excuse for failing to make at least one machine, in accordance with his conception. It is as much as to say that in his view his new conception, when reduced to practice, would not have sufficient value and utility to bring him any return commensurate with the outlay required to reduce it to practice, and in consequence he indefinitely postponed putting it into practical form until circumstances should change. This is a temporary abandonment of the idea, (*White v. Allen*, 2 Cliff. 224,) and is not the due diligence which entitles him to the favor of the public, for whose benefit, primarily, the patent laws were enacted, (*Wright v. Postel*, 44 Fed. Rep. 352.)

It can hardly be claimed that the rough sketch made by Seybold of his proposed press in January, 1886, was a reduction to practice. It has been held in many cases that drawings, much more complete than the one here testified to, are not reductions to practice, as against a subsequent conceiver who first made an actual,

operative machine. *Reeves v. Bridge Co.*, 5 Fish. Pat. Cas. 456; *Lubricator Manuf'g Co. v. Renchard*, 9 Fed. Rep. 293, (opinion by Mr. Justice Matthews); *Drill Co. v. Simpson*, 29 Fed. Rep. 288; *Ellithorpe v. Robertson*, 4 Blatchf. 307; *Draper v. Mills Corp.*, 13 O. G. 276; *Odell v. Stout*, 22 Fed. Rep. 159.

Further objection to reversing the decree is made on behalf of appellee on the ground that Christie was not the true inventor of the machine for which he obtained the patent. It is said that Christian Keck, who was in his employ, was the real inventor. We do not see how this is a subject which can be here investigated. The question here (section 4915, Rev. St.) is only whether Seybold was the first and true inventor. It is certain that some one reduced the invention to practice before Seybold did, and, if that is so, Seybold is not the first and true inventor, unless he was using reasonable diligence to adapt and perfect his conception; and we have found that he was not doing this. If Christie's patent is void because he was not the first and true inventor, and Keck was, that would not entitle Seybold to a patent. The commissioner of patents did not consider the question, and we think he acted rightly in this respect.

On the whole case we find, therefore, that Seybold is not the true and first inventor. The decree of the court below is reversed, with instructions to dismiss the bill at the costs of the complainant.

MASTEN v. HUNT et al.

(Circuit Court of Appeals, First Circuit. April 13, 1893.)

No. 40.

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM—COMBINATION.

Letters patent No. 321,833, issued July 7, 1885, to Cornelius E. Masten, for a firecracker, covers, in claim 1, the match, B, the fuse, C, in combination with the solid plug, D, and body, A, substantially as set forth. The specification makes no reference to the prior state of the art, and merely states that the invention produces "a more desirable article" "than is now in ordinary use," without particularizing the points constituting the improvement. *Held*, that the presumption of novelty applies to the combination as a whole, and, in the absence of evidence as to the prior state of the art the court has no power to declare that the match, B, or its equivalent was not essential, and to hold that a like cracker, with a continuous fuse, is an infringement. 51 Fed. Rep. 216, affirmed.

2. SAME.

The use of the conjunction "and" between the words "match, B," and "fuse, C," does not show that the match and fuse constitute but one element, of which a continuous fuse would be the equivalent. 51 Fed. Rep. 216, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. This was a suit by Cornelius E. Masten against Edward S. Hunt and others for the infringement of letters patent No. 321,833, issued July 7, 1885, for a firecracker. The circuit court dismissed the bill; its opinion, which is adopted by the circuit

court of appeals, together with a full statement of the facts of the case, being reported in 51 Fed. Rep. 216. The complainant appeals. Affirmed.

Charles C. Morgan and John S. Richardson, for appellant.
James E. Maynadier, for appellees.

Before COLT, Circuit Judge, and NELSON and WEBB, District Judges.

NELSON, District Judge. We agree with the learned circuit judge who decided this case in the court below, for the reasons given in his opinion, which we adopt as the opinion of this court, that the appellant has shown no infringement of his patent by the appellees. A common safety fuse inserted through a plug, such as is used by the appellees in the manufacture of cannon crackers,—a device as old as the art of blasting,—cannot possibly be an equivalent for the combined fuse and match described in the first claim of the patent. Decree affirmed.

MORSS v. DOMESTIC SEWING-MACH. CO.

(Circuit Court of Appeals, First Circuit. April 13, 1893.)

No. 12.

PATENTS FOR INVENTIONS—INFRINGEMENTS—EQUIVALENTS—DRESS FORMS.

Claim 1 of letters patent No. 233,239, issued October 12, 1880, to John Hall, for an improvement in dress forms, whereby they may be made more readily adjustable to the varying styles and sizes of dresses, was for "the combination with ribs, c, of the springs, h, each pair of springs having their upper ends secured to a single rib, substantially as and for the purpose specified." The specifications show the ribs to be divided into sections, with the two springs attached to the upper section, and spreading downward to the adjoining ribs, and expressly disclaim as new the stretchers, blocks, rests, and band, and their operation to expand and contract the dress form at pleasure. *Held*, that the patent was limited to the specific device, and that the equivalent thereof was not contained in the patent of November 29, 1887, to William H. Knapp, having double ribs composed of a single U-shaped wire, extending in an unbroken piece their entire length, and rigidly attached to a segmented waistband. 48 Fed. Rep. 113, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. This was a suit by Charles A. Morss against the Domestic Sewing-Machine Company for the infringement of letters patent No. 233,239, granted to John Hall, October 12, 1880, for a new and useful improvement in dress forms. The circuit court dismissed the bill, its opinion, which is adopted by the circuit court of appeals, being reported in 48 Fed. Rep. 113. Complainant appealed. Affirmed.

Payson E. Tucker and Charles F. Perkins, for appellant.
John Dane, Jr., for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

NELSON, District Judge. We are satisfied that the learned circuit judge who decided this case in the court below was right, for the reasons stated in his opinion, in holding that the ribs in the defendant's dress form, which are constructed according to the Knapp patent, and are composed of a single wire in such manner as to form a double rib, U-shaped at the lower ends, and extending in an unbroken piece the entire length, and supported in position by being rigidly attached to a waist band divided into segments, can in no sense be held to be an equivalent for the combination of ribs and springs described in the first claim of the plaintiff's patent. Decree affirmed.

THE WELHAVEN.¹

WILLIAMS v. THE WELHAVEN et al.

(District Court, S. D. Alabama. October 8, 1892.)

1. CONSTITUTIONAL LAW—CONFLICT OF TREATY AND STATUTE.

When an act of congress conflicts with a prior treaty, the act controls. *Steamship Co. v. Hedden*, 43 Fed. Rep. 17, followed.

2. TREATY WITH NORWAY—JURISDICTION OF CONSUL.

The Norwegian consul has by treaty exclusive jurisdiction to hear and determine complaints of ill treatment of seamen shipping from an American port for a voyage on a Norwegian vessel.

3. SAME—ADMIRALTY COURTS.

United States statutes conferring admiralty jurisdiction do not apply to claims of bad treatment suffered by an American serving as a seaman on a Norwegian vessel.

In Admiralty. Libel in rem and in personam.

Henry Williams, a citizen of the United States, filed a libel for damages and for wages against the Norwegian steamship Welhaven and her master, claiming that he shipped at Mobile for a round voyage to Tampico, and that on his arrival in Mobile bay, on the return trip, he was put ashore, manacled, and finally discharged at Mobile, without full pay. The Norwegian consul at Mobile, William H. Leinkauf, interposed by petition, setting out that this was a matter within his consular jurisdiction, and that he was engaged at the time the libel was filed in investigating the case.

Smith & Gaynor, for libellant.

Pillans, Torrey & Hanaw, for claimant and for Norwegian consul.

TOULMIN, District Judge. It has been held that, where an act of congress is in conflict with a prior treaty, the act must control, since it is of equal force with the treaty and of later date, (*Steamship Co. v. Hedden*, 43 Fed. Rep. 17;) hence the contention of libellant's counsel could be sustained if the statute which he invokes in this case (Rev. St. §§ 4079-4081) was in conflict with the treaty between the United States and Norway and Sweden, which must govern the action of the court in the matter under considera-

¹Reported by Peter J. Hamilton, Esq., of the Mobile, Ala., bar.

tion, or if such statute had any application to the case at all. But my opinion is that it is neither; that it is not in conflict with the treaty; and that it has no application to a case of this character. The earnest desire of this court to afford to seamen every right and protection authorized by the law, and the sympathy I have with that class of people to which libellant belongs, strengthened by the able and impressive argument of his counsel, induced me to take for examination and careful consideration the matter and arguments submitted before a decision by the court denying the jurisdiction prayed for; but such consideration has only served to confirm the correctness of the decision of this court in the case of *The Burchard*, 42 Fed. Rep. 608, where it was held that the court had no jurisdiction in a case very similar to this one. In addition to that case, I cite, as sustaining the decision in this, *The Salomoni*, 29 Fed. Rep. 534; *The Marie*, 49 Fed. Rep. 286; *The Elwine Kreplin*, 9 Blatchf. 438; *In re Ross*, 140 U. S. 453, 11 Sup. Ct. Rep. 897. I am therefore constrained to sustain the exceptions to the libel, and to order that the libel be dismissed.

O'ROURKE v. NEW YORK DYEWOOD EXTRACT & CHEMICAL CO.¹

(District Court, S. D. New York. March 31, 1891.)

SHIPPING—VESSELS AT WHARVES—CONCEALED SEWER—NECESSITY FOR NOTICE.

A boat which, in the ordinary course of business, moored at high water, in the usual way, at respondent's bulkhead, where the master had never before been, and which at low water was sunk by a discharge from a sewer, concealed at high water, and of which her master was not notified, was *held* entitled to recover her damages by reason of the failure of respondent to give notice of the concealed danger.

In Admiralty. Libel by Patrick O'Rourke against the New York Dyewood Extract & Chemical Company for damage to a canal boat sunk by discharge from a sewer while lying at respondent's bulkhead. Decree for libellant.

Stewart & Macklin, for libellant.

Charles H. Russell, for respondent.

BROWN, District Judge. The evidence leaves no doubt, I think, that the discharge of water from the sewer pipe between high and low water mark along the respondent's bulkhead at Greenpoint, although somewhat guarded by spiles running across its mouth, was sufficient to flood any loaded canal boat that moored close alongside of it unawares. The captain of the Cayuga had never been there before; he arrived at high water, when the sewer was covered, and was not visible. He reported his arrival with coal at the respondent's office a few rods distant, and received no notice of the need of breasting off from the concealed sewer. While waiting for the arrival of bills of lading and the necessary preparations for a discharge, the captain, having moored his boat in

¹Reported by E. G. Benedict, Esq., of the New York bar.

the usual manner, went to sleep in the cabin, and was roused only a few minutes before the boat sank.

For the defense it is claimed that the boat lay somewhat away from the bulkhead, and did not take in water from the sewer; that she came alongside loaded in an unseaworthy manner, and that she must have sunk from her own leaky condition, or the very unequal loading by the stern, after the previous removal of about 33 tons of coal at Hunter's point. On this branch of the case I am disposed to accept the captain's testimony, as the more credible and probable. The respondent must, therefore, be held to answer for the damage. The canal boat went to the wharf in the usual course of business to deliver coal, in pursuance of the arrangements for its delivery there made between the respondent and the shippers. The libelant's captain, on coming there for the first time, was entitled to notice of the concealed danger either specifically, or by some general notice to the public, giving reasonable caution against the concealed danger. *Heisenbittel v. Mayor*, 30 Fed. Rep. 456; *Smith v. Havemeyer*, 36 Fed. Rep. 927, affirming 32 Fed. Rep. 844. There was no negligence on his part in mooring at the bulkhead in the usual way or in going to his cabin; and he had no knowledge of the sinking condition of his boat until too late to prevent it.

Decree for the libelant, with an order of reference to compute the damages.

BRITISH & FOREIGN MARINE INS. CO. v. SOUTHERN PAC. CO.¹

(District Court, S. D. New York. March 31, 1893.)

CARRIERS—FREIGHT—PRO RATA—DAMAGED GOODS—GOODS DESTROYED.

While a quantity of cotton was in course of transportation from southern ports to Liverpool, by various connecting carriers, but under through bills of lading, certain bales were destroyed and others damaged by a fire on the pier of the respondent,—one of the carriers. The damaged bales were sold, with the knowledge of the insurer, to whom the owner had abandoned, and the proceeds were turned over to such insurer; respondent retaining its pro rata freight on all the cotton destroyed and damaged. Suit was brought by the insurer to compel payment over of such money retained, on the ground that no freight was earned because the cotton was never delivered at the stipulated place of delivery. *Held*, that the insurer, by standing in the place of the owner, and practically receiving the damaged cotton, acquiescing in its sale, and receiving the proceeds, and because, by the terms of the bill of lading, the respondent's contract of carriage was for the most part completely performed, became thereby liable to pay pro rata freight on the damaged cotton sold and accounted for; but, as there was no delivery of the cotton destroyed by the fire, no freight ever became due on that part, and respondent was not entitled to withhold any freight for that part from the insurer.

In Admiralty. Libel by the British & Foreign Marine Insurance Company against the Southern Pacific Company to recover freight withheld by respondent. Decree for libelant as to part of its demand.

¹Reported by E. G. Benedict, Esq., of the New York bar.

Butler, Stillman & Hubbard, for libellant.
Benedict & Benedict, for respondent.

BROWN, District Judge. The controversy in this case turns upon the question of the right of the carriers to pro rata freight on 52 bales of cotton, part of which was destroyed and the rest damaged, by a fire on the pier of the Morgan Line in this city, on February 28, 1887. These 52 bales were parts of much larger quantities of cotton, which had been shipped partly from interior points in Texas, on the Houston & Texas Railroad, and partly from Galveston and New Orleans. All the cotton was covered by bills of lading, somewhat different in form, but all providing for the transportation to New York by the Morgan Line of steamers, and thence to Liverpool and to other European ports by steamer from New York. By the bills of lading, none of the different carriers were to be responsible for any damage except such as occurred on its own part of the route. The course of dealing was that each succeeding carrier advanced to the preceding carrier the charges of the latter for its proportion of the transportation; while the freight specified in the bill of lading was at a certain rate per pound, or per 100 pounds, for the transportation as an entirety, and was payable on delivery at the place of final destination.

Most of the cotton covered by the various bills of lading was delivered at the place of destination. But so much as was damaged by the fire and was not in fit condition to be forwarded was sold, and the proceeds thereof was paid to the defendant, the proprietor of the Morgan Line. The libelants were the insurers of the cotton, to whom an abandonment was made of what was damaged by the fire; and the proceedings for the care, reparation and sale of the damaged cotton were made, as the evidence shows, with the concurrence and approbation of the libelants. Out of the proceeds of the cotton sold, the defendants claim to retain a pro rata freight to New York, both upon the cotton damaged and sold, and also upon the cotton that was totally destroyed by the fire; i. e. the amount of freight which the respondent had advanced thereon to preceding carriers, and its own pro rata charges for the transportation to New York. The libelants deny that the respondent has any right to retain any freight charges at all on the cotton destroyed, or sold here, for the reason that no freight was earned thereon, in consequence of the failure to deliver this part of the cotton at the stipulated place of delivery, so that no freight thereon ever became due.

The case is not one of a complete failure to perform the contract. It is the case of a complete performance of a part of what was embraced in the bills of lading, and of a failure to perform the residue through perils for which the carrier was not responsible. The libellant, as insurer, accepting an abandonment, as regards the damaged cotton, stands in the situation of the shipper and owner. The disposition of the damaged cotton was made for the best interest of all concerned, viz.: the carrier, the owner and the insurer, and though the disposition of the cotton was through the hands

of the respondent, this was practically, as it seems to me from the evidence, the joint act of both the parties to this libel; and all the proceeds, save the amount covered by this dispute as to freight, has been turned over to the libelants. The disposition of the damaged cotton was, therefore, equivalent to an arrangement for the acceptance and disposal of it by both for their joint account and benefit.

From the earliest times the rule of the maritime law has been different from that of the common law in respect to payment of pro rata freight; the rule being that where the ship, through accident or major force, has been prevented from completing her voyage, the owner, on receiving his goods, must pay ratable freight. *Macl. Shipp.* 478; *Roccus*, 81; *Consolato*, 151; and see other authorities cited in *The Spartan*, 25 Fed. Rep. 44, 57. Upon this ground I must allow to the carrier in the present case a pro rata freight upon the damaged cotton, the proceeds of which were received by the libelant as the owners' representative. The present is a stronger case for a pro rata freight from the fact that the bills of lading contemplated in several respects the divisibility of the contract; and because the contract contained in the bills of lading was for the most part completely performed.

The method of dividing the entire freight was a matter of private arrangement between the different carriers, to which neither the owners of the cotton, nor the libelants, as insurers, were parties. If any question is made as to the equity of this division, the libelants are entitled, and will be allowed, to take further proof concerning it.

As respects the cotton destroyed, on which the pro rata freight retained by the defendant amounts to a net balance, as I understand from the evidence, of \$614.75 over all average deductions for salvage, etc., I do not see any ground on which the respondents can prevail. No benefit has ever accrued either to the owners or to the insurer from the cotton destroyed. So much of the cotton is gone, and the freight is gone with it. The ground of the allowance of a pro rata freight is the meritorious service on the part of the ship in the delivery of the goods to the owner, (*Macl. Shipp.* 478,) though not at the place originally contemplated. The meritorious services exist in this case as to the damaged cotton delivered, or, what is the same thing, sold by mutual arrangement, and accounted for. But as to the cotton destroyed, this consideration wholly fails; and the freight being payable by the pound, there is no legal or equitable ground, on the destruction of a part, for holding the residue for the freight on the cotton destroyed. No deduction, therefore, should be made for what was destroyed, and the libelants are entitled to a decree for the amount withheld on that account; and they may give further proof as respects a fair pro rata on the residue, if the division made is not acceptable.

THE J. & J. McCARTHY.

STYFFE v. THE J. & J. McCARTHY.¹

(District Court, S. D. New York. April 1, 1893.)

SHIPPING—PERSONAL INJURIES—SHIFTING HAWSER OF TOW—LIABILITY OF TUG.

Libelant, master of a canal boat in tow of defendant tug, lost two fingers by getting them caught in the loop of his hawser while shifting it from the port cleat to the forward bitts. On conflicting evidence the court found that the shifting of the hawser by libelant was in response to an authorized hail from the tug, and that the accident was due to the premature starting up of the tug. *Held*, that the tug was liable; but as the evidence also indicated that the libelant carelessly and unnecessarily exposed his fingers in the loop of the hawser while pushing it down on the bitts, *held*, that libelant was also negligent, but should recover \$450. The Max Morris, 11 Sup. Ct. Rep. 29, 137 U. S. 1.

In Admiralty. Libel by Wm. T. Styffe against the steam tug J. & J. McCarthy for personal injuries. Decree for libelant.

Hyland & Zabriskie, for libelant.
McCarthy & Berier, for respondent.

BROWN, District Judge. On the 19th of July, 1892, between 2 and 3 o'clock in the afternoon, the libelant, who was the captain in charge of the canal boat Fred Fassbender, which was going around the Battery in tow of the tug J. & J. McCarthy on a hawser about 40 or 50 feet long, lost two of the fingers of his right hand by getting them smashed in changing the hawser from the port cleat to the forward bitts. The tow had been taken from the Wallabout by two hawsers running to the port and starboard sides. Off pier 5 or 6, East river, the starboard hawser either slipped or parted, and the canal boat, being held by the port line only, began to take a sheer to starboard. The libelant was at that time near the stern of his boat. Seeing the sheer, he ran forward, saw that the starboard hawser was gone, and, according to his testimony, was hailed by one of the men on the stern of the tug, who told him to shift the hawser from the port cleat, and put it over the bitts near the stem; that he attempted to do so; and that while putting the loop which formed the end of the port hawser over the bitts, the tug started up, and that his fingers were thereby caught between the hawser and one of the bitts about six inches from its top. The libelant was but 21 years of age, and had been on board the canal boat as captain for only a short time.

The witnesses for the tug all testified that no order was given from the tug to the libelant to change the port hawser. The pilot and engineer testified that the tug did not start up. The deck hand and the cook, who were on the stern of the tug, contradicted each other about the starboard hawser; while the cook says the tug did start up, and he agrees with the libelant in assigning that as the reason why his fingers got caught.

¹Reported by E. G. Benedict, Esq., of the New York bar.

Upon the contradicting testimony I must find in accordance with the reasonable probabilities of the case. The libelant had no business to change the hawser, except on orders from the tug; and there is not the least probability that he would do so. I have no doubt that he did receive a hail to change the hawser, as he testifies; and that this hail was in some way either directed by the pilot of the tug, or was known and acquiesced in by him. It was the proper and natural thing to do; while the pilot's account of what he was doing, or rather was not doing, seems to me wholly improbable. I cannot give full credence to the testimony of the witnesses on the McCarthy as to what was done or not done, on account of the contradictions between them, as well as the improbabilities arising from the situation. The pilot says that for a considerable period, namely, while the libelant ran forward, got off the port hawser and got hurt, he was not looking aft, and did not see what was going on; though he knew the starboard hawser was gone and that the canal boat was sheering to starboard; but he says he was waiting for the boats to come towards each other. He says he ordered the starboard hawser hauled in; while both deck hands deny any such order.

I am persuaded that the truth of the matter is that the port hawser was shifted on the authorized hail from the tug by the pilot's direction; that the pilot knew what was doing, and started up a little sooner than he should have done.

I cannot wholly acquit the libelant, however, of some negligence or want of reasonable precaution. The loop or eye of the hawser was some three feet in circumference. There would have been no difficulty in throwing it over the bitts, but for the weight of what was hanging over in the water. I have no doubt the hawser was slackened by stopping the engines, as the pilot and engineer testify. The libelant says that he was pushing the hawser down the bitts when his fingers were caught. Allowing for some probable difficulty in getting the hawser over the bitts, arising from the drag of the hawser, which necessitated some pulling back all the time, still I cannot conceive how his fingers could be caught in the way he describes, except by a careless and unnecessary exposure of his fingers in the loop of the hawser; since by the use of both hands in pulling back, he could easily have kept his fingers away from the bitts. The tug, however, had no right to start up, under such circumstances, until a signal was given that all was ready for the start, and no such signal is claimed to have been given. Under these circumstances I award him but \$450. *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. Rep. 29.

UNION ICE CO. v. CROWELL et al.

CROWELL et al. v. UNION ICE CO.

(Circuit Court of Appeals, First Circuit. March 22, 1893.)

Nos. 4 and 5.

1. SHIPPING—UNSAFE BERTH—DAMAGES—LIABILITY.

Libellant's schooner was berthed alongside respondent's wharf to load ice, and after the cargo was nearly all in she began to leak badly, showing signs of a severe strain by hanging up at the ends. It was shown that there was a greater depth of water under her amidships than at either bow or stern, and she was aground at the ends. At the bow there was a bed of sawdust, edgings, etc., of whose existence both her captain and the respondent were aware, but neither took any steps to investigate its extent or character, assuming that it was soft enough for the schooner to cut into it. Respondent had, however, examined the bottom for rocks, logs, or other hard substances, and removed such as were found. *Held*, that both the respondent and the vessel were in fault as to the unsafe berth, and libellants' damages should be divided.

2. SAME—PROXIMATE CAUSE.

A survey was had, and the surveyors recommended that the schooner be beached, and repaired temporarily, which was done without taking the ice out of her. The ice, softened by the water she had taken, suddenly shifted in the hold, and strained the vessel much worse than before. *Held*, that the unsafe berth was nevertheless the proximate cause of this injury, and damages therefor are recoverable.

3. SAME—MEASURE OF DAMAGES.

The measure of damages in such case is the cost of repairing the schooner, and not the difference between her value before and her value after the injury.

4. SAME—COSTS.

In admiralty the costs are under the control of the court, and do not necessarily follow the rule in cases at law or in equity. They may be denied in whole or in part to the prevailing party, or even allowed to the losing party, as, in view of all the facts, seems proper.

Appeals from the District Court of the United States for the District of Maine.

In Admiralty. Libel by Samuel R. Crowell and others against the Union Ice Company for damages to the schooner "Weybosset." The district court entered a decree for divided damages, and subsequently overruled respondent's exceptions to the assessor's report, at the same time sustaining in part and overruling in part the exceptions of the libellants. Both parties appeal. Affirmed.

The opinions of the court below, by WEBB, District Judge, referred to by the circuit court of appeals, are as follows:

(April 16, 1890.)

The owners of the schooner Weybosset prosecute this libel to recover for injury and damage to their vessel, caused, as they aver, by the unsuitable and dangerous condition of the bottom at the berth provided for loading vessels with ice from the respondent's ice houses on the bank of Penobscot river. The case shows that the Union Ice Company, proprietor of ice houses and a loading pier, contracted ice to be loaded at their pier, from their houses, and that the Weybosset, under a charter, proceeded thither to take a cargo. This brought her lawfully at the berth, and was such an invitation to come there as imposed on the owners of the pier the duty to employ reasonable diligence to have the place safe and proper for the vessel to lie. The Moorcock,

13 Prob. Div. 157; *Sawyer v. Oakman*, 1 Low. 136; *Nickerson v. Tirrell*, 127 Mass. 236; *Trustees v. Gibbs*, L. R. 1 H. L. 93; *Higgins v. Gaslight Co.*, 33 Fed. Rep. 295.

The river bottom for considerable space above the pier and along outside the berth was obstructed with accumulated edgings, sawdust, shavings, and other similar materials, that had been thrown into the water at sawmills above. How long it had been there does not appear, but there is no pretense that it was of very recent deposit. That such an accumulation was there was known to the ice company. They had taken measures to ascertain that there were no logs, slabs, and other large bodies in the river bed, which, rising above the general level of the bottom, might become dangerous to vessels doing business there; but they had taken no precautions to remove this accumulation of lighter materials, nor, so far as appears in testimony, to mark the exact extent and position of it. The *Weybosset* was about 165 feet keel, and her hatches so arranged on her deck that, when lying so as to receive her cargo from the ice run, her bow would extend about 30 feet above the upper corner of the pier, and would project upon this material for nearly that distance. In front and below the pier the bottom was hard and solid. Soundings made by two different witnesses show that the depth of water at low tide, where the *Weybosset* loaded, varied, being, according to one set of soundings, at the bow, 6½ feet, and 12 at the stern, with a depth varying from the shoalest point to 16 feet about midships, and thence shoaling to 12 feet at 30 feet from the stern. According to the soundings made at the instance of the respondent, the depths range from 8.45 forward to 14 feet aft. These measurements, instead of showing a concavity of the bottom along amidships, show it to be convex, a raised portion of the bottom extending from about midway of the keel, aft about 30 feet, where the depth is from a foot to 1.3 feet less than at the stern, and an extreme of .8 of a foot less than at the point where the edgings, etc., leave off. They also show that in the distance of about 36 feet this pile of material rose with nearly a uniform incline to a height of 5.9 feet at the point where the stern of the schooner rested.

The vessel showed no signs of injury till shortly after her loading was completed, when she was found to be leaking badly, and giving evident indications that she had settled along amidships. Her spring stay was slacked, and hung loosely, which showed that in settling the tops of the masts came towards each other. This was precisely the effect that would follow loading heavily with the keel resting at the bow and at the stern, but unsupported in the middle. And the condition of the bottom, with the pile of edgings along at the vessel's head, was exactly a condition to hang the vessel up at the ends. That the injury did not make itself apparent before the entire cargo was loaded must be accounted for by the gradual increase of pressure avoiding any sudden action, and the power of the hull to resist the gradual strain. In consequence of the strain and settling, the schooner leaked very badly, and it was found necessary to beach her for repairs. The ice on board was practically lost by melting, and while she lay on the beach she suffered further damage. Temporary repairs were made, and she was taken to Boston, where she was thoroughly repaired.

There is some conflict as to the conversation between the captain and the ice company's superintendent in respect to the character of the berth before the vessel hauled in and made fast. The captain declares and the superintendent denies that the berth was guaranteed. It is not of any importance whether it was or not. But I am of opinion that the captain somewhat too inattentively interpreted the words of the superintendent to be a warrant of the berth. It is admitted by both that the captain inquired as to the character of the place. The superintendent's answer implied, as he doubtless believed to be the truth, that it was safe to lie and load at. But neither he nor the other officers of the company had exercised proper care in respect to the condition of the bottom. They knew that there was an accumulation of edgings, but how high or how broad, or how far it extended up river, or how near it came to the pier, they had taken no pains to ascertain. They apparently assumed that, in the absence of rocks, or logs, or other large and hard substances, all was right. In all this they were at fault, and for damages occasioned by the unsafe accumulation, the presence and danger of which they

were bound to know, they must be held responsible. But the master admits that he was told that his vessel was larger than others that had loaded there; that the location of his hatches would require him to lie further up on the bunch of edgings. He exercised no care to ascertain the condition or the character of the bunch of edgings upon which he was notified that his vessel would rest. He took it for granted that the schooner would cut through whatever bank of materials from the sawmills she might run upon. He was negligent of duty, and careless in thus failing to make suitable inspection, and in too easy reliance upon the judgment of others. This was negligence on his part contributory to the result. In admiralty the rule is that there shall be apportionment of damages when there is fault and negligence on both parts. *Christian v. Van Tassel*, 12 Fed. Rep. 884; *The Max Morris*, 28 Fed. Rep. 881; *Atlee v. Packet Co.*, 21 Wall. 389.

The libelants are therefore entitled to a decree in their favor for one half the damage arising from the unsafe condition of the berth, and for ascertaining that damage reference is made to Benjamin Thompson, Esq.

Opinion of the Court on Exceptions to Assessor's Report.

(August 11, 1891.)

WEBB, J. Both parties except to the report of the assessor. Of the respondent's exceptions, only the fourth demands any discussion, and this involves the consideration of the proximate cause of the injury to the libelants' vessel. It is unprofitable to cite cases in illustration of the maxim, "*In jure non remota causa sed maxima spectatur*," which is the basis of this exception. The principle is elementary. Its application to a given case is often difficult. Reported cases exhibit how it has been applied, and show the interpretation of special facts by courts. They manifest the difficulty, more than supply a guide to the principle. Each case must be determined by a careful analysis of its own conditions and circumstances. The influence and effect of a given cause will very naturally be differently judged by different minds. The discussion easily leads to metaphysical refinement and subtlety. In the present instance I have already decided that the vessel was damaged and set leaking by taking ground on the uneven bottom at the berth given her to load a cargo of ice at the respondent's pier, and that for the unsafe condition and character of that berth the respondent is liable.

It was only when the cargo was nearly or quite all on board that the vessel was loaded deep enough to press so heavily on the uneven surface as to strain and open her, and set her leaking freely. What occurred afterwards, while she was beached and receiving temporary repairs, it is contended is not attributable to the cause that hung the vessel up at the ends and strained her, opening her butts and seams. For the later injury, it is claimed, a new and distinct cause is responsible,—a cause arising from the negligence of the master. I cannot think so. It is true that, if the cargo had been at once discharged, much, perhaps all, of that later damage would have been avoided. But the respondent refused any assistance or advice to the captain in respect to the cargo. He acted upon his best judgment under the exigency, and upon the advice of surveyors. While he was diligently pursuing such measures as appeared prudent for the repair of the visible damage received, and for the rescue of the vessel and cargo from the peril arising from that damage, the ice, probably undermined by the water let into it through the openings occasioned by the improper bottom, suddenly shifted in the hold with force sufficient to draw the three pilings to which guys from the schooner's mast heads had been made fast, and to part the cable, also run to the shore to keep her steady. The vessel was thrown over on her side, and received the injury which is the subject of this contention between the parties.

It is, I think, altogether too narrow a view of these facts to say that the injury and wasting of a cargo like ice, and the shifting of that cargo consequent on its wasting, was independent of the strain of the vessel by the uneven bottom, or that we cannot look to anything prior to such shifting of the cargo for a cause of the injury it immediately occasioned. Warm river water must melt ice; no other result could be expected; and damage to the vessel following that melting is reasonably to be regarded as the result of the cause that admitted the water. The unsafe berth was specifically given for

taking an ice cargo, and that unsafety of berth led directly to all the subsequent loss. I overrule all the respondent's exceptions.

The libelants excepted to the assessor's ruling that the damages are to be ascertained by valuing the vessel before receiving injury and deducting her value in her damaged condition. I think this exception must be sustained. The rule is restitution,—the cost of repairs. *The Catherine v. Dickinson*, 17 How. 174. Fortunately the assessor has reported the damages made up according to that rule, and it is not necessary to recommit the case. The other exception of libelants is overruled.

The total, according to Schedule B of the report here approved, is \$11,673.55, one half of which is \$5,836.77, and for the proportion and amount, with interest from the date of filing the libel, a decree is ordered.

Question is made respecting costs. In admiralty, costs are under the control of the court, and do not necessarily follow the rule in cases at law or suits in equity. They are denied in whole or in part to the prevailing party, and sometimes are even allowed to the losing party, as, on a view of all the particulars of a case, seems to be proper. In this case, the reasoning of *Lowell, J.*, in *The Mary Patten*, 2 Low. 196, 199, is cogent:

"If the loss is all suffered by one vessel, and her owner brings his libel, he will recover half his damages; and there is no reason why he should not, in general, recover his full costs. It is the ordinary case of a prevailing party recovering less than he asks for, and if there has been no tender or offer of amends, and no equity peculiar to the individual case, it is according to the sound and reasonable law of all courts that he should recover costs."

The criticism of this reasoning, found in *The Pennsylvania*, 15 Fed. Rep. 814, does not, in my view, impair its force; nor can I regard the case of *The America*, 92 U. S. 432, as a binding authority on this point. The question in that case received no discussion, and the citations at the conclusion of the opinion are of cases affirming the rule of apportionment of damages where there is mutual fault. In no one of those cases is any reference made to this subject of costs.

Decree, \$5,836.77, and interest from date of filing libel, and costs.

Charles P. Stetson, for Union Ice Co.

Charles T. Russell, Jr., and Clarence Hale, for appellants.

Before COLT, Circuit Judge, and NELSON and CARPENTER, District Judges.

PER CURIAM. We are satisfied with the findings of fact and the conclusions of law reached by the learned district judge in this case, as expressed in his opinion, and the judgment of the district court is therefore affirmed.

THE RICHARD S. GARRETT.¹

McCaldin et al. v. THE RICHARD S. GARRETT.

(District Court, S. D. New York. April 1, 1893.)

SALVAGE—POSSIBILITY OF DAMAGE—PROBABLE LOSS TO BE CONSIDERED.

Where a tug in New York harbor was, in consequence of a collision, abandoned by her crew, and left with her engines still backing, and was immediately boarded by another tug, her steam shut off, and herself taken to a place of safety, the service lasting some three hours, and no other vessel being immediately at hand to render it, and the evidence left it doubtful whether, if assistance had not been so rendered, she would have sunk, at a damage of \$1,500 to \$2,000, or backed ashore at half that damage,

¹Reported by E. G. Benedict, Esq., of the New York bar.

the court, while inclining to think that she would not have sunk, yet did not wholly exclude that contingency in fixing the award, and held that \$350 should be allowed the salving tug, \$50 to her master, who shut off the steam of the disabled vessel, and \$75 to another tug, which rendered assistance in pumping.

In Admiralty. Libel by James McCaldin and others against the steam tug Richard S. Garrett to recover salvage. Decree for libelants.

Carpenter & Mosher, for libelants.

Stewart & Macklin, for claimants.

BROWN, District Judge. This libel was filed to recover salvage compensation for services in picking up the Garrett within a few minutes after she had been abandoned by her crew in a supposed sinking condition, following a collision about 1 P. M. on the 29th of April, 1892, in front of the South Ferry slip, from 200 to 300 feet off the shore.

Owing to a burst in the steam pipe caused by the collision, the engineer had left her immediately with her engines still backing. The McCaldin came up alongside a few minutes afterwards, and after two or three attempts succeeded in making fast; and then her captain, at some personal risk, succeeded in shutting off her steam from the engines. She was then taken to the shoal water a little below Ft. William by Governor's island, and after being pumped out with the aid of the Garfield, another tug belonging to the libelants, she was towed to Jersey City. The whole service was about three hours.

The amount to be allowed for a salvage service must be in proportion, among other things, to the *probable loss*, in case the service had not been rendered. That question, aside from the wide differences in the estimated value of the Garrett, presents some doubt in the present case. From the evidence it appears that the Garrett would undoubtedly, if she had not been aided by the McCaldin, have either sunk, or backed upon the rocks at Governor's island. If she had sunk, the damages would probably have been at least from \$1,500 to \$2,000. Had she not sunk, but only run upon the rocks, the damages would probably have been not half so much. There does not appear to have been any other tug except the libelants' boats that could have rendered her efficient service in time to prevent one or the other of those damages. When she was abandoned it was supposed she would sink at once; and although upon the whole evidence I am inclined to think the probabilities are that she would not have sunk, yet as this is not certain, that contingency should not be wholly excluded in fixing a compensation.

A fair award in the present case will be, I think, (1) \$50 to Capt. Barker of the McCaldin for his personal exposure; (2) \$350 to the McCaldin; (3) \$75 to the Garfield. Of the two latter items two thirds will go to the owners, and the remaining one third to be divided among the master, officers and crew of each boat respectively, according to their wages. Decree accordingly, with costs.

THE BARNEGAT.

THE MONTANA.

MILLARD v. THE BARNEGAT AND THE MONTANA, (two cases.)¹

(District Court, S. D. New York. April 3, 1893.)

SALVAGE—FIRE—BURNING LIGHTER—PUMPING—FIRE DEPARTMENT.

A tug which first began to play water upon a cotton lighter, on fire in a slip in the harbor of New York, and which assisted the city fire boats in getting to the fire, and which played water upon a side of the cotton which the fire department could not reach, and which continued her service for 12 hours, was *held* entitled to an award of \$1,000 on a salvage of \$28,000, though the major part of the work of extinguishing the fire was performed by the city fire boats and the land fire department, which arrived at the fire shortly after the tug began her work.

In Admiralty. Libel by Edwin E. Millard against the tugs Barnegat and Montana and their cargoes. Decrees for libellant.

Wilcox, Adams & Green, for libellant.

Robinson, Biddle & Ward, for claimants.

BROWN, District Judge. Considering that of the \$30,000, the value of the Barnegat and her cargo at the time when the fire on her broke out, \$28,000 was saved, the salvage services were unusually successful for a cotton fire. The major part of the service, however, was performed by the city fire boats Havemeyer, and the New York, and by the land fire department; although the Adelaide probably had her two streams playing upon the fire some two or three minutes before the hose of the land department was played. It was necessary also that the Barnegat should be removed, and that other boats which obstructed the approach of the Havemeyer should be pulled aside, to permit her to come in near where the Barnegat lay. The services of the Adelaide were important, both from her getting into action first, and because she was able to play upon the side of the cotton which the fire department on shore could not reach; also for her prompt assistance in aiding the Havemeyer to come in as soon as possible. These were, doubtless, the most important parts of her special service. After the barge was pulled out into the stream by the Havemeyer, there was in reality a sufficient force without the Adelaide's help. The Adelaide, nevertheless, continued her service along with the very much more powerful fire boats until the arrival at the Erie basin, when she was put in charge by the fire boats, which then left; and the Adelaide remained until about 11 o'clock the following day, making a continual service of nearly 12 hours in all.

The arrival, however, of such abundant means of relief, within 10 or 15 minutes at most after the Adelaide began her work, prevents any very large allowance to the Adelaide. She did not incur any material danger, nor was the service one of any special risk or difficulty to those engaged in it. But the necessity of prompt assist-

¹Reported by E. G. Benedict, Esq., of the New York bar.

ance in the case of fire, and the great value of the earliest service in preventing such a fire from becoming very destructive, must also be considered and compensated. As respects the Barnegat and her cargo, an award of \$1,000, as it seems to me, will be sufficient, and just to both parties under the circumstances of the case.

As respects the Montana, I think the service rendered in pulling her away should be regarded as of a salvage character, though of the lowest possible grade. There was no fire on board of her, and the danger to which she was exposed was small, and the means of relief not difficult. I am inclined to think that the Adelaide did pull upon her, as well as upon the other two barges, and assist in removing her a few rods from the immediate presence of the burning barge, partly for her own safety, and partly, also, to admit the Havemeyer for the purpose of pulling the Barnegat out of the position where she was threatening all the other boats in the slip. Fifty dollars will, I think, be a sufficient award for the service rendered to the Montana.

The amount allowed in each case will be distributed two thirds to the owners, and the other third to the officers and crews in proportion to their wages; the machinist Smithy to rank as one of the crew, and to share the same as the steward. Decrees accordingly.

THE DUPUY DE LOME.

CHARENTE STEAMSHIP CO. v. THE DUPUY DE LOME.

(District Court, E. D. Louisiana. March 28, 1893.)

No. 10,957.

1. SALVAGE—COMPENSATION.

The steamship D. broke her shaft during a heavy gale in the Gulf of Mexico at a point whence she was likely to drift on a dangerous coast. She was taken in tow by the steamship E., which occupied four days in bringing her to port, part of which time the sea was rough, and during which the E., in addition to the other perils consequent upon salving service, also incurred the danger of breaking the blades of her propeller. *Held*, that the E. should have as salvage one twelfth of the aggregate value of both ship and cargo.

2. SAME—DISTRIBUTION.

The saving of the ship being attributable to the exposure and peril of the salving vessel and not of her crew, the sum awarded should be allotted, one sixth to the master and crew, to be apportioned among them according to their respective monthly wages, and five sixths to the vessel.

3. SAME—RIGHTS OF SHIPPER—EFFECT OF BILL OF LADING.

A provision of a bill of lading for part of the cargo of the salving ship, that the ship might "tow and assist vessels in all situations * * * without the same being deemed a deviation," did not make the shipper a joint salvor to the extent of his interest in the cargo jeopardized. A shipper taking such a bill of lading would naturally look to insurance for protection, and cannot be deemed to have turned his contract of affreightment into a salvage expedition. As a consequence, the interest of such a shipper is not to be counted in arriving at the value of the cargo risked to effect the salvage. The *Blaireau*, 2 Cranch, 240, distinguished.

4. SAME—TOWAGE.

The fact that the officers of the E. agreed to "tow" the D. to port did not change the character of the service rendered from salvage to that of towage.

5. SAME—Costs.

The fact that the libelant made no offer to arbitrate did not entitle the claimant to costs, there being no tender either of arbitration or payment for the libelant's services in the claimant's answer. The libelant should pay one twelfth, and the claimant eleven twelfths, of the costs.

In Admiralty. Libel by the Charente Steamship Company against the steamship Dupuy de Lome, her cargo and freight, to recover salvage. Decree for libelant.

J. McConnell & Son, for libelant.

Rouse & Grant for Rousseau, Latour & Co., intervening libelants.
Howe & Prentiss, for claimants.

BILLINGS, District Judge. This is a libel for salvage. On the morning of Sunday, March 22, 1892, the steamship Dupuy de Lome, on a voyage from Antwerp, via Havre, other ports, and Tampico, to New Orleans, became disabled by the breaking of her shaft. She was then in the Gulf of Mexico about 100 miles northeast from Tampico. On the evening of that day she was taken in tow by the libelant's steamer the Engineer, which was also bound for New Orleans. After the accident occurred the captain, who was confined to his bed, had a council of the officers, and a futile effort was made to turn the head of the De Lome westward. Then the sail was taken in. After a second consultation application was made to the steamship Engineer for aid. At the time the Engineer took the De Lome in tow a storm known as a "norther" was exerting its force, the wind blowing from N. N. E. The norther was of about three days' continuance, lasting during a portion of Monday. There was on Sunday a heavy head sea. The sea was agitated, though the waves had no crest, (houleuse.) The De Lome was brought, in charge of the Engineer, to the Southwest pass, where she arrived and was safely anchored on Thursday, the 26th of May. The value of the ship and cargo salvaged was as follows:

The S. S. Dupuy de Lome, say.....	\$265,200
Her cargo	111,000
" freight	3,600
Total value salvaged.....	\$379,800

The value of the salving ship and cargo was as follows:

S. S. Engineer	\$175,000
" cargo.....	68,000

Total value salving ship and cargo.....	\$243,000
From this must be deducted the portion of cargo covered by interveners' bill of lading, viz.....	20,927.40

Leaving total value risked by salving ship at.....\$222,072.60

The salvage services continued for four days, and consisted of rescuing and bringing to port. The danger to the salvaged vessel

was that in a fierce wind with a rough sea she was comparatively helpless, and from the quarter of the wind was liable to drift towards a dangerous point upon the Mexican coast and there be stranded, or to founder in the open sea. The danger to the salving vessel was that which attends any vessel which, not made for drawing another vessel, is attempting to draw one by day and by night for the period of four days, during a portion of which time the vessels were in an ugly sea. There was another risk arising from the danger of fracture of the blades of the propeller of the Engineer. They were of cast iron, and this danger came from the liability of the iron chain, in case it should become slack, coming in contact with these cast-iron blades and breaking them, which, since they were of cast iron, was quite possible in such a sea, and during a four-days connection between the two vessels. If the blades had broken, the Engineer would have been also at the mercy of the elements in the Gulf of Mexico, which is a dangerous water.

The general principle as to quantum of salvage is thus given by Judge Peters in *The La Belle Creole*, 1 Pet. Adm. 42:

"It is not confined to a mere quantum meruerunt as to the person saving, but is expanded so as to comprehend a reward for the rescue of life and property, labor and danger in the undertaking, as well as a premium operating as an inducement to similar exertions."

It must be borne in mind that this is not a case of river or harbor salvage, but the case of a salving at sea, where the full force of the doctrine must be applied that the compensation must be a reward of such magnitude as to encourage similar efforts to save property situated far from a safe harbor, and where the danger is of total submerging or of being wrecked. Salvage hardly ever exceeds one half of the value of the property saved. This is in case of derelict property. From that rate it comes down to a small percentage or a sum in round numbers. Judge Conkling (speaking in 1857) in his treatise on Admiralty, at page 362, says:

"In cases other than derelict, and which are not characterized by very extraordinary features, the amount of salvage allowed may be said to have fluctuated between one eighth and one half, and it may be added that one third seems to have been the amount most frequently adjudged."

The reference in support of this statement is to Judge Story in *The Emulous*, 1 Sum. 207, 213, and the reports of cases determined in admiralty in England and in the United States, *passim*.

It seems to me that, considering the danger to the disabled ship and the protracted danger to the libellant's vessel, an award of one twelfth of the value saved would be just. The property saved amounted in value to \$379,800. One twelfth of this would amount to \$31,650. For this amount I think there should be a decree, with interest from judicial demand.

Next, as to the division of the salvage: As between the vessel and crew the ratio of salvage or its division depends largely upon whether the rescue was owing substantially to the efforts and peril of the men, or the exposure to danger of the ship. In this case I think it was to a large extent the latter, and that, when it is

considered that the ship was a steamship, as between the vessel and crew, five sixths of the salvage should go to the vessel, and one sixth to the crew, including the master; the one sixth to be apportioned among them according to their respective monthly wages.

As to the question whether the owner of the 737 packages of coffee constituting a portion of the cargo of the Engineer is entitled to share in the salvage: The claim of the freighter is placed upon the fact that the bill of lading contains this clause:

"The ship owners reserve to themselves liberty for the steamers to sail with or without pilots, to tow and assist vessels in all situations, to proceed to the ports stated in this bill of lading via any other port or ports, in any order or rotation, whether in or out of the customary or advertised route, without the same being deemed a deviation."

It is urged that this clause makes the case parallel to that of *The Blaireau*, 2 Cranch, 240, where the shipper, through his partner, being on board, assented to the deviation. It seems to me that the cases, when closely analyzed, are distinguishable. Whereas, in the case of *The Blaireau*, the freighter had, before the goods were laden, made his contract of affreightment, in accordance with which there could be no deviation without the ship being responsible for any loss resulting to his cargo therefrom, and afterwards, being on board during the voyage, consented to the stoppage and deviation for the purpose of rendering salvage services, he released the ship from an existing contract for which a consideration had been agreed, to wit, a specified freight, and, having no opportunity to insure, it was held to be the fair intendment of the parties that he should become a joint salvor and share ratably in the salvage. In this case the contract of affreightment contains the stipulation that the ship may assist vessels in distress, i. e. may render salvage service. The contract of carriage, by its original terms and vigor, exempted the ship from responsibility arising from deviation for salvage purposes. The consideration for the carriage was based upon, and the opportunity to obtain insurance afforded in accordance with, a contract of carriage containing this exemption. With such a stipulation in the bill of lading, do the freighter and the ship by fair intendment agree that, if salvage service is rendered, the cargo shall share in the salvage, or that, so far as relates to salvage, the cargo shall not be counted as risked by the master or the ship? Does this stipulation exempting the ship from responsibility imply an agreement that the shipper, in case of deviation for salvage, shall have his indemnity in a proportionate participation in the salvage or in insurance elsewhere? The question means this: Does the freighter become more than a shipper, and does he also embark in a salvage enterprise, and seek in that for the insurance which, without the exemption, the obligation of the vessel would have furnished, or does the shipper permit the salvage service, agree that the cargo should not be counted as risked by the vessel, and that he will look for his indemnity to other insurance? It seems to me the implied understanding between shipper and ship, when the bill of lading contains such a provision, must be

the latter. Judge Conkling, in his treatise on Admiralty, seems to make such a distinction, for at paragraph 367 he says:

"The freighter of the salvor ship is not entitled to salvage unless, being on board at the time of the salvage enterprise, he consented to it, and discharged the owner from the responsibility incurred by deviating from the voyage."

In the case of *The Blaireau* the implication was held to be that the shipper, being present on board, exempted the vessel that he might run his own risk and become a salvor. In this case the implication is that in advance of the voyage the shipper exempted the ship, not that he might become a salvor, but that he might pay freight accordingly, and seek his indemnity by other insurance. The clause in the bill of lading in question seems to be a commercial adoption pro tanto of the suggestion of Judge Peters in *The Cato*, 1 Pet. Adm. 65, where he says:

"It ought to be settled by the general consent of all merchants, in whatever capacity they find themselves, that these exertions to save life or property should incur no loss to the salvors."

I have thus far considered this question with reference to the natural inferences which follow from the circumstances of the case. The evidence shows that in this case such was the understanding, for the bill of lading shows that the coffee thus billed was insured for \$24,000,—more than its full value, that being \$20,927.40.

In support of the conclusion to which I have arrived is the fact that in England never has the cargo of the salving ship shared in the salvage, and *The Blaireau* is the solitary case in the courts of admiralty of the United States where such a participation has been allowed to any cargo owner. It does not appear how generally or how long bills of lading containing this reservation have been used, but it does appear that they are the ordinary bills of lading of this line of steamers, for this reservation is for all the steamers of the line. Justice Washington, in *The Cora*, 2 Wash. C. C. 86, says as follows:

"It is unreasonable to suppose that, in the multitude of cases which were cited at the bar, some of the saving vessels should not have had cargoes on freight; and yet in not one, except that of *The Blaireau*, does it appear that even the claim of a freighter was interposed. This is certainly strong evidence of the general understanding of legal and commercial men as to the rights of such a claimant."

Justice Story, in *The Nathaniel Hooper*, 3 Sum. 580, calls attention to the same fact, as follows:

"In the first place, although the case must be of frequent occurrence in suits for salvage, yet it does not appear that any such general claim has ever been allowed in practice or by courts of justice. The omission to make any such general claim, under such circumstances, cannot but be very significant, and expressive of the general sense of the community."

It seems to me, therefore, that the claim of the shipper of the coffee must be rejected, and his intervention dismissed. It follows, also, that, in the determination of the value of the cargo risked by the salving vessel with a view of fixing the rate or amount of sal-

vage, that portion of the cargo covered by the interveners' bill of lading must be excluded.

It is urged by the answer of the claimant that by agreement of the parties what was done was characterized as towage. Lieut. Laretsche, the officer of the *De Lome* who acted for that vessel, and the captain of the *Engineer*, who acted for the latter, do not differ as to what was said on this subject. It was that the *Engineer* should tow the *De Lome* to the mouth of the Mississippi river, and "as for payment the arbitrators will decide that on her arrival there." I do not think that this means anything more than that the *Engineer* should bring the *De Lome*. The words were not selected studiously, nor with a purpose to characterize legally the service. Salvage may be rendered by towage as well as by any other act.

It is further urged that there was no offer on the part of the libellant of arbitration, but that the suit was instituted immediately upon the arrival of the *De Lome*, or before any opportunity was given the claimant for settlement. But no tender either of arbitration or of money for the libellant's services was made in the claimant's answer. Strictly the salvor may retain possession of the salvaged property till he institutes his suit, and delivers it over to the admiralty court. On the whole, it seems to me that the ordinary rule as to costs should be observed, the libellant bearing one twelfth thereof, and the claimant eleven twelfths; the ordinary rule in salvage being that the costs are to be paid out of the property saved. *The Nathaniel Hooper*, 3 Sum. 542, 582.

THE CITY OF NORWALK.¹

THE TRANSFER NO. 4 AND THE CAR-FLOAT NO. 16.

MCCULLOUGH v. NEW YORK & N. STEAMBOAT CO. et al.

NEW YORK & N. STEAMBOAT CO. v. THE TRANSFER NO. 4 et al.

(District Court, S. D. New York. March 27, 1893.)

1. CONSTITUTIONAL LAW—MARITIME LEGISLATION—STATE STATUTES—MUNICIPAL LAW.

The law administered in the admiralty courts of this country embraces not merely what is peculiar to the maritime law, but also much of the municipal local law, derived from the constituted order of the state, and all competent state and national legislation. What is peculiar to the maritime law, or that which by its interstate or international relations would be incompatible with diverse state legislation, can be changed by congress alone, which, by implication, has the general power of legislation on the maritime law. This does not exclude state legislation upon maritime subjects of a local nature, nor legislation under the police power for the preservation of life or health, not incompatible with interstate and international interests, in the absence of legislation by congress. A state statute giving damages for death by negligence, as applied to a negligent collision on navigable waters within the state, does not infringe those conditions, and is valid.

¹Reported by E. G. Benedict, Esq., of the New York bar.

2. ADMIRALTY—ACTION FOR DEATH—STATE STATUTE.

An action to recover such damages is for a tort which by its nature and locality is a maritime tort, and as such is within the ancient jurisdiction of this court, and equally so whether the right of action is given by state or by federal legislation. Though no lien is raised by implication, the statutory right may be enforced by an admiralty proceeding in personam. The grounds of action are not statutory, but only the right to a remedy, which it is competent for the state to enact in the absence of legislation by congress, and which, under the provisions of the limited liability acts, (Rev. St. U. S. §§ 4283-4285,) as interpreted by the supreme court, it is incumbent on the district court to recognize and enforce.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Such a suit is subject to the conditions of the state statute. Contributory negligence of the deceased will, therefore, bar recovery in this court, as in the state court.

4. NEGLIGENCE—SEAMAN—SUIT AGAINST HIS VESSEL—FELLOW SERVANT.

A seaman, as fellow servant, cannot recover against his own ship for damages occasioned by the negligence of any of the ship's company in the details of navigation, the owners being in no personal fault.

5. COLLISION—STEAM VESSELS MEETING—INSPECTORS' RULES.

A tug, with a car float alongside, bound for the Harlem river out of the channel of the East river between Blackwell's island and the Long Island shore, and a steamboat coming down between Flood rock and Hallett's point, collided by night at a point from one to three hundred feet above the northerly end of Blackwell's island. The vessels saw each other when 700 yards apart, being then nearly head and head. Each mistook the other's intention. The lights were changing, and the evidence conflicting, but neither gave any signal to the other, as required by the inspectors' rules. *Held* that, without considering any of the other faults alleged, both steam vessels were in fault for their failure to signal, and that the locality made signals more than usually imperative; but that no fault was shown in the car float.

6. SAME—DEATH OF SEAMAN—CONTRIBUTORY NEGLIGENCE—LIMIT OF RECOVERY.

The engineer of the steamboat jumped for the car float at the time of the collision, but fell into the water, and was drowned. On suit by his administratrix against the owners of both vessels, it was claimed that such attempt to jump was negligence contributory to the accident, and that libelant could not recover. *Held*, that if such attempt to jump was an error, it was, under the circumstances, analogous to an error in extremis, for which he was not to blame. Both steam vessels having been found in fault for the collision, *held*, that libelant could not recover from the vessel on which her intestate had been employed, by reason of his relation of fellow servant with those whose negligence had caused the collision; that the liability of the other vessel in collision was not thereby to be increased, but was limited to one half the damages.

In Admiralty. Libel by Mary McCullough, administratrix of Patrick McCullough, against the owners of two vessels, alleging negligent collision by which the intestate lost his life. Libel by owner of one of the vessels to recover damages for collision. Decrees for libelants.

Hyland & Zabriskie, for administratrix.

Owen, Gray & Sturgis, for New York & N. Steamboat Co.

Page & Taft and Wheeler H. Peckham, for New York, N. H. & H. R. R. Co. and for Transfer No. 4 and Car Float No. 16.

BROWN, District Judge. At about half past 3 o'clock in the morning of March 30, 1892, the steam tug Transfer No. 4, having a

railroad car float, 225 feet long, in tow on her starboard side, and projecting about 40 feet ahead of her, was proceeding up the East river against the ebb tide through the easterly channel between Blackwell's island and the Long Island shore, at the rate of about 2 knots per hour by land. She was bound for the New Haven docks in the Harlem river. The weather was fair; the night starlight, but dark. When near the upper end of Blackwell's island she shaped her course to cross to the westward between the upper end of Blackwell's island and Mill rock, and so into the Harlem river. When from one to three hundred feet above the northerly point of Blackwell's island, the forward end of her float came in collision with the steam propeller City of Norwalk, about 125 feet long, which had come down through the easterly channel between Flood rock and Hallett's point, and was making for the westerly channel between Blackwell's island and the New York shore. The square bow of the float struck the port side of the City of Norwalk, aft of her forward gangway, at an angle of about six points. A considerable part of the side of the City of Norwalk was carried away, and part of her cargo was knocked overboard, or shifted, so that she immediately took a strong list to starboard. She rapidly filled with water, and was soon after beached a short distance below on the Blackwell's Island shore. The fireman and one of the deck hands in alarm jumped from the upper deck of the City of Norwalk to the bow of the float. The engineer, Patrick McCullough, husband of the libelant administratrix, was seen a few moments after to jump for the float from the rail of the steamer on the main deck; but failing to reach the float, he fell into the water and was drowned. The libelant sued under the state statute to recover damages for his death, as having been caused by the negligence of all the vessels. The steamboat company also filed its libel *in rem* against the Transfer No. 4 and the float, for the damages sustained by the City of Norwalk.

The tide was ebb at the time of the collision, and being about an hour before low water, the current was probably not less than 4 knots. The City of Norwalk, which did not slacken her full speed of about 8 knots, was, therefore, coming down at the rate of about 12 knots by land, and was making, therefore, about six times the speed of the tug and tow by land. When the former was abreast of Flood rock, she was about 550 yards from the place of collision, while the latter could not then have been more than about 90 yards from it. The lights of all the boats were properly burning.

1. In those positions, if the vessels had followed the usual courses, the pilot of the Norwalk should have seen the green light of the tug, and the tug should have seen the red light of the City of Norwalk. The witnesses on both boats, however, testify in the most positive manner that the lights seen at that time were precisely the reverse; the steamer showing only her green light, and the tug, her red light. Accordingly, the pilot of the tug testifies that he supposed the steamer was going down the easterly channel between Blackwell's island and the Long Island shore; while the pilot of the steamer testifies that he supposed the tug was intending to keep up by the As-

toria shore, to go between Flood rock and Hallett's point. Those are the reasons stated by each for not giving the signals required by the inspectors' rules. Each testifies that subsequently the other gave a sheer across his bow, and thus brought about collision. A whistle was given by the City of Norwalk just before collision. But the evidence shows that the boats were then so near that the signal was of no use; and on account of their nearness, also, the Norwalk did not reverse, but kept on at full speed, as offering the only chance of escape.

Each, also, contradicts the other as to the positions of the boats respectively at the time they were first seen. But I do not find it necessary to determine the precise positions of either vessel in the channel, or the lights which at different times might have been exhibited to each other; for both were swinging more or less, and different lights were no doubt exposed to view at different times during a short interval. Independently of these controverted points, there is sufficient to charge both the steamer and the tug with fault; because it was a misunderstanding by each as to the supposed intent of the other, that caused the collision; and this misunderstanding could not possibly have happened had either given the signals required by the inspectors' rules.

The vessels were visible to each other, and were probably seen by each other, when at least 700 yards apart, the steamer being then a little above Flood rock, and the tug a little below the Blackwell's Island light. As respects the line of the channel, the two were very nearly ahead of each other, although from some swinging by each, they may each have borne somewhat on the other's bow. The inspectors' rules imperatively required a signal to be given; and the circumstances were such as made the omission of signals in this case specially dangerous and reprehensible. The tug was recognized as having a railroad float in tow, bound for the Harlem river. Even if the custom had been fixed and invariable for such tows to proceed up the easterly channel between Flood rock and Hallett's point, the rule would have still required signals to be given. But there was no such invariable custom, and the frequent practice of going to the southward of Little Mill rock in the nighttime made it at least uncertain which course the tug and float would pursue. In passing around curves and through so swift a current, there was from the first the greatest danger of collision unless a common understanding was had. Neither had any right in such a situation as Hell Gate to trust to mere inference derived from the light seen, or the supposed position at a particular moment. The Transfer No. 5, 49 Fed. Rep. 398. The rules as to signals are designed for the purpose of securing a common understanding and of preventing just such mistakes as the present. The Connecticut, 103 U. S. 710, 713; The Ice King, 52 Fed. Rep. 894, and cases there cited. The duty to give such a signal rested upon each alike, and both are alike to blame for the omission. Without considering, therefore, any other faults alleged against Transfer No. 4, and the City of Norwalk, those vessels must both be held liable; but not the car float, as no fault in her is proved.

The New York & Norwalk Steamboat Company is, therefore, entitled upon its libel to a decree for one half its damages and costs.

2. The other libel is brought by the administratrix, for damages for the death of her husband, the engineer of the City of Norwalk. It has been held in this district and circuit in a number of cases that a seaman cannot recover against his own ship for damages occasioned by the negligence of any of the ship's company in the details of navigation, such as the omission of proper signals, as in the present case, the owners being in no personal fault. Even the officers, in the performance of the ordinary duties of navigation do not stand as the representative, or *alter ego*, of the owners as respects the other employes on board. As respects such details, all are engaged in one common employment, viz. the navigation of the ship, in their several grades, and each person so employed takes the risk of any negligence of the other in the common employment. The Queen, 40 Fed. Rep. 694; The Frank and Willie, 45 Fed. Rep. 494, and cases there cited; Quinn v. Lighterage Co., 23 Fed. Rep. 363. And such in effect is the decision of the supreme court in the case of Steamship Co. v. Merchant, 133 U. S. 375, 378, 10 Sup. Ct. Rep. 397. See, also, Hedley v. Steamship Co., [1892] 1 Q. B. 58. The deceased being, therefore, disabled from recovering anything from his own ship by reason of his special relations to her as a fellow servant, as respects her share in causing the collision, must be limited to a recovery of only one half his damage against Transfer No. 4; since the latter cannot be prejudiced, nor her liability be increased, by reason of that disability. The Queen, *supra*.

3. It is further contended that the administratrix can recover nothing from Transfer No. 4, because the deceased lost his life through his own contributing negligence in attempting to jump from the City of Norwalk to the float, when the circumstances made such an attempt dangerous. The right of action conferred by the statute is upon condition that "the deceased, if living, might himself have maintained an action" for his damages. By the law of this state the plaintiff's contributory negligence bars his recovery; and such contributing negligence, if found, must, therefore, bar any recovery by the administratrix in an action in this court based upon the state statute. The Harrisburg, 119 U. S. 199, 214, 7 Sup. Ct. Rep. 140; The A. W. Thompson, 39 Fed. Rep. 115. I am of the opinion, however, that the attempt of the deceased to jump to the float should not be treated as a legal fault, though a mistake, and an error of judgment. He had doubtless seen one or both of his shipmates jump just before. Coming suddenly from the engine room immediately upon the crash of the collision, when a considerable part of the side of the steamer had been carried away, and in the alarm attending such a catastrophe in the night-time, there was no time nor opportunity for the exercise of deliberate judgment, and his act should, I think, be treated as errors *in extremis* are treated, viz. as a mistake made under the apprehension of immediate danger, for which those who wrongfully

brought about the situation, and not himself, should be held to blame.

4. It is further contended that there can be no recovery for loss of life in this court, because there is no liability therefor under the general maritime law of this country, (The Harrisburg, 119 U. S. 199, 7 Sup. Ct. Rep. 140; The Alaska, 130 U. S. 201, 9 Sup. Ct. Rep. 461;) and because, as it is said, it is not competent for state legislation (1) to change the law in maritime cases, or (2) to extend the jurisdiction of a court of admiralty so as to authorize it to enforce a new and purely statutory cause of action.

The question raised is doubtless a most important one. It has not been directly adjudicated in the supreme court. In the case of *The Corsair*, 145 U. S. 335, 12 Sup. Ct. Rep. 949, it was held that a suit *in rem* would not lie where the state statute gave no lien, thereby confirming the decision of Judge Benedict in *The Sylvan Glen*, 9 Fed. Rep. 335, and that of Judge Butler in *The North Cambria*, 40 Fed. Rep. 655. In his opinion in the latter case, Judge Butler observes, that if the state statute indicated a purpose to create such a lien, he would "hold the statute to be inoperative in this respect." "The states," he says, "have no power to interfere with the admiralty system of laws; they can add nothing to it, nor take anything from it. The subject lies within the exclusive domain of congress." Judge Hughes, also, in the case of *The Manhasset*, 18 Fed. Rep. 918, says, that "the state cannot create a maritime right or confer jurisdiction, in any particular, upon an admiralty court," (page 923;) that the instances to the contrary, such as state statutes giving liens for supplies to domestic vessels, and actions for half pilotage where no services are rendered, are anomalous exceptions; and that "rights created by state statute, unless identical with maritime rights, are *not maritime*," (page 927.) And in the recent case of *Ingebregtsen v. Nord Deutscher Lloyd S. S. Co.*, before Judge Green in the district of New Jersey, an action *in personam*, which, from the record submitted to me, seems to be in all respects analogous to this, was dismissed, on exceptions, for want of jurisdiction. No written opinion was delivered. This is the only case I have found in which an action *in personam* in such a case as this has been dismissed on that ground.

There have been a number of cases, on the other hand, in which the validity of such state statutes and the jurisdiction of a court of admiralty to enforce them have been considered, and upheld. Among these are the cases of *Holmes v. Railway Co.*, 5 Fed. Rep. 75, and *The Oregon*, 45 Fed. Rep. 62, 77, before Judge Deady; *The Garland*, 5 Fed. Rep. 924, 927, before the present Mr. Justice Brown; *In re Long Island, etc., Transp. Co.*, Id. 599, 608, 609, in this court before Judge Choate; *The Sylvan Glen*, 9 Fed. Rep. 336, before Judge Benedict; and *The St. Nicholas*, 49 Fed. Rep. 671, 677-679, before Judge Speer.

Besides these, there have been many other cases in which the right conferred by the state statutes to damages for death caused by negligence has been enforced in admiralty without question; in

this circuit, among other cases, that of *Felty v. Steamship Co.*, 29 Fed. Rep. 332, affirmed on appeal by Mr. Justice Blatchford, 32 Fed. Rep. 112, where, as I am informed, the point was argued, but not considered in the opinion; and in *Daly v. Railroad Co.*, 44 Fed. Rep. 693, affirmed, on this point, in the court of appeal, 49 Fed. Rep. 956, 959, 1 C. C. A. 483, 486. And in the supreme court, although the question has been several times referred to, without adjudication, yet in the last case on the general subject, (*The Corsair*, 145 U. S. 335, 347, 12 Sup. Ct. Rep. 949,) both the validity of such state legislation, and the jurisdiction of the district courts to enforce it by libel *in personam* seem directly affirmed. Mr. Justice Brown, in delivering the opinion of the court, says:

"If it [the local law] merely gives a right of action *in personam*, for a cause of action of a maritime nature, *the district court may administer the law by proceedings in personam.*" Page 347, 145 U. S., and page 952, 12 Sup. Ct. Rep.

Mr. Justice Gray, also, sitting in the court of appeal in the subsequent case of *The H. E. Willard*, 52 Fed. Rep. 387, after stating that the admiralty jurisdiction conferred by the constitution cannot be enlarged or restricted by state legislation, says:

"When a right maritime in its nature has been created by the local law, the admiralty courts of the United States may doubtless enforce that right according to their own rules of procedure;" citing *The Corsair*, *supra*, and other cases.

Against the power of state legislation in such matters, the doubts expressed by Mr. Justice Bradley in the opinion in the case of *Butler v. Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. Rep. 612, are cited; in which, after stating that the limited liability act applies to an action brought in a state court under a state statute to recover damages for death caused by negligent navigation within the state limits, he says:

"It might be a much more serious question whether a state law can have force to create a liability in a maritime case at all, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of congress has created such a liability. On this subject we prefer not to express an opinion."

But in the case of *The Corsair*, three years later, the opinion of the supreme court does not continue the expression of such doubts; and what is said, though *obiter*, is plainly in support of the maintenance of such libels *in personam*.

Aside from this expression, however, it seems to me that the previous decisions of the supreme court had substantially covered the case, both as to the competency of the state to create the right, and of a court of admiralty to enforce it.

If it was not within the power of the state "to create such a liability in a maritime case at all," but within the power of congress alone, then clearly the statutes of all the 30 or more states creating such a liability would be void, so far as they relate to deaths in collision cases arising on navigable waters. For all such waters are within "the dominion of the admiralty and maritime jurisdiction," and no action, therefore, in such cases, could be sustained in the state courts any more than in the courts of admiralty. But the validity

of judgments giving damages in the state courts in such cases and the validity of the statutes on which they were founded, have been twice directly and expressly adjudged: First, in *Steamboat Co. v. Chase*, 16 Wall. 522, and afterwards in *Sherlock v. Alling*, 93 U. S. 99. These suits arose on writs of error to judgments in the state courts of Rhode Island and Indiana for deaths in collision cases like the present, based upon similar statutes of those states. In the former case, the validity of the act was attacked as an encroachment on the admiralty and maritime power of congress; in the latter, as an encroachment on the commercial power. In both cases the validity of the statutes was upheld. In the latter, the careful opinion delivered by Mr. Justice Field contains what seems to me a full answer to all objections against the authority of the states to pass statutes of this character. He says:

The act "only declares a general principle respecting the liability of all persons within the jurisdiction of the state for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. * * * But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of congress are silent, and the laws of the state govern. *The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.* In our judgment, the statute of Indiana falls under this class. Until congress, therefore, makes some regulation touching the liability of the parties injured, *we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased; and that, as thus applied, it constitutes no encroachment upon the commercial power of congress.*" Pages 108, 104.

Aside from the grant of power to regulate foreign and interstate commerce, the constitution, it must be remembered, contains no direct grant to congress of legislative power over the maritime law. Its authority upon that subject, over and above the power derived from the commercial clause, though no doubt now firmly established, (*Butler v. Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. Rep. 612; *In re Garnett*, 141 U. S. 1, 14, 11 Sup. Ct. Rep. 840,) rests upon implication only.

The grounds of this implication, briefly stated, are that the constitution, in extending the judicial power to all cases of maritime jurisdiction, presupposes a certain body of maritime law as its necessary attendant; that this law is not only a matter of interstate and international concern, but requires, also, harmony and consistency in its administration, and hence cannot be subject to defeat or impairment by liability to the diverse legislation of numerous

states; and that it cannot be supposed that the states, in parting with all control over the judicial administration of maritime causes, intended to reserve to themselves a general legislative power over the same subject; and that congress must, therefore, be the only body competent to make any needed changes in the general rules of the maritime law.

This view, however, does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority, and which have always been thus cared for; nor does it exclude general legislation by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs; provided that such legislation does not contravene any acts of congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. The long-established doctrine in the supreme court has been that in this field of "border legislation," state laws are valid until congress interposes, and thereby excludes further state legislation. *The Lottawanna*, 21 Wall. 558, 581; *Cooley v. Port Wardens*, 12 How. 299; *County of Mobile v. Kimball*, 102 U. S. 691, 697-699; *Bowman v. Railroad Co.*, 125 U. S. 507, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 120-122, 10 Sup. Ct. Rep. 681; *Manchester v. Massachusetts*, 139 U. S. 240, 266, 11 Sup. Ct. Rep. 559; *Ficklen v. Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. Rep. 810. There is no reason why local state legislation should be deemed any more restricted by the implied power of congress over maritime legislation, than it is by the express grant of the commercial power. That the rule should be the same on each subject was intimated by Chief Justice Marshall in *U. S. v. Bevans*, 3 Wheat. 385, and by Mr. Justice Curtis in *Smith v. State of Maryland*, 18 How. 71, 76. The subject has been but little discussed, as compared with the frequent review of the commercial power of congress and its limitations.

The instances, however, in which *new legal rights*, created by state authority in maritime affairs, have been recognized and enforced, are numerous and diverse. They embrace—First, liens for supplies to domestic vessels, (*The Lottawanna*, 21 Wall. 558;) second, liens for *master's wages*, (*The Mary Gratwick*, 2 Sawy. 342, affirmed by Mr. Justice Field; *The Louis Olsen*, 52 Fed. Rep. 652; *The J. E. Rumbell*, [March 6, 1893,] 13 Sup. Ct. Rep. 498;) third, liens for damages for *refusing to load* under a charter, (*The J. F. Warner*, 22 Fed. Rep. 342, by Mr. Justice Brown;) fourth, liens for *double wharfage*, (*The Virginia Rulon*, 13 Blatchf. 519;) fifth, actions for half pilotage where a pilot's services were *refused*, (*Ex parte McNiel*, 13 Wall. 236, and *Ex parte Hagar*, 104 U. S. 520, re-affirming *Cooley v. Port Wardens*, supra;) sixth, liens for expenses of seamen at a quarantine hospital, (*The Wensleydale*, 41 Fed. Rep. 829;) seventh, regulations as to *rivers, harbors, and wharves*, (*County of Mobile v. Kimball*, supra; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. Rep. 185;

Transportation Co. v. Parkersburg, 107 U. S. 691, 701-704, 2 Sup. Ct. Rep. 732; Packet Co. v. Keokuk, 95 U. S. 80; Packet Co. v. Aiken, 121 U. S. 444, 7 Sup. Ct. Rep. 907; Steamship Co. v. Pennsylvania, 122 U. S. 326, 346, 7 Sup. Ct. Rep. 1118; eighth, *penalties* imposed for the protection of *fisheries*, (Manchester v. Massachusetts, supra; Smith v. State of Maryland, 18 How. 71;) ninth, *quarantine* laws, (Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 6 Sup. Ct. Rep. 1114;) tenth, regulating the *charges* of *floating elevators*, (Budd v. New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468;) eleventh, establishing and regulating *ferries*, (Gibbons v. Ogden, 9 Wheat. 1, 203; Conway v. Taylor, 1 Black, 603; Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 365, 2 Sup. Ct. Rep. 257; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 214-217, 5 Sup. Ct. Rep. 826.)

Besides these new rights created, of so diverse a character, there are many other local regulations established under state authority, concerning the navigation of rivers and harbors, anchorage grounds, port wardens, navigation about piers and slips, and wharf and ferry privileges, which give birth to many specific rights that are constantly recognized and enforced in the trial of admiralty causes. These acts rest either upon the police power of the states, or on the local nature of the subject, and the absence of any legislation by congress on the same matter. Gloucester Ferry Co. v. Pennsylvania, ut supra. They show that over quite a wide range of local interests, state legislation is competent to deal with purely maritime subjects, and to create rights and duties which must be recognized in admiralty causes, though they may not change any of the characteristic principles of the maritime law.

Still further, it must be borne in mind that the maritime law is not in itself a complete and perfect system. In all maritime courts there is a considerable body of municipal law that underlies the maritime as the basis of its administration. Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns, maritime transactions. The general body of the law as regards the ordinary, fundamental rights of persons and property, whether on land or sea, is, as observed by Mr. Justice Field in the passage above quoted, derived from the constituted order of the state, i. e. from the municipal law, which courts of admiralty to a considerable extent must necessarily adopt and follow, subject only to the modifications which the special characteristics of the law of the sea impose on maritime subjects. These general rights and regulations of persons and property are subject to the control of the state and may be changed as the state sees fit, if they are not regulated by congress and do not trench upon its exclusive authority. The administration of the law in the maritime courts of different countries, therefore, though it might be the same in all that is peculiar to the maritime law, might in other respects differ widely, through the differences in the municipal law which in part enters into the adjudication of maritime causes.

It was upon the recognition of this principle alone, as I understand, that in the case of The Harrisburg, 119 U. S. 199, 213, 7 Sup.

Ct. Rep. 140, it was decided that no action could be maintained in a court of admiralty of this country for loss of life, aside from statutory authority; namely, because there is no rule on this subject belonging specially to the maritime law as such. "It [the maritime law] leaves the matter untouched." Page 213, 119 U. S., and page 146, 7 Sup. Ct. Rep. And since the maritime courts in each country follow their own municipal law as regards giving damages for death; and inasmuch as by the common law of this country such a cause of action does not survive,—the latter rule must, therefore, obtain in our courts of admiralty. In other words, it is the municipal law that on such a point determines the law applicable in a court of admiralty.

There seem, therefore, to be at least three classes of subjects, (none of them affecting, however, what is peculiar to the general maritime law, or touching its international or interstate relations,) in which state legislation is competent to affect the rights of parties in courts of admiralty, in the absence of legislation by congress, viz.: (1) In the establishment of the general rights of persons and property within the state limits; (2) in the exercise of the police power; (3) in certain local regulations of a maritime nature.

The statute of this state which authorizes a recovery of "the pecuniary damages," "in behalf of a widow, husband, children or next of kin," falls within each of the above classes. (1) It is a general law of personal rights, not specially directed to commerce or navigation, but applying alike on sea or shore; (2) it is within the police power; for it is "a statute intended to protect life," (*Huntington v. Attrill*, 146 U. S. 657, 675, 13 Sup. Ct. Rep. 224,) through one of the most effectual of all sanctions, viz. by imposing on the offender a liability to pay a pecuniary indemnity; while in the interest of the public, it also tends to avert the dependency or pauperism of the survivors by shifting the burden of their support, in part at least, from the community to the authors of the wrong; (3) it is local in its scope and interferes in no way with any needful uniformity in the general law of the seas, or with international or interstate interests. Its validity, therefore, as applied to maritime affairs within the state limits, seems to me clear.

5. *Jurisdiction*. This court has jurisdiction of the cause, from the nature of the subject, and from the place where, and the causes out of which, the claim arises. The claim is for damages growing out of a tortious collision, through faults of navigation, arising on navigable waters of the United States. That is a purely maritime transaction. The case is, therefore, a maritime case; and as such, it is within the original field of the jurisdiction of this court, as established under the constitution and the judiciary act. The court has authority, therefore, to hear and to determine the cause, whether the law applicable to it entitles the libellant to any damages or not. The latter question is wholly different from the question of the jurisdiction of the court. If the state statute has force to affect this transaction as a maritime case, then this court, in hearing the cause, must give effect to the state law. If the

state act is not competent and has no such force, then this court must disregard it. In either case, the court has jurisdiction to hear and determine the cause on its merits as a maritime cause, and is bound to apply whatever law is operative upon it.

This was the precise point adjudicated in *Ex parte Gordon*, 104 U. S. 515, and in *Ex parte Ferry Co.*, Id. 519, where a writ of prohibition was denied in each cause on the sole ground that the case was by its nature one that the district court had authority to hear and determine. It would, indeed, be a singular anomaly in our jurisprudence if, under state legislation, the state courts could entertain suits that the admiralty courts could not entertain in collision causes, which from time immemorial have been among the characteristic subjects of maritime jurisdiction.

It is urged that the death claim is purely statutory, and *not maritime*, and hence not cognizable in this court; that state legislation cannot create a new maritime cause of action; and that to execute state statutes would be to extend the jurisdiction of the court, which, it is conceded, state legislation cannot do. But these objections seem to me to be all virtually covered by what has just been said; and to have been repeatedly overruled in substance by the supreme court.

The state statute does not create the *cause* of action. It does, indeed, create a new *right*, and liability; but it does not create a single one of the elements that make up the fundamental cause of action, that is, the essential grounds of the demand. All these elements exist independently of the statute, and are not in the least affected by it. It no more creates the wrong, or the damage, than it creates the negligence or the death; nor does it, as in the pilotage and double wharfage cases, add anything to the damages sustained. It authorizes no recovery except for "the pecuniary damages" already existing. It is apparent, therefore, that, as suggested by Mr. Justice Clifford in *Steamboat Co. v. Chase*, 16 Wall. 532, the statute does no more than "take the case out of the operation of the common-law maxim that an action for death dies with the person."

The effect of the statute is to attach a new legal right and responsibility to a purely maritime transaction. But that does not make the case in its essential nature any the less a *maritime* case. Nor does the enforcement of the statute extend the jurisdiction of the court, any more than the giving of damages for the first time for injuries to a cargo of dynamite or petroleum would be an extension of jurisdiction because those articles were new to commerce. *Ex parte McNeil*, 13 Wall. 236, 243; *The Oregon*, 45 Fed. Rep. 62, 77; *Dennick v. Railroad Co.*, 103 U. S. 11, 17-18, by Mr. Justice Miller.

If the mere fact that the rights or responsibilities sought to be enforced were created by new legislation, made actions brought to enforce those rights no longer truly maritime, but purely statutory, in the sense of the objection here considered, and therefore outside of the jurisdiction of this court, then all rights based on any new legislation, either by the states or by congress in maritime

affairs, would be equally outside of the jurisdiction of this court to enforce; since it is not within the power of congress any more than of the states, to extend the admiralty jurisdiction of this court to matters not really maritime.

On that theory the law of our admiralty courts would be unalterable, and statutes such as those limiting the liability of shipowners, would not be enforceable in this court. The objection is plainly mistaken. Mr. Justice Bradley, in referring to this point in the case of *The Lottawanna*, 21 Wall. 576, says:

"The law of the admiralty courts depends upon what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it; * * * it cannot be supposed that the framers of the constitution contemplated that the law should forever remain unalterable."

The principle, indeed, is now well settled, that the federal courts may enforce rights newly created either by the states or by congress, which by reason of their subject or the relations of the parties, fall within any branch of the federal jurisdiction; and that such jurisdiction cannot be restrained even by the express enactment of the state statute. *Railway Co. v. Whitton*, 13 Wall. 270, 286; *Ellis v. Davis*, 109 U. S. 485, 497 et seq., 3 Sup. Ct. Rep. 327; *Providence, etc., Co. v. Hill Manuf'g Co.*, 109 U. S. 589, 3 Sup. Ct. Rep. 379, 617; *Dennick v. Railroad Co.*, 103 U. S. 11, 17-20; and see cases collected in 1 *Fost. Fed. Prac.* § 7. Maritime legislation by congress and by the states has accordingly been frequent and copious; and in the great majority of current admiralty causes, the rights and obligations of the parties are either created or largely modified by national or state legislation, enacted since the adoption of the federal constitution.

The amendment of the law applicable to a maritime case, or the creation of new rights or responsibilities in maritime affairs, by any competent legislation, state or national, therefore, does not make the claim under it any the less maritime; nor withdraw the case from the jurisdiction of this court. The question really returns to the competency of state legislation to affect the law applicable to a maritime transaction; and that such legislation is competent, under certain narrow limits and restrictions which this statute does not transgress, is, it seems to me, sufficiently clear for the reasons above stated.

The objection that the case is not a *marine tort*, but only a statutory one, is of the same nature as the objection last considered. Before the statute, the case was *damnum absque injuria*; by the statute, it became at once a tort in the full legal sense, and a *marine tort* by reason of its place, its nature, and its circumstances, within the definition given by Mr. Justice Blatchford in *Leathers v. Blessing*, 105 U. S. 626, 630, and as stated also in previous decisions. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 394.

It may be said that if the case under the statute constituted a *marine tort*, a *lien* by implication would have been allowed by the supreme court in the decision of *The Corsair*, upon the analogy of

liens allowed in other cases of marine torts, though the state statute gave no express lien; and that the refusal by the supreme court to recognize any implied lien is, therefore, by implication, a decision that the case is not one of a marine tort. But there is no general rule of the maritime law that attaches a lien or privilege to personal torts. Rule 16 in admiralty provides, on the contrary, that for "assault or beating on the high seas, the suit shall be *in personam* only." And in the maritime codes of all the principal maritime countries for more than 200 years at least, no lien or privilege for pure torts, or for damages arising from collision, except as regards injuries to the ship's own cargo involving a breach of her contractual relation, has ever been allowed, until within a recent period in England and this country, and in a few recent codes, which have allowed in collision cases a privilege of a very low rank. See *The Young America*, 30 Fed. Rep. 799; *The Gratitude*, 42 Fed. Rep. 299. The establishment of a lien in England for collision damages to property, (*The Bold Buccleugh*, 7 Moore, P. C. 267, apparently arose through a misinterpretation of the meaning of the ancient practice of the proceeding *in rem*, which, as pointed out by President Jeune in *The Dictator*, [1892] Prob. Div. 304, did not involve the existence of any lien or privilege on the ship, in the sense in which we now understand it; but was only a means of compelling an appearance, and included a special citation to the master, as in the continental practice. 2 Brown, Civil Law, 397; *The Sloop Merchant*, Abb. Adm. 5; Mar. Col. (2d Ed.) 73. Precisely how or when the practice arose of dropping the personal defendant in suits in the English admiralty, is not now determinable; but it was during the long controversy between the admiralty and common-law courts; and it was probably a mere device of the admiralty courts to avoid the persecution of prohibitions, which were not issued where no personal judgment was asked or rendered. Zouch, Adm. 125. Taking the maritime law as a whole, a lien or privilege for personal torts, or even for damages to property, save the ship's own cargo, is the exception and not the rule; and by the recent act of congress, approved February 13, 1893, such liens arising from faults or errors of navigation, after July 1st, may possibly be held to be entirely abolished in this country.

It is evident, however, that the supreme court, in the case of *The Corsair*, did not deem it necessary to consider at all this phase of the case; but chose to look upon the state statute, not as establishing any general principle upon which remedies were to be extended by analogy, but as giving merely a particular remedy, which was to be enforced in the manner, and with the conditions and limitations, provided by the statute. *The Corsair*, 145 U. S. 347, 12 Sup. Ct. Rep. 949; *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. Rep. 140.

That a new right is none the less maritime because based upon state legislation, where the subject-matter is maritime, was necessarily involved in the very recent case of *The J. E. Rumbell*, (in the supreme court, March 6, 1893,) 13 Sup. Ct. Rep. 498. There the priority of a lien, created by the statute of Illinois, for supplies and master's wages, as against a prior recorded mortgage,

has been most elaborately and broadly treated by Mr. Justice Gray. Conceding that neither the lien nor the jurisdiction of the court to enforce it, could be sustained except upon its maritime character, the court repeatedly affirmed, and the decision was based upon this ruling, that the lien, though resting wholly upon the state statute, was "in the nature of a maritime lien," and, therefore, enforceable in the district court and entitled to priority over the previous mortgages; thus settling not only the long-vexed question of the right of priority, but the *maritime nature* of the state lien itself. (The Madrid, 40 Fed. Rep. 677; The Lyndhurst, 48 Fed. Rep. 839, 842; The Samuel Marshall, 49 Fed. Rep. 754, 758, affirmed 54 Fed. Rep. 396, 401.) The court says:

"The contract in each case is maritime; and the lien which the law gives to secure it, is maritime in its nature, and enforced in admiralty by reason of its maritime nature only."

So in the present case, it may be said, that the negligence is maritime, and the right or remedy which the law gives to redress it, is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The difference where the original subject-matter and the essential cause of action are not maritime, is clearly pointed out by Judge Webb in the case of *The H. E. Willard*, 53 Fed. Rep. 599, affirmed 52 Fed. Rep. 387. The recent decisions of the supreme court do not, therefore, warrant the inference that a death claim is not to be treated as a marine tort, and therefore not cognizable in this court; but they appear to me to support the opposite view.

In the case of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140, the libel was dismissed, not because of any lack of jurisdiction, but because of the absence of any act of congress creating the right; and because "the maritime law, as accepted and received by maritime nations generally, *leaves the matter untouched*," and the consequent absence of any distinct rule in the maritime code; and therefore the courts of admiralty, it was held, must take their rule on that subject from the municipal law. From that decision it necessarily follows, that within the sphere in which the municipal law is valid and operative, viz. within the navigable waters of the state, the state law, in the absence of any act of congress, as to the survival of any such right of action, or any distinctively maritime rule applicable to the case, must furnish the rule of law as to the right of recovery. And this in effect is precisely what was said and applied in the case of *The Corsair*.

Finally, it is now settled, that the provisions of the acts of congress limiting liability in matters of navigation, apply to death claims like the present when brought in the state courts; that such claims are within the *language* of section 4283, Rev. St., and that they are *constructively* within sections 4284 and 4285; that such suits in the state courts may, therefore, be enjoined, and the litigation and the adjustment of all such claims transferred to the courts of admiralty. *Butler v. Steamship Co.*, 130 U. S. 527, 551, 9 Sup. Ct. Rep. 612; *Craig v. Insurance Co.*, 141 U. S. 638, 12 Sup. Ct. Rep. 97.

These acts, as thus construed by the highest authority, are alone sufficient to show the will of congress that the district courts shall take cognizance of claims like the present. If such claims are valid, and may be rightfully prosecuted to judgment in the state courts, as the supreme court has repeatedly determined, then the right to prosecute them in the state courts cannot be enjoined by the district courts under the limited liability acts, unless the demands come within the jurisdiction of the district courts; nor unless the latter at the same time take on themselves the recognition and the enforcement of these demands. See *The St. Nicholas*, 49 Fed. Rep. 671, 677. But besides that, inasmuch as these death claims are now held by the supreme court to be by construction within the provisions of section 4284, Rev. St., it follows that such claimants must have the right to the remedy which that section gives; and they may, therefore, at once file a libel in the district court to establish their own claims, and at the same time bring in all other creditors entitled to share in a *pro rata* distribution. *The Scotland*, 105 U. S. 24, 25; *The Dimock and The Alva*, 52 Fed. Rep. 598, 599. Since, therefore, under the provisions of the acts of congress, the recovery of damages for death in maritime cases may be wholly withdrawn from the state courts, by order of the admiralty courts, after the actions are begun in the state courts, or may be prosecuted in the first instance in a court of admiralty for a *pro rata* distribution, citing all claimants to appear, it is evident that a court of admiralty must have jurisdiction over the whole subject, and may award the damages given by the state statute upon a simple libel, as the greater includes the less.

The administratrix is entitled to a decree against the railroad company for \$2,500, with interest and costs; and the steamboat company to a decree for half its damages against *Transfer No. 4*. A reference may be taken therein to compute the amount if not agreed upon.

THE CIRCASSIA.¹

THE DAYLIGHT.

BARROW STEAMSHIP CO. v. THE DAYLIGHT. ARMSTRONG et al.
v. THE CIRCASSIA. FORSTER v. THE DAYLIGHT and THE CIRCASSIA.

(District Court, S. D. New York. April 13, 1893.)

COLLISION—STEAM AND SAIL—OBSCURED LIGHTS—CHANGE OF COURSE IN EXTREMIS A FAULT—STEAMER NOT REVERSING NO FAULT.

A steamer and schooner met by night at sea, the steamer on a course about E., the schooner sailing S. W. The schooner saw the white and red lights of the steamer on her starboard bow some two miles off; but the schooner's fore staysail, as found on conflicting evidence, obscured her green light, so that the steamer saw nothing of the schooner until the ves-

¹Reported by E. G. Benedict, Esq., of the New York bar.
v.55f.no.1—8

sels were within a quarter of a mile of each other. The schooner then showed a torch, and her green light was about the same time seen by the steamer, which stopped her engines and hard a-starboarded, bringing the green light on her starboard bow; but the schooner then ported, and the vessels came together some two or three points from head and head. Held, that the schooner was solely in fault for the collision, her faults consisting in the obscuration of her green light and her change of course; that her irregular exhibition of the torch and change of course—the latter the immediate cause of collision—might have been treated as committed in extremis, had not their apparent necessity been brought about by the primary fault of the obscuring of her colored light; and that the steamer was not negligent in failing to observe the schooner earlier; and that her navigation, after making the light, was proper; and that her not reversing on starboarding was not an error, as she would thereby have rendered inoperative the effect of her altered wheel.

In Admiralty. Cross libels for collision. Libel by cargo owner for damage to cargo occasioned by collision.

Wing, Shoudy & Putnam, for the *Circassia*.
Owen, Gray & Sturgis, for the *Daylight*.
Sidney Chubb, for Charles Forster.

BROWN, District Judge. About 9:45 P. M. of September 26, 1891, the steamship *Circassia*, bound east for Glasgow, and the *Daylight*, bound from the northeast for Philadelphia, and on a course of about southwest came in collision at a point on the high seas about 75 or 80 miles east of Sandy Hook. The collision was nearly head on; the stem of the schooner struck the hawse pipe on the steamer's starboard bow at an angle of from one to three points, about ten feet aft of the stem, and tore a large hole through the steamer's plates, penetrating several feet into the ship; and the schooner's stem was carried away. Both vessels afterwards arrived in New York, and their owners filed the above libel and cross libel respectively. The libel of Forster is for damage sustained by the injury to a consignment of apples on board the *Circassia*, through the delay in delivering them at Glasgow, in consequence of the detention caused by the collision.

On the main facts there is less dispute than usually arises in collision causes. The weather was moderate; the night, good for seeing lights. The steamer, an iron ship, 400 feet long by 42 feet beam, had been previously sailing on a compass course of E. $\frac{3}{4}$ S. The schooner, 175 feet long, had been sailing on a S. W. course on her port tack, the wind being one or two points aft of the beam, not far from E. S. E. The steamer was going at the rate of about 11 knots; the schooner, as her witnesses say, about 6 knots; but the distances run between the times noted by her log and collision indicate that she was going at the rate of at least 9 knots.

The evidence leaves no doubt that the steamer's white light and red light were seen about two points off the schooner's starboard bow at a distance of two miles or more. After this had been observed for some time without much change of bearing, a torch light was exhibited on the schooner for the purpose of attracting the steamer's attention. This was waived up and down three or four times during an interval probably of some 20 seconds. The

torch light was the first that was seen of the schooner on board the steamer. When the torch light ceased, the schooner's green light was dimly seen for the first time, as stated by several of the witnesses for the steamer, about a point on the port bow of the latter. When the torch light was first seen, the schooner was supposed by the officers of the steamer to be a pilot boat. As soon as the green light was seen, the engines were stopped and her wheel put hard a-starboard. Soon afterwards the schooner's green light was brought on the steamer's starboard bow; but at once the red light, also was seen, as well as the loom of the schooner; whereupon the engines of the steamer were reversed, probably less than half a minute before collision, but too late to avoid it.

In behalf of the steamer it is contended that the green light of the schooner, which was placed on the fore shrouds about 14 feet above deck, and ranged about 3 feet inside of the rail, was wholly or partially obscured, so that it could not be seen at a sufficient distance; that the steamer was misled by the torch light, which is not any longer allowed to be exhibited except by a vessel overtaken; and that the schooner's change of course was a fault which was the immediate cause of the collision.

For the schooner it is contended that her green light was properly visible; that the torch light was shown and the change of course made in extremis, and in consequence of the negligence of the steamer to observe the schooner's green light, or to take any timely steps to keep out of her way.

There can be no doubt that the green light of the schooner, which ought to have been seen a little on the port bow of the steamer at least one or two miles distant, was not seen until the schooner was near, and after she had exhibited her flash light to attract the steamer's attention. Nor is there any doubt that the green light was a proper and sufficient light; for, when near, it was observed to be burning brightly. If it was not obscured by the staysail, then the officers and lookout of the steamer were plainly negligent, and would be held in fault for taking no steps to keep out of the schooner's way before the vessels had come into such close proximity as to excite alarm and render proper extraordinary means for calling attention to her presence. If the green light was obscured, then there was nothing to indicate the near approach of the schooner, until after the torch light had expired, when the two vessels were probably not much above a quarter of a mile apart.

There were five persons upon the steamer who were in a position to see the schooner's green light, four of whom ought to have seen it, if it was visible before the torch light was exhibited. The interval was a considerable one. The night was not bad for seeing lights; and if it was visible, nothing but simple negligence could have prevented its being seen. There is nothing to indicate that the officers were not reasonably vigilant and attentive to their duties. Under such circumstances, failure to see the light has been frequently held to be strong evidence that the light was not visible; and this ought to be deemed sufficient, where, as in this case, there appears to have been a reasonable and sufficient cause for the ob-

scuration of the light. The length of the fore staysail boom and the spread of the staysail were such that with a list of the vessel to starboard and the bellying of the sail, the green light might have been obscured, when the vessels were in such relative positions as these. The only check to the obvious tendency to obscure the light would be scant play allowed the staysail sheet. But even as the evidence stands upon that point, it does not seem to me that this would necessarily prevent obscuration. That the schooner must have had a considerable list, being light loaded, is to be inferred from the fact that there was a good breeze, and that her speed, as shown from her log, and her different positions at different hours, must have been about nine knots. Under these circumstances, the reasonable conclusion on this point seems to me to be that the green light was not seen because obscured; and that when first visible it was dim, being also possibly partly thrown out of position by the natural slack of the lee fore rigging in which it was fixed. The *Narragansett*, 20 Blatchf. 87, 11 Fed. Rep. 918; The *Belgenland*, 5 Fed. Rep. 86; The *Alaska*, 22 Fed. Rep. 548; The *Johanne Auguste*, 21 Fed. Rep. 134; The *Monmouthshire*, 44 Fed. Rep. 697. This conclusion derives some further confirmation from the natural improbability that the master would change his course, as this master did, when approaching a steamer so as to show his red light to her red, unless he suspected that his green light could not be seen.

Notwithstanding this primary fault of the schooner, I am satisfied that the collision would have been avoided by the steamer's hard a-starboard wheel together with her stop as soon as the schooner's dim green light was observed, probably a quarter of a mile away, had not the schooner at about the same time ported her own wheel, as above stated. The mate of the schooner, who exhibited the torch light, says that the order to port was given just before the flash light went out. The other testimony indicates that it was just afterwards; and I am inclined to think that the latter is correct, or at least that the order to port was not given long enough before the flash light went out to make any change in the schooner's heading; for, if any such change had been made so soon, her green light would have been still more shut out, and would not have been visible to those on the steamer after the torch light went out. In other respects this difference is of no importance. As soon as the green light was seen, as I have said, the steamer's helm was put hard a-starboard. She changed about $2\frac{1}{2}$ points to port; while the schooner, under her hard aport wheel, must have changed about four or five points, in order to bring her angle of collision to about three points, as testified to by her captain. This angle agrees with the probabilities derived from the wound, and from the fact that her green light was shut out just before collision. As the schooner was not much over 150 feet on the water line, and the steamer nearly 400 feet, she could not fail to change her heading more than twice as rapidly as the steamer. Striking the steamer as she did upon her starboard bow, at an angle of at least from two to three points, and after a change of at least four points

in her own course, it is evident that the change of her course by the schooner was the immediate cause that brought about collision.

If there had been no previous fault or neglect of the rules on the part of the schooner, this change of course, having been ordered when the two vessels were probably not much, if any, over a quarter of a mile apart, and therefore in the apprehension of immediate collision, might have been treated as committed in extremis, and as not involving the schooner in fault; and the same observation applies to the irregular exhibition of the torch light. But the schooner is precluded from urging this defense in the present case, because the occasion for the torch light, and the supposed necessity of her change of course, were brought about, as I find, not by any fault of the steamer, but from the fault of the schooner herself, in the obscuration of her green light. In consequence of this fault, the steamer was in no way to blame for not seeing the schooner earlier, or for not sooner taking measures to keep out of the way, and to avoid causing the alarm under which the schooner acted in exhibiting the torch light and in changing her course. And as these acts were merely the results of the schooner's previous fault, she cannot be exonerated therefor. *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. Rep. 468; *The Blue Jacket*, 144 U. S. 371, 391, 12 Sup. Ct. Rep. 711.

From the time the green light was visible, I find that the management of the steamer was without fault. It was apparently essential that her heading should be changed to port. She made this change by stopping her engine, and putting her wheel hard a-starboard. Had she also reversed at once, no such change of heading could have been made; because her starboard helm on reversal would have been inoperative; and a worse collision would undoubtedly have followed. The situation was critical from the moment the green light was seen; and critical, as I must find, by the schooner's fault. It follows that the libel against the schooner must be sustained, and that against the steamship must be dismissed.

As respects the libel of Forster, for damages through the delay in delivery of the cargo of apples, there seems to be sufficient evidence of some damage. I must, therefore, allow a decree in his favor as against the Daylight, but with a dismissal as respects the *Circassia*.

Decrees may be entered accordingly.

THE TRAVE.¹

LAW et al. v. THE TRAVE.

(District Court, S. D. New York. April 7, 1893.)

1. COLLISION—FOG—SPEED—ENTERING FOG BANK.

A steamship entered a fog bank, and thereupon reduced her engines a half a dozen revolutions, bringing her speed down from 16 to about 15

¹Reported by E. G. Benedict, Esq., of the New York bar.

knots. The fog suddenly became dense, and within a few minutes a sailing vessel was seen about a length ahead, with which the steamship collided. *Held*, that the steamship was in fault for not reducing her speed at once, on entering the fog bank, to the moderate speed required by statute.

2. SAME—MECHANICAL FOG HORN—NECESSITY FOR SPARE HORN.

A vessel is not properly equipped at sea which has no spare mechanical fog horn. Hence, where a sailing vessel's mechanical fog horn had become out of order, and the vessel was run down in a fog while using an ordinary mouth horn as a substitute, and the evidence indicated that a mechanical fog horn might have given seasonable warning, *held*, that she was in fault for improper fog signals.

In Admiralty. Libel by William Law and others against the steamship *Trave* for collision. Decree for divided damages.

Carver & Blodgett and Mr. Putnam, for libelants.

Shipman, Larocque & Choate, for claimants.

BROWN, District Judge. The above libel was filed by the owners of the British ship *Fred. B. Taylor* to recover their damages arising from collision with the North German Lloyd steamship *Trave*, in a dense fog some 240 miles to the eastward of Sandy Hook at about half past 6 in the morning, steamer's time, June 22, 1892, whereby the ship was cut in two and sunk.

The steamer was outward bound, and on her usual course, going about due east. The ship was bound from Havre to New York. The wind was moderate from the W. S. W., and the ship was sailing upon her port tack, heading about N. W. She had been sailing for several days in fog, so as to be unable to take observations. The steamer, until about five minutes before collision, had clear weather, and was going at about full speed. A few minutes before the collision the sky began to grow hazy; fog was evidently apprehended; two of the lookout were called down from the crow's nest and stationed at the bow, as required in thick weather. Orders were given to close the compartments, and to the engineer to stand by, and a reduction of half a dozen revolutions of the engine was made, bringing the speed of the *Trave* to about 15 knots. The sun, from an hour and a half to two hours high, was still visible. The fog suddenly became dense; within two or three minutes afterwards the loom of the ship's sails was seen by the starboard lookout a couple of points on the starboard bow, and he immediately reported to the officer on the bridge, who answered the lookout's report with a wave of the hand, and a little afterwards the ship's horn was heard. The steamer's engines were reversed as soon as possible and her helm was put hard aport, but without avail. Her stem struck the port side of the ship at an angle of about 80 degrees between the main and mizzen chains, cut her in two and passed between the two parts of the wreck, and disappeared in the fog. Some of the ship's crew were drowned; but most, including the master, were recovered from the wreck.

1. I find it impossible, under decisions binding on this court, to acquit the steamer of the charge of legal fault in running at nearly full speed in thick fog. No doubt the coming on of the fog was very

sudden; but it was not so sudden but that her speed could have become "moderate" had her officers chosen to give prompt orders to reduce it to the moderate rate allowed by the regulations. The steamer, doubtless, had no notice of the ship's near presence, as she was invisible in the dense fog ahead; and no sound of the ship's horn was heard until after her sails were seen. The chances that she would meet a vessel so speedily near the very edge of the fog were no doubt small; but in not bringing her speed down at once on entering the fog, the steamer took all the risk, and the attendant responsibility. A similar question was presented in this court in the case of *The City of Alexandria*, 31 Fed. Rep. 427, 431, in which it was held that the steamer running into a fog bank was bound, at her own risk, to have moderate speed as soon as she got into the fog, and to regulate her approach to a fog bank accordingly. Had this steamer slowed as soon as she got into the thick fog, there is no doubt that she would have cleared the ship, as she lacked only 100 feet of doing so, as it was. The question of what constitutes a moderate speed in a fog has been so often considered and adjudicated by the supreme court, that further discussion on that point here would be inappropriate. *The Nacoochee*, 22 Fed. Rep. 855; *Id.*, 137 U. S. 330, 11 Sup. Ct. Rep. 122; *The Normandie*, 43 Fed. Rep. 151, 157; *The Bolivia*, 49 Fed. Rep. 169, 1 C. C. A. 221.

2. The ship, however, must also be held in fault for not complying with article 12 of the new international regulations, which required that she should be provided with an efficient "fog horn to be sounded by a bellows or other mechanical means." The ship, on leaving Havre, had such a horn, provided with a piston for blowing it by mechanical means; but there was considerable fog on the voyage, and a few days before this collision the apparatus had got out of order by the derangement of some valve, and a horn blown by the mouth was thereafter used instead.

The object of the new rule, which is as obligatory on sailing vessels as on steamers, (*The Wyanoke*, 40 Fed. Rep. 702; *The Catalonia*, 43 Fed. Rep. 396; *The Bolivia*, 49 Fed. Rep. 169, 1 C. C. A. 221,) is manifestly for the purpose of securing louder and more penetrating blasts than can be given by the mouth, in order that the presence of vessels in fog may be made known at a greater distance, and a better opportunity thereby be given to avoid collision. If, therefore, there is any obligation at all upon a ship to make provision for the possible giving out of a single fog horn on the voyage, this obligation is not satisfied by supplying a spare horn substantially different from what the statute requires. I cannot doubt that the obligations of reasonable prudence do require in a matter so essential to safe navigation upon the Atlantic, as a fog horn for use during fog, that a spare horn should be provided to meet the liability to loss or derangement that may happen from various causes during the voyage. A ship that started across the Atlantic with no spare compass, chain, or tackle, would surely not be deemed reasonably equipped for the voyage; and she could not plead her lack of equipment in any of these respects as an excuse for noncompliance with the rules of navigation. It is the same with so important an article as a fog horn;

and no substitute can be lawfully supplied substantially different from what the statute requires. I cannot follow *The Chilian*, 4 Asp. 473.

It is impossible to say that the lack of a mechanical fog horn in this case would have made no difference. On the contrary, there is every probability that it might have made a difference sufficient to have avoided collision; for the last blast given happened to come after the sails of the ship had been seen. At the previous blast, given probably a minute before, the steamer was too far away to hear it; whereas the blast of a mechanical fog horn, given at the same time, might very probably have been heard; and the slowing of the steamer, which would naturally have been thereupon ordered a minute earlier, would certainly have avoided this collision. It is not incumbent, however, on the steamer to show that the use of a mechanical fog horn would have certainly prevented collision. The burden, upon noncompliance with the statute, is upon the faulty ship. She remains in fault unless she can prove certainly that a compliance with the statute could not possibly have made any difference; and this, as in the case of *The Pennsylvania*, 19 Wall. 125, 137, 138, is impossible. *The Bolivia*, *supra*.

The damages and costs must, therefore, be divided. A decree may be entered accordingly, with an order of reference to compute the damage, if not agreed upon.

THE HERCULES.

HUBBELL et al. v. THE HERCULES.

(Circuit Court, E. D. Michigan. April 8, 1893.)

1. TOWAGE—NEGLIGENCE OF TOW—DREDGE.

A tug with two scows and a dredge in tow left Au Sable, Mich., at 9 P. M., to cross Saginaw bay, there about 30 miles wide. At the time there was little or no breeze. At 11.30, when about halfway over, the captain of the dredge hailed the tug, and asked if it would not be better to turn back, but the tug's captain thought it as well to go on. At this time there was a little sea on, but not of such a character as to indicate danger to the dredge. Between 1 and 2 o'clock the heavy crane and dipper of the dredge broke their chain fastenings, and rolled from side to side. The tug hauled up into the wind, and in about an hour the crane was secured. At 3 o'clock the dredge suddenly sank. She was not well shaped to withstand any sea at all, and the weight of evidence tended to show that her sinking resulted from the straining of her bottom caused by the swinging of the crane. The chains holding the crane were three sixteenths of an inch in size. Neither sea nor wind was heavy at any time during the night. *Held*, that the sinking of the dredge was due to her unseaworthy condition, and the insecure fastening of the crane, and that the tug was not at fault in not turning back at the first hail.

2. SAME—BURDEN OF PROOF.

The burden was on the owners of the dredge to show that the sinking was due to the negligence of the tug.

In Admiralty. Libel by Thomas M. Hubbell and George W. Skelton against the tug *Hercules*, her engines, etc., for negligence causing the loss of libellant's dredge while in tow of the *Hercules*. The

cause was certified to this court because of the disqualification of the district judge. Libel dismissed.

F. H. Canfield, for libelants.

J. W. Finney, for respondent.

TAFT, Circuit Judge. The libel in this case was filed to recover the value of a dredge which the master of the tug Hercules undertook to tow, with a couple of dredge scows, from Au Sable to Port Huron. The dredge was sunk in crossing Saginaw bay, and the libel charges that the sinking was on account of the negligence of those in charge of the tug. The answer of the respondent denies negligence, and the case turns on this issue.

The libel was filed in the district court, but because of the disqualification of Judge Swan, the district judge, who had been of counsel, the case was certified to the circuit court, where the evidence already taken before Judge Brown in the district court was presented, and the case argued before me. I called to my assistance, as assessors, two gentlemen who for many years had been captains in charge of steamers on the lake, and have advised with them in reaching my conclusion as to the effect of the evidence.

It is not disputed that the tug, with her tow, left Au Sable, which is on the north side of Saginaw bay, at its mouth, some time after 8 o'clock, and before 9, on the night of the 18th of August, 1888, and that when she left there was little or no breeze blowing. About half past 11, when the tug and her tow must have been about half-way across the mouth of the bay, which is there from 28 to 30 miles wide, the captain of the dredge boat hailed the captain of the tug, and asked him whether they would not better go back. The captain replied that they were halfway across; that he thought he might as well go on. They went on until between 1 and 2 o'clock, when the heavy crane and dipper of the dredge, secured by chains, broke loose from its fastenings, and revolved from one side to the other of the dredge. The tug hauled up into the wind to give the men on the dredge time to secure the crane. After about an hour the crane was secured, and lashed with another chain, and the tug proceeded on its way, turning from its course across the mouth of the bay to a point a little inside the bay, called Port Austin. When about eight miles from Port Austin, at 3 o'clock in the morning, the men on the dredge whistled the danger signal. The tug rounded to, and succeeded in taking off the men before the dredge sunk. The two scows were left in the lake, where they were picked up the next day, and the tug went on to Sand Beach, a point on the lake near the mouth of the bay.

The claim of the libelants was that it was the duty of the master of the tug, when first hailed, to turn around, and go back; that it was negligence in him not to do so, and that, if he had done so, he might have safely brought the dredge back to Au Sable. This depends on what the condition of the sea was at the time the suggestion came from the captain of the dredge. It is quite clear that for some time out of Au Sable the sea was smooth, and I am of opinion

that the weight of the evidence is that while there was some little sea on at the time of the first hail, at half past 11, it was not of such a character as to indicate danger to the dredge. The captain of the dredge put the question to the captain of the tug in a merely suggestive way, to get his opinion, and did not request him, or direct him, to turn back. They were then halfway over, and, while it may be that, if they had turned back, they might have been able to reach smooth water more quickly than by going over, because of the protection which the high hills about Au Sable would furnish against the wind, this is by no means certain; and it could hardly be called negligence or want of good seamanship, in the captain of the tug, in not turning about then. It would seem, from the weight of the evidence, that the sea increased somewhat in roughness as they proceeded towards the other side, but that it was by no means a heavy sea. It was merely a fresh breeze, which rolled the dredge a good deal because of its peculiar shape and construction. It had a flat bottom, shallow hull, with open hatchways, and was not particularly well shaped to withstand any sea at all. The evidence of the men at the life-saving station on the south side of Saginaw bay, and the daily official record, is quite strong evidence that there was nothing like a heavy wind blowing on the bay that night. The waves ran high enough, doubtless, to shake the dredge considerably; but if she had been a staunch boat, and if the accident to which I am about to allude had not happened, she would probably have stood any sea that was running that night, and would have been brought safely into port on the other side.

The crane used in operating the dredge consisted of two beams at right angles, making an L, the upright part of which was about 18 feet long, with its lower end pivoted to the deck of the dredge so as to permit the horizontal part, reaching out over the bow some 20 feet, to swing radially about the upright beam as a center. At the end of this beam was suspended or lashed a dipper weighing 1,200 pounds. The horizontal swinging arm of the crane was fastened by two chains, from 18 to 20 feet long, connecting the anchor posts with the end of the crane. These chains were three sixteenths of an inch in size, and the moment the dredge began to roll the strain on each end of the chains became very great. The assessors inform me, and the evidence is confirmatory of their view, that a three-sixteenths inch chain, for such a purpose, was wholly inadequate, and that it was negligence on the part of the dredge owner so insufficiently to secure the crane. The assessors state that, in their opinion, the revolving from side to side of the heavy arm and dipper, in waves of any size at all, would tend to lift the other end of the dredge out of the water, and bring it down again with pounding force, so as to subject the bottom planking of the hull of the dredge boat to a great strain, and that if the boat were old, and not strong, the strain might easily spring the bottom open, and allow the water to come through, and sink the dredge. The weight of the evidence shows that the sinking of the dredge was quite sudden, that it followed immediately the danger whistles, and that it was with considerable difficulty that the people were taken off.

There is some evidence tending to show that the captain of the dredge—one of the complainants—stated that the sinking was very sudden, and that the probable cause of it was a springing or straining of the bottom boards of the dredge. While the admission is not proven with sufficient strength of evidence to justify the court, with that alone, in reaching the conclusion that this is the explanation, other circumstances which are brought out in the evidence, taken together with the statement, confirm me in the view that the sinking of the dredge would not have occurred but for the negligent weakness of the chains securing the crane, and the old and unseaworthy condition of the hull of the dredge. The burden is upon the libelants to show that the sinking occurred through the negligence of the respondent, and I am quite clear that this burden has not been sustained. In this conclusion the assessors agree with me.

The libel will therefore be dismissed.

THE ROBERT ROBINSON.

THE FANNY P. SKEER. YERTON v. THE ROBERT ROBINSON et al.
DEVENDORFF v. SAME.¹

(District Court, S. D. New York. April, 1893.)

COLLISION—STEAM VESSELS CROSSING — TOWING LIGHTS — LONG HAWSER—DEFECTIVE LOOKOUT.

The tug S., bound out of the East river to Gowanus, at night, with two canal boats alongside, met the tug R., with a scow astern on a hawser of about 75 fathoms. The courses of the two vessels were crossing from two to three points, and, the R. being a little on the port bow of the S., the latter gave one whistle to indicate that she would pass under the stern of the R., to which the latter replied with one whistle. On conflicting testimony, *held*, that the weight of evidence indicated one of the R.'s vertical lights was not burning when the signals were exchanged. The tugs passed each other 200 to 400 feet distant, but the S. did not perceive the scow until it was within 100 to 200 feet, when she stopped and backed, but the scow collided with and sank the two canal boats. The collision occurred a few hundred yards below Ft. William on Governor's island. *Held*, that the R. was in fault for failing to exhibit towing lights, and also for misleading the S. by towing the scow on a long hawser in that neighborhood, when the evidence showed that it is customary to shorten hawsers to about 100 feet. But as the night was moonlight, and the scow stood 12 to 15 feet above the water, and, moreover, was exhibiting lights, *held*, also, that she should have been observed in season by the S., which, for failing to do so, was also in fault.

In Admiralty. Libels filed respectively by Peter Yerton and Alfred Devendorff against the tug Robert Robinson and Scow No. 5, and the tug Fanny P. Skeer, to recover damages for a collision. Decrees against both tugs, but dismissing the libels as to the scow.

Alexander Cameron, for libelants.

Carpenter & Mosher, for the Skeer.

Benedict & Benedict, for the Robinson.

¹Reported by E. G. Benedict, Esq., of the New York bar.

BROWN, District Judge. The above libelants were the owners respectively of the canal boats Jones and Mulhare, which, at about 2 A. M. of October 15, 1891, were sunk a few hundred yards below Fort William, abreast of Governor's island, through collision with Scow No. 5, which was in tow of the tug Robinson. The canal boats were in tow alongside of the tug Skeer, and bound from Morris' dock to Gowanus. The Robinson was towing the scow up the bay upon a hawser of about 75 fathoms. When the Skeer had approached the Robinson within about a quarter of a mile, she gave her a signal of one whistle, indicating that she would go under the Robinson's stern, to which the Robinson answered with one whistle. The Robinson was a little on the port bow of the Skeer, and their courses were crossing, probably from two to three points. That is to be inferred, not merely from the testimony and the diagrams, but from the fact that the Skeer and the Robinson passed each other from 200 to 400 feet distant; and nevertheless, in going not over a hundred yards, the Skeer brought her boats in collision with the scow, which, according to the testimony, was directly behind the Robinson, and in line with her course. The two canal boats projected considerably ahead of the Skeer; and the scow, coming somewhat crosswise, first struck the starboard boat on her bow, and then passing on, ran into the port boat, causing both to sink in a few moments. The Skeer backed away from between them unharmed.

The first and principal point of controversy in the case is, whether at the time of the exchange of whistles, the Robinson exhibited two white vertical lights, as required by the rules, to indicate a tow, or only one white light, as three witnesses for the Skeer expressly testify. The master of the Robinson, on the other hand, testifies that on giving his answering whistle, he turned to look at his pole lights and saw both burning brightly. Two or three other witnesses for the Robinson testify to observing both vertical lights not long before the collision. The shock of collision parted the hawser of the Robinson and broke one of the pole halyards. There is no doubt that immediately after the collision only one staff light was burning. For the Robinson it is claimed that the shock of collision extinguished one of the lights; that until then, both vertical lights were burning; and that the witnesses for the Skeer misapply the time when the second pole light went out.

The contradictions on this point are extremely embarrassing, and I have found it difficult to arrive at any very satisfactory opinion. From the testimony, however, which Mr. Littlefield, the master of the Robinson, gives as to the conversation between him and Capt. Kelly just after the collision, as to the absence of one of the two vertical lights, as well as from the testimony of other witnesses, there can be no doubt that the charge was made against him at that time that he had not had the proper lights to indicate a tow; and it is difficult to suppose that that charge would have been willfully and falsely trumped up within a few moments of the collision, as it must have been, if the pilot and the mate of the Skeer had seen two pole lights instead of one. They had noticed the Robinson at a sufficient dis-

tance; each was showing to the other her red light, and the officers of the Skeer were the first to give proper signals to indicate that she would go under the Robinson's stern. It seems scarcely credible, therefore, that they should not have noticed the two staff lights of the Robinson, if at that time two had been showing; nor, if they had noticed two, that they should a few moments afterwards have charged the master of the Skeer with having but one. Their testimony is confirmed by the man on the Jones, who came on deck when the scow was only 100 feet away, and is quite positive that there was but a single pole light then burning. A rigid cross-examination seems to me to have been well supported by him, and I do not think it is shown that he was not in a position to see the tug and her staff lights before collision. It is, however, possible in his case that the time of noticing the pole light may have been transposed.

I do not attach very much weight to the testimony of several of the witnesses for the Robinson, who think they saw the two pole lights shortly before collision. They had no duty in regard to it; and there was nothing to call their attention to it. The pilot and mate of the Skeer, on the other hand, were navigating in reference to the Robinson, at their original whistle to her shows, and designed to go under her stern; and from the time she was first seen by them until they passed from 200 to 400 feet abreast of her, there was abundant opportunity to see the lights she carried; and as the Skeer was crossing the Robinson's course under her stern, it seems to be, as above stated, incredible that they should not have paid sufficient attention to see whether she indicated a tow or not, or should not have seen both the staff lights, if they were properly burning. Upon these circumstances and the testimony, therefore, it seems to me that the weight of probability is in favor of the Skeer.

In one other regard I think the Robinson ought, also, to be held in fault; namely, for the unusual length of hawser which she was using for the scow in that situation. The evidence leaves no doubt that it was customary, in towing light scows up the bay, to shorten the hawser to about 100 feet off Red Hook, or in that neighborhood. This was expected by the men on board the Robinson that night; and they were in attendance for that purpose, as appears from their testimony; but it was not shortened. The Skeer crossed the Robinson's course about 400 feet astern of her, and this was twice the distance of an ordinary scow-tow upon a hawser in that region. The scow was not seen by the Skeer until within one or two hundred feet of her, when orders to reverse were immediately given, but too late. There is no doubt that the Skeer was misled, or misunderstood the situation. An unusual length of hawser would contribute to mislead her, even if there had been two staff lights, and these lights had been seen. The unusually long hawser might account for the collision, even if the story of the Skeer in regard to the lights was held to be a fabrication; that is to say, if both lights had been burning, and had been seen by the pilot and mate of the Skeer, since they might have supposed that they went a sufficient distance astern to avoid any stern tow of the Robinson. But this seems hardly credible

upon such a moonlight night. For the Skeer passed the Robinson near enough to see whether the tow, which two pole lights would have indicated, was alongside, or was astern; and it being plain enough that no tow was alongside, it must have been looked for astern. So that if two lights had been visible and seen, it does not seem credible that the collision should have taken place. I think the Robinson must, therefore, be held in fault both for failure to display proper staff lights, and for the unusual length of hawser.

The Skeer must, also, be held in fault for lack of vigilance in observing the scow. She was not only a large object some 12 or 15 feet out of water, easily seen on such a moonlight night, even without lights, in ample time to avoid her; but the evidence also leaves no possible doubt that she had white lights displayed and visible, to which no attention was given until the Skeer had approached within 100 or 200 feet of her. No doubt the fact that the scow was moving through the water, distinguishes the case somewhat from that of running into a similar boat at anchor; but the failure to observe her altogether until she was so near, deprives the Skeer of any defense on that ground, since it wholly fails to meet her negligence in observation, with which I must hold her chargeable. The nonobservance of the scow evidently contributed to the collision; and each must, therefore, contribute to the loss. No fault is proved against the scow. The libelants are each, therefore, entitled to a decree against the Robinson and the Skeer; and the libel as respects the scow must be dismissed. Decrees accordingly.

THE LIME ROCK.¹

DONELLY et al. v. THE LIME ROCK.

(District Court, S. D. New York. March 30, 1893.)

COLLISION WITH BULKHEAD — MOVING VESSEL FROM BERTH — NECESSITY FOR CAUTION.

The steamboat E. was moored alongside a bulkhead in Gowanus creek, and outside of and moored to her was libelants' canal boat A. The steam lighter L. R., desirous of reaching her berth, which the E. was occupying, put her bow against the stern of the E., and pushed her forward; libelants' canal boat accompanying her. The forward motion, however, parted the canal boat's stern line to the E., and when the latter was checked the canal boat ran ahead, and into the bulkhead, receiving injuries from which she sank. The claimants denied that the canal boat struck the dock at all, and averred that the accident must have been caused by a floating log. *Held*, that the weight of evidence sustained the libelants' contention, and that, while the L. R. had the right to move the canal boat in order to reach her berth, she was bound to do so in a way to avoid accident, and was liable for her failure to use reasonable precautions.

In Admiralty. Libel for damage to canal boat by pushing her against a bulkhead. Decree for libelants.

Hyland & Zabriskie, for libelants.

Benedict & Benedict, for claimants.

¹Reported by E. G. Benedict, Esq., of the New York bar.

BROWN, District Judge. On the afternoon of May 10, 1892, the steam lighter Lime Rock, desirous of obtaining a berth occupied by the Enterprise and the libelants' canal boat Alpha, moored outside of her along the bulkhead in Gowanus creek, shoved those two boats up the creek by pushing against the stern of the Enterprise. As a consequence of moving them in that way, the Alpha's stern line to the Enterprise was parted, and the Alpha, after first dropping back alongside the Enterprise more or less, ran ahead again when the latter was checked, until, as the libelants allege, she struck the bulkhead and knocked a hole in her bow, from which she sank in a few minutes. The above libel was filed to recover the damages.

The claimants contend that the Lime Rock did not touch the Alpha, and that the Alpha did not hit the bulkhead; and they suggest that the hole knocked in her bow some two or three feet above her bottom, may have been caused by running against some sunken water-logged timber, such as, it is said, has been occasionally found in that region. The Alpha was loaded and deep in the water, and her rail was about six feet below the deck of the Enterprise. Two witnesses testify that the canal boat did hit the dock. A very intelligent lad who was standing on the stringpiece of the bulkhead, watching the maneuver, and was within about 50 feet of the canal boat, says that the blow shook all the bulkhead, and the two others say they felt the shock. Several witnesses for the claimants testify positively that the canal boat did not come in contact with the dock. But the master of the Lime Rock had his attention otherwise occupied, and others of them plainly were not in a position to see whether she did strike or not; it is doubtful whether the rest were giving any special attention to that point. I am inclined to believe the libelants' witnesses rather than those who did not see the contact. The bow was broken in and no other probable explanation is given. The mere possibility of a sunken log without any evidence of its presence, is not enough to overcome this strong corroboration of the libelants' witnesses. I cannot give much weight to the argument that such a contact was impossible, from the position and the lines of the Alpha, because I do not think there is any certainty whatsoever with regard to the data on which the argument is founded. The bow line may have parted or rendered, and the distance the stern swung off is uncertain. The chief opposing circumstance is the statement that the bow line did not part, though that is not at all certain; evidently not much attention was paid to it. But even if it did not part, it may easily have rendered sufficiently to admit the contact with the bulkhead, and such rendering is a common occurrence.

As regards one circumstance, moreover, to which several of the claimants' witnesses testify very positively, it seems to me most probable that they are mistaken; viz.: in their statement that the Lime Rock's stem pushed inside of the rudder post of the Enterprise, i. e. between that and the bulkhead. Considering that the Lime Rock was five feet wider than the Enterprise, and that the latter lay right alongside the dock, even if the stem and the rudder post were only six inches across, the Lime Rock could not have put

her stem on the port side of the rudder post, that is, on the side towards the bulkhead, without thrusting her stem at least three feet out of the line of the bulkhead; and her pushing in such a position would be improbable, since it would be pushing the quarter of the Enterprise against the dock. I have no doubt that the witnesses have reversed the position of the tiller and the blade of the rudder about which they testify; that at first it was the tiller which was towards the bulkhead, and that the Enterprise began to push on the blade at least three feet to starboard of the rudder post; that she then backed until the tiller was put to starboard and the blade turned towards the dock out of the way of the tug's stem, and that the Lime Rock then put her stem in its natural position for pushing the Enterprise, namely, at least three feet to starboard of the rudder post, and very likely somewhat more than that. In that position in shoving up the Enterprise, the Alpha would necessarily drop astern, as one of the claimants' witnesses says she did. No confidence is to be placed in the estimates of the number of feet of the various changes. If the stern lead of the Alpha's line was at first considerable, she would certainly have dropped back sufficient to encounter the port bow of the Lime Rock, and in that way her stern would be swung off by direct contact with the Lime Rock; and despite the testimony of the defendants' witnesses to the contrary, I have little doubt that is what happened. It is immaterial, however, whether that be so or not; for all the witnesses agree that while moving up, the Alpha's stern did swing off considerably, and when the forward motion of the Enterprise was checked, and no attention paid to the deeply-loaded Alpha, she would necessarily move forward again, as the evidence shows she did, until her way was checked. There is no evidence that her stern did not swing out enough to enable her bow to reach the dock.

The claimants, doubtless, had a right to move the Alpha away to get at their own berth; but in doing so they were bound to use reasonable precautions against accident. There were three modes of procedure, either of which would have been proper and sufficient; viz.: to go alongside of the Alpha; or, if pushing was resorted to, then either to have the Alpha made fast by lines running both ways to the Enterprise, or if not that, then by having a man to tend the lines of the Alpha and render them properly, as was done on the Enterprise, to prevent sudden breaking. Reasonable care required one of these things to be done. I do not perceive any fault on the part of the libelants' boat. I must, therefore, allow a decree for the libelants, with costs.

WALKER et al. v. RICHARDS et al.

(Circuit Court, D. Minnesota. April 13, 1893.)

1. REMOVAL OF CAUSES—SUFFICIENCY OF PETITION—UNKNOWN DEFENDANTS.

In an action against known and unknown defendants to determine adverse claims, if the known defendants be served with process, they cannot be required to delay an application for removal of the suit until persons unknown, who might claim some interest in the matter in controversy, shall be served, and join in the application.

2. SAME—"PARTY DEFENDANT."

A party defendant to an action, within the meaning of the removal act, is one who is named as such, and appears in the record as a defendant, at the time the right of removal exists.

3. SAME—ACTION TO DETERMINE ADVERSE CLAIMS—FEDERAL QUESTION.

A petition for removal of an action to determine adverse claims alleged that the lands in controversy were entered by persons under the United States laws as a "soldier's additional homestead," and that each of these persons executed an instrument assigning his right prior to doing any of the acts or things required by the laws of the United States to be done and performed in order to perfect their rights, and alienating such lands contrary to law; that plaintiffs' title is wholly derived through such void instruments; that the land remained thereafter a part of the public lands, subject to entry; and that defendants' title is derived through original entry men holding under United States patent. *Held* that, as the validity of such transfer depends upon a construction of the federal laws, the petition showed a federal question in controversy, and that a motion to remand must be denied.

At Law. Action by Thomas B. Walker and Healey C. Akeley against Benjamin B. Richards, Azro T. Crossly, and others. Heard on motion to remand to state court. Denied.

Statement by NELSON, District Judge:

This suit was commenced in the state court to determine adverse claims, and pursuant to the statute of the state of Minnesota. All unknown as well as certain known persons are made defendants. The defendants named upon whom the summons was served filed their petition for removal under the act of 1887, claiming that the suit was one arising under the constitution and laws of the United States, and it was removed to this court. At the time of the removal no publication of the summons was made in order to bind and conclude by the decree unknown persons who claimed any right, title to, or interest in the property in controversy. A motion is now made by the plaintiffs to remand for the following reasons: First. Because all the defendants in said action did not join in the petition or application for removal from the state court, and no separable controversy is alleged or claimed between plaintiffs and the defendants who petitioned for removal. Second. Because the petition for removal is not sufficient in law to entitle the defendants Richards and Crossly to a removal. Third. Because the petition does not state any fact or facts that show, or tend to show, to the court, or from which the court can see, that any federal question is involved in the controversy, or that the decision of the case must or will depend in any degree upon the right construction of any law of the United States.

Wilson & Van Derlip, for plaintiffs.

Twomey & Morris, for defendants.

NELSON, District Judge, (after stating the facts.) The first reason assigned is not tenable. The defendants in court by name, served with process, were not required to delay the application

for a removal of the suit until persons unknown, who might claim some right, title, estate, or interest in the controversy, were served. Such delay would have proven fatal to the right given them by the statute. The right of removal is given to known defendants,—such as are made defendants by name, and served with process, or voluntarily appear. The two petitioners are all the known defendants to the controversy at the time the petition for removal of the suit was filed. A party defendant to an action, within the meaning of the removal act, is one who is named as such, and appears in the record as a defendant at the time the right of a removal exists.

Again, when it is sought to remove a suit on the ground that it is one arising under the laws of the United States, it must appear from the petition for removal and pleadings that there is a question actually involved in the suit depending for its determination upon a correct construction of a law of the United States, and the facts averred in the pleadings or in the said petition must show what the question is, and how it will arise. The allegations in the petition are that the lands mentioned in the complaint and claimed to be owned by the plaintiffs were entered by parties under and pursuant to title 32, c. 5, Rev. St. U. S., and for a soldier's additional homestead; that prior to these entries each of the parties, and his wife joining, executed and delivered an instrument in writing, which was made, executed, delivered, and received by the respective parties thereto for the sole purpose and with the intent of selling, assigning, and transferring the right of the party executing the same to an additional homestead conferred upon him by and under the laws of the United States, and particularly under title 32, c. 5, aforesaid, prior to doing or performing any of the acts or things required to be done and performed under said law, and for the purpose of alienating the several tracts of land described, contrary to and in violation of the laws of the United States; that the instruments were, and each of them was, intended, and each on its face purports, to alienate the right of the party executing the same under the laws of the United States aforesaid, and that said instruments are void under the United States laws; that the lands are a part of the public lands of the United States, and subject to entry under the laws aforesaid, and that plaintiffs' title is wholly derived through said instruments, and the defendants' title is derived directly from the original entry men, by deed duly executed; that each of said entry men received a patent from the United States for the lands entered by him. Upon the facts thus set forth it is claimed that if the instruments alleged to be given for the sole purpose of selling and transferring the right of the parties thereto to lands under title 32, c. 5, are valid, the plaintiffs are entitled to a decree quieting their title. On the other hand, if they were made in violation of the United States laws, and are void, they cannot avail as against the defendants' title, derived from the original entry men. The decision of this question depends on the construction of title 32, c. 5, Rev. St. U. S., and is a federal ques-

tion. The second and third grounds urged against the motion to remand are not tenable, in my opinion, and must be overruled. It is so ordered.

NOTE. Plaintiffs' motion to remand in the case of the Red River Lumber Company against Benjamin B. Richards et al. is also overruled.

PENNSYLVANIA CO. FOR INSURANCE ON LIVES AND FOR GRANTING ANNUITIES v. JACKSONVILLE, T. & K. W. RY. CO. et al., (AMERICAN CONSTRUCTION CO., Intervener.)¹

(Circuit Court of Appeals, Fifth Circuit. January 16, 1893.)

No. 78.

1. APPEAL—TRANSCRIPT—AUTHENTICATION.

Rule 14 of the circuit court of appeals for the fifth circuit requires "a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case" (47 Fed. Rep. vii.) to be sent up on appeal. *Held*, that an authentication stating "that the foregoing is a true, full, and complete transcript of all the papers, orders, and decrees from the files and records of my office" is sufficient, but, to be strictly accurate, the authentication should follow the language of the rule.

2. RAILROAD COMPANIES—BONDS AND MORTGAGES—FORECLOSURE—COLLUSION.

Where a railroad company is sued by a few minority stockholders, and a receiver is asked, which suit is opposed by a great majority of stockholders, it is perfectly proper for the mortgage bondholders, upon default in the payment of their bonds, to institute a foreclosure suit, and have a receiver appointed, and thus to control any litigation which might withdraw from the corporation the mortgaged property; and it is not fraudulent or collusive for the officers of the corporation to admit the truth of the allegations of the bondholders' bill.

3. APPEAL TO CIRCUIT COURT OF APPEALS—INTERLOCUTORY ORDER—INJUNCTION.

Where, on the motion of an intervener, the proceedings in an equity case in the United States circuit court are stayed, and a receivership vacated until the further order of the court, this is an interlocutory order granting an injunction, within the meaning of section 7 of the act of March 3, 1891, which allows an appeal in such case to the circuit court of appeals.

4. SAME—INTERVENTION—STAY OF PROCEEDINGS.

A stockholder who has brought suit against the corporation, asking to have a receiver appointed, cannot, by intervening in a subsequent suit by the mortgage bondholders asking a foreclosure and the appointment of a receiver, have such suit stayed until the stockholders' suit is first determined, unless the case is an extraordinary one, and such a proceeding is justified within sound judicial discretion.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

In Equity. Suit by the Pennsylvania Company for Insurance on Lives and for Granting Annuities against the Jacksonville, Tampa & Key West Railway Company to foreclose a mortgage. The American Construction Company filed a petition of intervention, praying that the temporary order appointing a receiver be set aside, and that all further proceedings in the suit be stayed. The circuit

¹Rehearing denied January 30, 1893.

court granted the petition, and stayed the proceedings until further order. Complainant appeals. Reversed.

E. H. Farrar, B. F. Jonas, E. B. Kruttschnitt, John W. Simpson, Richard H. Leggett, and Geo. F. Baer, for appellant.

H. Bisbee and Wm. Wirt Howe, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The appellee, the American Construction Company, moves to dismiss this appeal on the following grounds: (1) Because there is no properly authenticated transcript of the record filed in this court, as required by the rules thereof. (2) Because this court has no jurisdiction to entertain the appeal from the order appealed from. (3) Because it appears from the papers and pleadings on file in this court that the suit is a collusive one between the appellant and the defendant railway company. The language of the authentication in this case is "that the foregoing is a true, full, and complete transcript of all the papers, orders, and decrees * * * from the files and records of my office." Section 997 of the Revised Statutes of the United States requires "an authenticated transcript of the record;" rule 8 of the supreme court directs "a true copy of the record and of all the proceedings in the cause" to be transmitted; and our rule 14 requires "a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case." There is in this case no suggestion of a diminution of the record, and an examination of the record discovers on its face no indication that it is incomplete. All the papers, orders, and decrees filed and entered in the clerk's office in the given case would seem to embrace the whole record. It is true that papers may be filed that are not so marked, and may be so marked, though not properly a part of the files.

The objection here, though general in its terms, cannot be that the clerk has sent up too much, and it is difficult to conceive what he can have omitted when he has sent us "a true, full, and complete transcript of all the papers, orders, and decrees" in the given case. It may be well to impress on clerks of the trial courts that in the absence of a controlling stipulation by the parties, or written instructions from the plaintiff in error or appellant filed in the case, transcripts in cases of appeal or writs of error should meet the requirements of our rule 14, and their certificates of authentication follow the language of our rule, and show that the transcript transmitted is "a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case."

On the 23d July, 1892, the appellant, the Pennsylvania Company for Insurance on Lives and for Granting Annuities, exhibited its bill of complaint to the circuit court for the northern district of Florida, showing that it was the trustee in a consolidated mortgage made by the Jacksonville, Tampa & Key West Railway Company, a corporation created and existing under the laws of Florida, on about 200 miles of road, with its equipment, and other property de-

scribed in the mortgage, to secure an issue of 4,000 bonds of the denomination of \$1,000 each. Said railway company was the sole defendant in the bill. It was shown to be a consolidation of three other constituent corporations, each of which had constructed and owned a portion of its railroad and other property, and had placed a first mortgage on its respective portions, which was still outstanding and binding, and all aggregating \$2,216,000; that 4,000 of consolidated bonds were issued under the said consolidated mortgage, and that 2,216 of said 4,000 were retained by said trustee to retire said first mortgage bonds; that the interest on these 2,216 bonds had been duly paid, and the interest on the first mortgage bonds of the constituent companies duly protected; that the remaining 1,784 of the said consolidated bonds had been issued, and sold in part and hypothecated in part to pay and secure the floating indebtedness of the defendant railway; that, on a large number of these, three installments of interest had matured, and payment had been demanded at the proper office and payment refused; that by the terms of said mortgage such continued refusal to pay interest put said railway in default, and authorized said trustee to proceed to foreclose said mortgage; that a number of the holders of said bonds and interest coupons had in writing requested said trustee to ask a foreclosure of said mortgage; that, besides the consolidated bonds aforesaid and the said bonds of the constituent companies, the defendant railway company had outstanding certain bonds known as its collateral trust bonds, aggregating \$3,673,000, which are inadequately secured by the pledge or deposit of certain bonds and stock of the Florida Southern Company; that an installment of interest on these collateral trust bonds, amounting to \$73,460, will become payable August 1, 1892, which the defendant railway company is unable to pay, and on which it must make default; that, by the terms of the pledge agreement securing said collateral trust bonds, the trustee thereunder will become entitled to declare the whole principal sum of said bonds due and payable, and to foreclose the lien of said pledge, and to enter judgment against the said defendant railway company for any deficiency that may remain unpaid upon the said bonds; that the floating indebtedness amounts to more than \$1,800,000, of which between \$300,000 and \$400,000 is unsecured, and the remainder is secured by the pledge as collateral of certain of said consolidated mortgage bonds, of which indebtedness a large part is now due, and another large part is due and payable upon demand; that interest upon a large part of said indebtedness is long past due, and that the defendant railway company cannot pay either said interest or the said overdue principal; that the property covered by said mortgage to complainant is inadequate security for the bonds issued thereunder; that said defendant railway company is insolvent; that to protect the rights of complainant and of said bondholders and other creditors, and to preserve and keep together the property of the defendant railway company, so that its duty to the public as a common carrier may be duly performed, a receiver ought to be forthwith appointed of all the property, rights, and franchises covered by said consolidated

mortgage. The prayer is for foreclosure subject to the prior liens, for a receiver, and for general relief.

This bill, and affidavit of Charles C. Deming, vice president of the defendant company, supporting its allegations, and the consent of the defendant company to its being exhibited, and admission of the truth of the allegations of the bill expressed by its solicitor, A. H. Joline, Esq., there personally present, being exhibited to one of the judges of said circuit court on the said 23d day of July, 1892, a preliminary decree was passed granting the receivership as prayed for; and, the parties uniting in the request that, "if the said application be granted, Robert B. Cable, Esq., be named as such receiver," said Cable was appointed with the reservation that the said appointment of Robert B. Cable, Esq., as receiver is provisional to the extent that any person or party having an interest in the property of the defendant railway company may show cause within 30 days from date of said order why the said appointment should not be confirmed. The appointment was also made so far provisional as not to affect or forestall any action the court or any of its judges may hereafter see proper to take on any bill theretofore filed in said court against said railroad company, wherein prayer had also been made for a receivership.

On July 27, 1892, said receiver, Robert B. Cable, took the oath as such receiver. On July 28, 1892, the appellee, the American Construction Company, presented its petition of intervention in this case to another of the judges of said circuit court, showing that it had on July 6, 1892, exhibited its bill in said court against the defendant railway company and other parties, with exhibits and affidavits, to which it prayed reference as often and fully as necessary, in which bill it had asked for a receivership, injunction, and appropriate ultimate relief; that a temporary restraining order had been granted as prayed for by said intervener in its said bill, and the defendant company was ordered to show cause on or before the 11th day of said month why the receivership, as prayed for by it, should not be granted; that on the said 11th day of July, 1892, the said railway company moved the court for further time to prepare to show cause why a receiver should not be appointed, representing that it could show good cause; that on such representation the time was extended to the 28th day of July, 1892; that afterwards, to wit, on the 23d day of said month, the defendant railway company, by collusion with the complainant herein, imposed on the judge making said order appointing said Cable receiver; that said Cable is the manager and appointee of the directors of said company against whom intervener in its bill had made charges of gross fraud, mismanagement, and diversion of the funds of said company; that said directors are the owners of the floating debt of said company, and are the very persons (if any have applied) who have applied to complainant to bring this suit; that it fully appears from the pleadings and proceedings that the said railway company and its directors control both the defendant and complainant in this suit; and intervener prays that the order appointing a receiver in this case be set aside and vacated, and that all proceedings in this case

be stayed until the further order of said circuit court; and thereupon the order from which this appeal was taken was made on the 4th day of August, 1892, and is in these words:

"This cause came on to be heard on the 28th day of July, 1892, on the motion of the American Construction Company, which had intervened therein, and which is also complainant in another suit in equity against the said defendant and others, in the bill filed on the 6th day of July, 1892, praying for the appointment of a receiver. The said motion and petition of intervention of the said American Construction Company prayed for an order vacating the order entered in the above-entitled cause on the 23d day of the month of July aforesaid, appointing Robert B. Cable, Esq., receiver, and staying all further proceedings in said cause. On consideration thereof, and of the said several bills in equity and the affidavits and exhibits in support thereof, it is ordered, adjudged, and decreed that the aforesaid order appointing Robert B. Cable receiver of the property of the Jacksonville, Tampa & Key West Railway Company be, and the same is hereby, set aside and vacated, and all further proceedings in the above-entitled cause stayed until the further order of this court."

The proceedings in the appellee's suit, referred to in its petition of intervention, are made part of the record on this appeal, and a careful examination of those proceedings, and of the proceedings in this suit, has satisfied us that the third ground on which we are asked to dismiss this appeal is not well taken. Such examination has not only not suggested to our minds that this is a collusive suit, but, on the contrary, it clearly appears to us that no deception was practiced on the court in procuring the order made July 23, 1892. The terms of that order show that the judge making it had actual knowledge that such proceedings were pending, and providently guarded against any embarrassment likely to arise from two judges of the court acting separately on separate cases, involving more or less the same subject. And if the allegations of the appellant's bill are true, within the knowledge of the vice president of the defendant railway company, his making an affidavit to the facts, and the defendant's admissions of the truth of the allegations, should provoke no unfavorable criticism from a court of equity; and the litigation shown to have been instituted by a very small minority of stockholders against the owners of the great majority of the stock and the pressure for a receiver in that case made it highly proper, if not absolutely necessary, that the appellant should institute and control the litigation which should withdraw from the control of the company the most productive part of its property and that on which the consolidated mortgage rested, and the defendant company and its directors and officers individually, being seriously threatened with being disabled with the hostile attitude of the minority stockholders from meeting the obligations of the company as assumed in the consolidated mortgage, might very well, in good faith and to their credit, furnish to the complainant information and evidence of the true state of affairs. The appellee, the American Construction Company, contends that this court has no jurisdiction to entertain this appeal, urging that the order from which the appeal is taken is an interlocutory order not granting or continuing an injunction. The appellant insists that it is clearly an order granting an injunction, and hence within the seventh sec-

tion of the act of March 3, 1891, authorizing such appeals; and contends, further, that it is so decisive of the only issue made by the appellee as to bring it within the true construction of the statutes authorizing appeals from final decrees.

The intervenor's specific prayers were that the order appointing a receiver be set aside and vacated, and that all proceedings in the cause be stayed until the further order of this court, both of which were granted by the order from which the appeal is taken. The manifest effect of that order was, so far as this suit is concerned, to restore the property to the custody of the defendant company, and suffer the earnings on which complainant held a lien to continue to run to waste by being diverted into other channels. If we may consider, in connection herewith, the probable or actual action of the court in the other case affecting this property, it does not, in our view, materially change the situation. We are, however, relieved of the duty of determining whether the order in question is a final decree, in the sense that would authorize an appeal from it as such by the construction we place on that part of the order granting a stay of all further proceedings in the case. Our views as to what decrees in equity should be considered final decrees, within the meaning of the statutes giving appeals from final decrees, have been quite fully expressed in *Grant v. Railway Co.*, 50 Fed. Rep. 795, 1 C. C. A. 681, and in *Dufour v. Lang*, 54 Fed. Rep. 913. In our opinion, to order, at the prayer of one party, that all further proceedings in the cause shall be stayed until the further order of the court, is to grant an injunction, within the meaning of the seventh section of the act of March 3, 1891. It follows that the appellee's motion to dismiss this appeal must be denied.

The appellant assigns as error:

"(1) That the circuit court erred in rendering and entering the decree or order of August 4, 1892, whereby it stayed any further proceedings in the above-entitled cause till the further order of that court; wherefore the said Pennsylvania Company for Insurance on Lives and for Granting Annuities prays that the said decree or order entered and rendered by the circuit court of the fifth judicial circuit of United States in and for the northern district of Florida may be vacated, and such decree entered in lieu thereof as may be consonant with the principles of law and equity."

The order staying proceedings in this case carried with it necessarily the other branch of the order vacating the receivership. It is urged on behalf of appellant that the consolidated mortgage covered the income of the property, and expressly provided that appellant should be entitled to have a receiver appointed if it became necessary to resort to the courts to enforce the obligations of the defendant railway company. The appellee contends that, though such is the contract between the parties, the matter rests in the sound discretion of the chancellor; and this contention is supported by the cases cited on the brief of appellee's counsel. *Pullan v. Railroad Co.*, 4 Biss. 35; *Williamson v. Railroad Co.*, 1 Biss. 198; *Tysen v. Railroad Co.*, 8 Biss. 247; *Union Trust Co. v. St. Louis, I. M. & S. Co.*, 4 Dill. 114.

The appellee contends, further, that after its bill was filed, a restraining order granted, and an order to show cause why a receiver

should not be appointed at its suit, the property of the defendant company was drawn within the jurisdiction of the court in that case, and, the court having thus acquired jurisdiction of the cause and subject-matter, the appellee, as complainant in that suit, had the right to prosecute its suit, and to obtain the relief asked, if it established its case, in that suit, and could not be forced into another suit, even in the same court. In our opinion this contention is not supported by the cases cited. The doctrine is familiar that, between courts having concurrent jurisdiction of parties and subject-matter, the court which first takes jurisdiction holds it to the exclusion of the others; and the cases cited illustrate this doctrine, but do not hold, or, by analogy, lend support to, this contention of appellee. As attempted to be applied to this case, we are of the opinion that this contention can find no support from reason or from authority. The appellant is trustee in the consolidated mortgage covering 200 miles of the most productive part of the defendant railway's railroad. Said railway company is shown to be claiming to own, and is operating, nearly twice as much other railroad in an embarrassed condition, and to be running two other shorter lines of transportation, which the intervener in its suit charges are operated at a loss during a large part of the year, and the burden borne by the defendant railway company. The bonds secured by this mortgage aggregate \$20,000 to the mile on said 200 miles, greater, in all reasonable probability, than the value at foreclosure sale of all the property covered by the mortgage. The appellee is only interested as a stockholder, and claims to own about one eighteenth of the stock, while the stockholders charged by it with fraudulently controlling the directors own more than sixteen eighteenths of the stock, all of this being stock in a property bonded to or beyond its full present value. Can such a minority stockholder in such a property so precipitate a litigation with the other stockholders as to require that the bondholders, whose interest is not being paid, shall be stayed in their proceedings to enforce their lien until this fight between the stockholders is fought out, or must the bondholders in such a case be required, if they proceed at all, to become interveners in the stockholders' battle? The process is extraordinary; its use must rest in sound judicial discretion.

It seems clear to us that in this case the appellant was and is entitled to have this property taken possession of by the court through the appointment of a receiver, to have it preserved, and its earnings audited, reported, and applied according to the rights of the parties under the mortgage, as the same shall be settled during the progress and at the termination of the suit by the proper decrees of the court. We are of opinion that the order granting the stay of proceedings should be reversed, the stay dissolved, and the receivership granted July 23, 1892, at the suit of the appellant, be restored, and the orders in reference to said receivership be had in this case, and reports of the operations, earnings, and expenses of the property covered by said consolidated mortgage be made to the court in this case.

It is left with the circuit court to determine what person is the proper one to execute the office of receiver in this case, and

to continue Receiver Cable, or to appoint a more suitable person in his place, as the relations of the parties and the character and condition of the property may, in the judgment of that court, require.

It is therefore ordered that the motion to dismiss the appeal be overruled; that the decree appealed from be reversed; the stay of proceedings dissolved; the receivership restored; and the circuit court directed to proceed in this case in accordance with the views expressed in the foregoing opinion; and that the appellee, the American Construction Company, pay all the costs of this appeal.

PULLMAN'S PALACE-CAR CO. v. MISSOURI, K. & T. RY. CO. et al.

(Circuit Court, D. Kansas. January 5, 1893.)

RAILROADS—CONTRACT WITH SLEEPING-CAR COMPANY—INJUNCTION.

A contract was made between several railroads, including the Kansas R. Co. and the Pacific R. Co. and a car company, by which the car company agreed to furnish the sleeping and drawing-room cars for the several lines, provided that the car company should have the exclusive right to furnish these cars for a term of 15 years; and provision was made by which the railroad companies might provide three fourths of the capital required for the cars, and become joint owners with the car company therein. The contract also provided for the keeping of accounts by the car company, for their examination and adjustment, and for the payment of a proportion of the earnings of the cars to the railway companies. The same person was president of all the railway companies, and the contract was executed by him. When the Kansas R. Co. proceeded to make arrangements for obtaining an equipment of sleeping and drawing-room cars from another car company, the contracting car company filed a bill to enjoin it from doing so. On the hearing of a motion for a temporary injunction, it appeared that the whole of the earnings of the equipment had been paid to the Pacific R. Co., and no part had been paid to the Kansas R. Co., while the latter had been charged mileage at the maximum rate for the car service; that no accounting had taken place with the Kansas R. Co., but only with the Pacific R. Co.; that the whole capital therefor had been furnished by the Pacific R. Co.; and that the car company treated the latter company as its sole joint owner. It also appeared that, when the Pacific R. Co. was required to list to the Kansas R. Co.'s receivers all the property of the latter company which the former had in its possession as its lessee, it did not include therein any interest in the sleeping-car equipment. *Held* that, as it appeared from the facts that the contract had never been acted upon by the Kansas R. Co., and that it had been excluded from all benefit thereunder by the joint action of the car company and the Pacific R. Co., a preliminary injunction should not issue.

In Equity. Suit by the Pullman's Palace-Car Company against the Missouri, Kansas & Texas Railway Company, the Missouri Pacific Railway Company, the International & Great Northern Railroad Company, and the St. Louis, Iron Mountain & Southern Railway Company to enjoin the Missouri, Kansas & Texas Railway Company from using, on its line of railroad, sleeping or drawing-room cars belonging to any person or corporation other than the plaintiff. On motion for a preliminary injunction. Denied.

Rossington, Smith & Dallas, (Edward S. Isham and John S. Runnells, of counsel,) for plaintiff.

T. N. Sedgwick and Warner, Dean & Hagerman, (James Hagerman, Frederick S. Winston, and James F. Meagher, of counsel,) for defendant Missouri, K. & T. Ry. Co.

Alex. G. Cochran, for Missouri Pac. Ry. Co., International & G. N. R. Co., and St. Louis, I. M. & S. Ry. Co.

RINER, District Judge. This is an application for temporary injunction. The bill was filed in this court on the 13th day of December, 1892, and on that day a temporary restraining order was granted in the cause until the application for a temporary injunction could be heard, which was set down for hearing, upon notice to the defendants, on the 20th day of December, 1892, and on that day the restraining order was continued in full force and effect until the further order of the court. The bill of complaint, after properly setting forth the incorporation and citizenship of the complainant and the several defendants, alleges that in 1886 the several defendants, being the owners of lines of railway which they were at that time engaged in operating, entered into a contract in writing with the complainant, in which contract the several defendants in this cause were parties of the one part, and the Pullman Company party of the other part, which contract provided (among other things) that the complainant would furnish sleeping and drawing-room cars, to be used by the defendants for the transportation of passengers over their lines of railway, and that the cars which the Pullman Company was to furnish should be in part certain 48 cars (which cars should be equal in character and finish to the cars of complainant used upon competing lines) then operated on the lines of the railway companies, defendants herein, specifically named in said contract, and that, in addition to the 48 cars mentioned, the Pullman Company should, from time to time thereafter, furnish such additional cars, properly equipped and acceptable to the railway companies, as might be needed to meet the ordinary requirements of travel; that, in consideration of the use of said cars so to be furnished by the Pullman Company, the railway companies agreed to haul the same on their own lines of road, and on all other roads which they then controlled or might thereafter control, by ownership, lease, or otherwise, on such trains, and in such manner, as should be, in the judgment of the general manager or general superintendent of the railway companies, best adapted to accommodate passengers on said railways, and that the Pullman Company should have the exclusive right, for a term of 15 years from the 1st day of November, 1886, to furnish for the use of the railway companies such sleeping and drawing-room cars as might be required on all passenger trains of the railway companies run over their entire lines of railway, and on all roads which they controlled, or might thereafter control, by ownership, lease, or otherwise. It is further alleged in the bill that by the sixteenth section of said contract it was provided as follows:

"It is mutually agreed between the parties hereto that the railway companies shall have the option to determine whether they will provide three fourths of all the capital required for furnishing the equipment which may

be put upon the roads of the railway companies under this contract, and, upon the payment of the same to the Pullman Company, become a joint owner with the Pullman Company in the said equipment, and receive thereupon three fourths of the gains or profits, and bear the same proportion of all the losses, arising from the business of operating the said cars furnished under this contract, the Pullman Company to retain the control and management; provided, that such options shall be exercised, if at all, and notice thereof communicated to the Pullman Company, in writing, within five years from the first day of November, 1886. For the purposes of the options hereinbefore last provided, it is hereby mutually agreed that, for the three-quarter interest in the forty-eight cars now furnished under this contract, the railway companies shall pay to the Pullman Company an amount to be mutually agreed upon; and, for such additional cars and equipment as may be subsequently assigned to and accepted by the railway companies, the said railway companies shall pay to the Pullman Company three fourths of the actual cost of building said cars and equipment, with ten (10) per centum added thereto. And, in the event of the railway companies exercising their option to become a part owner of said cars and equipment, it is hereby mutually agreed, for the purpose of ascertaining the profit to be divided between the Pullman Company and the railway companies under this contract, that the operating expenses, which shall be held to include maintenance of said sleeping-car equipments, repairs, supplies, and all expenses and losses of administration, and superintendence, and cost of insurance of the joint property, and other expenses resulting from, or in any way connected with, the operation of said cars, including judgments or payments for injury to employes or passengers or loss of their property for which the Pullman Company, as managers, may be responsible, shall be deducted from the gross receipts, and the remainder thereof shall be divided in proportion to ownership in such cars and equipments; settlements to be made monthly."

It is also alleged that the contract provided that, for the use of the temporary cars to be furnished to defendant for special or unusual demands of travel from time to time, the Pullman Company was to receive the earnings from such cars, and keep them in repair at its own expense, and that it would not be required to account for or pay to the railway companies any profits arising from the operating of such temporary cars. It is alleged that the contract also contained other provisions concerning the care and repairs of the cars, and equipment thereof, and concerning the compensation and profit to be derived by the complainant from the use of said cars. It is further alleged in the bill that on the 1st day of November, 1886, the date of the original contract, a further and supplemental contract was entered into by and between the railway companies, defendants herein, of the one part, and the Pullman Company, complainant herein, of the other part, which supplemental contract recited that the railway companies had elected to exercise the option provided in the sixteenth section of the original contract, and that the railway companies thereby became joint owners with the Pullman Company in the 48 cars known as "Association Cars," and in their furniture and linen, and that the railway companies should receive three fourths of all the gains or profits, and bear three fourths of all the losses, arising from the business of operating the association cars under the terms and conditions of the original contract; that the Pullman Company should keep full and complete books of account, showing all expenses and receipts, losses and profits, arising from the operation of the association cars; that it was understood and agreed that so much of

the general expenses of the Pullman Company should be added to the specific expenses of the association cars as the number of association cars should bear to the whole number of cars run by the Pullman Company on all the lines operated by it; that the books and accounts should be balanced as often as once a month, and the profits and losses of the business ascertained, and that whatever might be shown thereby should be borne by, or paid to, the party entitled thereto before the end of the month following.

It is further alleged in the bill that, from the time of making the said original and supplemental contracts until the date of the filing of the bill, the defendants and complainant had proceeded in the execution of said contract, and the said association cars had been used and employed on the railroad of said railway companies, as provided in the original and supplemental contracts, and that the complainant has performed, on its part, all the several provisions and agreements entered into by it in said contract, and will continue so to do.

It is further alleged in the bill that the Missouri, Kansas & Texas Railway Company, one of the defendants herein, has indicated its purpose to repudiate its contract so made, in connection with the other railway companies, with the complainant, and has denied that said contracts were in force and binding between it and the other railway companies and the complainant; and it has served a notice upon the complainant that after the 15th day of December, 1892, it would cease to perform the said contract, and cease to operate the said association cars, or the cars of complainant, over its lines of railroad; and that it had engaged, by contract, for use upon its lines of road on and after the said 15th day of December, 1892, other and different sleeping and drawing-room cars than those of complainant, known as the cars of the Wagner Palace-Car Company. It is further alleged that the refusal of the Missouri, Kansas & Texas Railway Company to operate said cars upon its line of road is a violation of the provisions of its contract with the complainant, and that the violation thereof, in the manner proposed by the Missouri, Kansas & Texas Railway Company, would result in great and irreparable damage to the complainant. Then follows the prayer for a temporary injunction, and for a perpetual injunction upon final hearing. In addition to the verified bill of complaint, complainant filed, in support of its application, the affidavit of John S. Runnels.

On the 20th day of December, 1892, the day on which the application for a temporary injunction was set down for hearing, the Missouri, Kansas & Texas Railway Company, one of the defendants herein, filed its answer, under oath, admitting that certain writings were signed in the name of each of the defendants by Jay Gould, president of each, and by complainant herein, on the date alleged in the bill. It alleges that, at the time said writings were signed, they were not, and never have been at any time since, and are not now, binding contracts upon the part of the Missouri, Kansas & Texas Railway Company. It denies that it ever paid to the complainant, or any other person, firm, or corporation, any part or por-

tion of the value of the cars mentioned in the bill of complaint, and denies that it became a joint owner with complainant or with any other person, firm, or corporation of said cars. It denies that it became jointly interested with complainant in the business to be carried on, and the profits and losses resulting from the operation of said cars, as alleged in the bill. It denies that it has at any time proceeded in the execution of the writings or contracts as alleged in the bill. It denies that the cars mentioned therein, or any of them, are now running and being used upon the lines of railway of the Missouri, Kansas & Texas Railway Company. Denies that the complainant has kept and performed on its part the several provisions and agreements entered into by it in said writings, as alleged in the bill.

It admits that it has notified the complainant that it would refuse to be bound by the terms of said agreements, and that it has denied that the contracts were in force and binding upon it, and that it has given notice that it would cease to operate the cars of complainant after the 15th day of December, 1892. It admits that it has entered into a contract with the Wagner Palace-Car Company for use on its lines of railway, on and after the 15th day of December, 1892, of other and different sleeping, parlor, and drawing-room cars than those of the complainant. It denies that the use of other sleeping, parlor, and drawing-room cars on its line than those furnished by complainant will cause great and irreparable damage to the complainant. It denies that any of the cars of complainant used upon its line of railway since the rate of the contracts, mentioned in the bill of complaint, have been so run over and upon its lines of railway under the terms and provisions of the contract set out in the bill. On the contrary, it alleges that, of the moneys mentioned in said supplemental agreement to be paid as a purchase price of the interest and ownership in said equipment mentioned in the bill of complaint, no part or portion thereof was ever paid by the defendant the Missouri, Kansas & Texas Railway Company, and that no part thereof was ever charged to the Missouri, Kansas & Texas Railway Company, and that no demand for the repayment of any portion or part of the purchase price of said cars was ever made upon the Missouri, Kansas & Texas Railway Company, upon information and belief that the purchase price of said cars was paid by the Missouri Pacific Railway Company, one of the defendants herein.

It is further stated in the answer that on the 1st of November, 1888, H. C. Cross and George A. Eddy were appointed receivers of all and singular the property, assets, and effects of the Missouri, Kansas & Texas Railway Company, and that they qualified and took possession of said defendant's railroad and all of its property, managed and operated the business and affairs thereof until the 1st of July, 1891, when the same was turned over by the receivers to this defendant, and that, during the entire time that its lines of road were operated by the receivers, no sleeping cars were furnished to it, or to the receivers, under the terms and provisions of the agreement set out in the bill, but, on the contrary, during all of that time the cars

of complainant were run on said road under an arrangement whereby the complainant charged the defendant or the receivers the sum of three cents per mile for each and every mile each and every sleeping car was run or operated on its lines of railway during said period, and that the sums so charged by the complainant to the defendant or its receivers were paid by the defendant or its receivers to the complainant, and that neither the receivers nor this defendant ever accepted, agreed upon, or received any of the benefits and advantages mentioned, set out, and described in the contracts mentioned in the bill of complaint, but, on the contrary, the receivers were wholly unaware of the existence of such contracts until long after their appointment, and long after they had commenced the operation of said road, and had paid the bills from month to month to complainant at the rate above specified; and that since the road was turned over to the defendant, on the 1st day of July, 1891, the defendant has continued to pay the prices above set forth, except certain sums which have been withheld during the year 1892, for the reason that the cars furnished were not satisfactory.

Further answering, defendant alleges that the sleeping cars furnished by the complainant were old, worn out, undesirable, and unattractive in appearance, and were not equal in character and finish to the sleeping and drawing-room cars of the complainant used upon competing lines, and that the same were never furnished to this defendant under the contract mentioned in the bill of complaint, and the defendant did not claim, or does not now claim, ownership of any kind, name, or nature in and to said cars; and denies that it ever operated said cars other than by reason of a verbal understanding and arrangement with the complainant, by the terms of which the complainant was to furnish and supply the defendant with sufficient cars to accommodate its business, in return for which, and in consideration for which, this defendant was to pay, and did pay, three cents for each and every mile run by each and every car furnished by complainant for use upon the line and lines of railway of said defendant; that by the use of the cars of the Wagner Company the defendant, under its contract with that company, can offer and supply to the public better sleeping, parlor, and drawing-room cars by the substitution of gas for oil for light, and that the cars of the Wagner Company are safer and cleaner than those furnished by complainant; that the use of the Wagner cars will not in any way affect or prejudice through travel between remote points; that such through travel can be carried on with equal facilities, whether the cars used by the defendant are Wagner cars or Pullman cars; and that the substitution of the Wagner cars for the Pullman cars will not break up, or in any wise affect, through travel between remote points. It is further alleged in the answer that the contracts mentioned in the bill of complaint between the complainant and the defendants constitute a partnership arrangement respecting certain cars, and that such arrangement would be ultra vires this defendant and the other railroad companies, parties to said alleged agreement. Further answering, the defendant alleges that the complainant has stated

to this defendant that the said association cars mentioned in the bill of complaint were owned by the Missouri Pacific Railway Company. It is further alleged that, if the contracts are valid, and complainant has any remedy, it is at law.

It is further alleged that at the date of the contract mentioned in the bill the complainant knew that the Missouri, Kansas & Texas Railway Company was leased to and operated by the Missouri Pacific Railway Company as a part of its system, and that said last-named company fully controlled the operation of this defendant, and was in receipt of its revenue of every kind and nature, and that this defendant had no power to enter into any such partnership scheme as that contemplated by the contract mentioned in the bill; that it was beyond the corporate power of the defendant to enter into such contract, and that neither the president nor board of directors of this defendant had any power to enter into such alleged contracts, all of which was well known, or should have been known, to the complainant.

It is further alleged that, by the decree of this court entered in the cause of the Mercantile Trust Company v. Missouri, Kansas & Texas Railway Company and the Missouri Pacific Railway Company, it was ordered, adjudged, and decreed, among other things, that the lease of the property of this defendant to the Missouri Pacific Railway Company of the 1st of December, 1880, had ceased and determined. In support of the answer filed by the Missouri, Kansas & Texas Railway Company it has filed the affidavits of George A. Eddy, H. C. Cross, Thomas C. Purdy, M. Sweeney, George J. Pollock, Robert Walker, Joseph M. Bryson, J. J. Frey, J. H. Hill, John A. Spoor, and George F. Sharitt.

The application was heard upon the bill, answer, and the several affidavits filed in the cause. The questions presented were argued by counsel with distinguished ability. Since the argument I have carefully examined the pleadings, the affidavits, and also the briefs of counsel, together with the numerous authorities cited. For the purpose of disposing of the question now before the court, viz. whether or not a temporary injunction should issue in this case, I do not consider it necessary to decide whether the contracts mentioned in the bill were ultra vires, or, if not, whether they are contracts of which a court of equity may and ought to compel specific performance, for the reason that I think it is clearly shown, by the affidavits filed in support of the answer and the correspondence attached thereto, that these contracts have not been considered by any of the parties to this litigation as existing contracts between complainant and the defendant the Missouri, Kansas & Texas Railway Company. It may be said that this statement is too broad, for the reason that the Missouri Pacific Railway Company has not yet answered in the case, nor did it make any showing by affidavits upon the application for the temporary injunction, (although served with notice.) The answer of the Missouri, Kansas & Texas Railway Company, however, mentions the interest of the Missouri Pacific in these contracts, and the Missouri Pacific, although represented by counsel, who took part in the argument, did not see fit

to deny the allegations of the answer as to its interests; hence, we think, for the purpose of the question now before the court, the allegations of the answer of the Missouri, Kansas & Texas Railway Company must be taken as true, so far as it relates to the interest of the Missouri Pacific in the contracts mentioned in the bill.

While I have no doubt of the power of a court of equity, as stated by Mr. Justice Brewer, "to grasp with strong hand every corporation, and compel it to perform its contract of every nature, and do justice to every individual," yet what are the facts in this case as shown by the answer and the affidavits on file? Although the contract provides that the railway companies may elect to furnish three fourths of the capital required for furnishing the equipment (viz. the association cars) which may be put upon the roads of the companies under the contract, and the bill alleges that they did so elect, yet the affidavits show that the three fourths of the capital required for furnishing the equipment under the contract was all furnished and paid by the Missouri Pacific Railway Company; that no part thereof was ever paid by, or charged to, the Missouri, Kansas & Texas Railway Company. The contract also provides that the railway companies should receive three fourths of all gains and profits, and should bear the same proportion of all the losses, arising from the business of operating the cars furnished under the contract, while it is shown by the affidavits that, ever since these contracts were signed, the Missouri, Kansas & Texas Railway Company has been charged three cents for each and every mile for each and every car run over its line, which sum is shown to be a maximum charge.

It was further provided by the contract that the Pullman Company should keep full and complete books of account, showing all expenses, receipts, losses, and profits arising from the operation of said association cars, and that said books and accounts should be balanced as often as once a month, and the profits and losses of said business ascertained, and whatever should be shown thereby should be borne by, or paid to, the party entitled thereto before the end of the month following.

It is shown by the answer and the affidavits that, from the date of these contracts, no such accounting as required by the contract was ever had between the complainant and the defendant the Missouri, Kansas & Texas Railway Company; that the Missouri, Kansas & Texas Railway Company was never called upon by the complainant to bear any proportion of the losses, if there were losses, nor has it ever been paid its proportion of the profits, if there were profits. Upon the contrary, when requested by the receivers, appointed by this court, to furnish them a statement of earnings and expenses of these cars, Mr. H. T. Wickes, second vice president of the complainant, made the following reply, by letter:

"Second Vice President's Office, Chicago, July 3, 1889.

"George A. Eddy, Esq., Receiver M., K. & T. Ry., Sedalia, Mo.—Dear Sir:
I am in receipt of your favor of the 28th ultimo, requesting the state-
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ments of amounts paid by this company for account of the 12 cars assigned to the Missouri, Kansas and Texas Ry. In reply thereto I beg to say that we would prefer not to send the statements, but if you should come or send an authorized representative here, and express a demand to see these statements, we shall be glad to comply with same.

"Very truly yours,

H. T. Wickes, Second Vice Pres."

It is also shown by the answer and affidavits filed by the Missouri, Kansas & Texas Railway Company that the decree appointing Mr. Eddy and Mr. Cross receivers required the Missouri Pacific Railway Company which then had possession of all the property of the Missouri, Kansas & Texas Railway Company, under a lease, to list to the receivers all of the property, of every kind and nature, of the last-named company, and that the Missouri Pacific Railway Company made a list pursuant to the requirements of the decree, and turned over all of the property of the Missouri, Kansas & Texas Railway Company to said receivers; and that in making said list it did not include therein any interest whatever of the Missouri, Kansas & Texas Railway Company in and to the said association cars, or any part thereof, or interest therein, showing thereby that it did not consider the contract in force so far as it applied to the Missouri, Kansas & Texas Railway Company. If anything further is necessary to show how the Missouri Pacific considered this contract, the language of Mr. Clark, its vice president, in reply to an inquiry made by the receivers in relation thereto, is, I think, entirely sufficient. He says:

"Before specifically replying to this letter, I have to ask that you will kindly inform me what you mean by the words 'statement in settlement of our interest.' Please inform me what interest you claim, and as to the character of the statement which you expect from the Pullman Company."

Upon the question whether or not the complainant considered this contract an existing contract, so far as it relates to the Missouri, Kansas & Texas Railway Company, a letter under the date February 5, 1889, from Mr. Wickes, second vice president, addressed to George A. Eddy, receiver, may throw some light. The letter is as follows:

"Pullman Palace-Car Company.

"Second Vice President's Office. H. T. Wickes, Second Vice Pres.

"Subject: Sleeping-Car Equipment.

"Chicago, Feb. 5, 1889.

"George A. Eddy, Receiver M., K. & T. Ry.—Dear Sir: On my return from the east, I find your letter of the 31st ultimo, regarding the condition of some Pullman cars running over your line. On inquiry I find the majority of these cars are those assigned to the Missouri Pacific Railway, in which that company is joint owner with the Pullman Company, and are the same cars that were operated in this service before the M., K. & T. was placed in the hands of a receiver. I have given instructions to our general superintendent to have such cars as may not be satisfactory replaced at the earliest possible moment, which I trust will be satisfactory.

"Yours, truly,

H. T. Wickes, Second Vice Pres."

This letter clearly tends to show that at the date of the letter the complainant did not consider that the Missouri, Kansas & Texas Railway Company had any interest in, or was bound by the terms and provisions of, the contract. I think this is the only fair con-

struction that can be given the language used by Mr. Wickes when he says: "I find the majority of these cars are assigned to the Missouri Pacific Railway Company, in which that company is joint owner with the Pullman Company." I think these letters and the affidavits clearly show that the contract, so far as it applies to the Missouri, Kansas & Texas Railway Company, has never been acted upon, either by that company or the complainant; that although the contract was signed as admitted in the answer, yet the defendant the Missouri, Kansas & Texas Railway Company has been continually excluded therefrom by the joint action of the complainant and the defendant the Missouri Pacific Railway Company, and, upon the showing now before the court, (assuming the contract to be a valid contract,) complainant has never complied, or attempted to comply, with the requirements of the contracts set out in the bill of complaint. True, it has furnished cars for the use of this defendant; not, however, in the manner provided by the contract, but at a maximum rate charged therefor. It has never accounted, nor offered to account, for the profits arising from the business. It has never called upon the defendant to pay its proportion of the losses, nor in any other way has it treated this contract as an existing contract, so far as this defendant is concerned, but, on the contrary, when asked for a statement, it declined to make it, and the same is true of the Missouri Pacific, the other party to the contract.

While it is true that, if the facts were as alleged in the bill,—that the contract up to this time had been in the continuous and peaceful course of performance by the parties, and had been recognized and treated by the parties thereto as an existing contract,—the court would not permit either party to declare the contract void, and proceed without process and without settlement to violate its provisions, yet, upon the other hand, it would certainly be a very harsh rule to say to this defendant, under the facts now before the court, "While it is true you have been excluded from the provisions of this contract, or any participation in the business conducted thereunder, and have been charged the maximum rate for the cars used by you; that no accounting has been made to you of the business done, as provided in the contract; and that, notwithstanding you have requested a statement and accounting, the same has been refused,—yet, because your name is signed to the contract, you shall not make another, although the equipment furnished is inferior, and other provisions of the contract have not been complied with;" and that, too, when one of the other parties to the contract is operating a competing line of railroad in active competition with the defendant filing the answer.

This, it seems to me, would be doing great injustice to this defendant; and, without passing upon any of the other questions urged by counsel, my own view is that, upon the showing now before the court, the application for a temporary injunction should be denied, and the restraining order heretofore issued set aside.

MILLIKEN v. BARROW, (BARROW, Syndic, Intervener.)

(Circuit Court, E. D. Louisiana. April 13, 1893.)

1. EXECUTORY PROCESS—SURRENDER OF PROPERTY BY INSOLVENT.

If the surrender of an insolvent defendant's property to his creditors has been accepted by the Louisiana insolvent court, executory process cannot be issued against it by a federal court thereafter.

2. SAME—MORTGAGED PROPERTY—PACT DE NON ALIENANDO.

A mortgagor made a surrender of his property to his creditors under the insolvent laws, which was accepted. Five days later, and before the syndic had taken possession of the mortgaged realty, the mortgagee, whose mortgage contained a pact de non alienando, issued what is known as "executory process" from a federal court, and the marshal took the mortgaged property into his possession. *Held* that, as the mortgagee cannot seize the property after a cessio bonorum of the mortgagor under the law of Louisiana, the enforcement of the executory process must be restrained, notwithstanding the pact de non alienando.

3. ALIENS—CONTRACTS RELATIVE TO REAL ESTATE.

An alien who has long been a resident of a state, and is a resident at the time of making a contract relative to real estate situated within the state, is, so far as relates to such contract, subject to the laws of the state in the same manner as its citizens are.

In Equity. Motion by A. D. Barrow, syndic, intervener, in an action by R. Milliken against C. J. Barrow, for an injunction restraining the marshal from enforcing executory process against the property of the defendant, an insolvent. Injunction granted.

Jas. Legendre, for plaintiff, Milliken.

Farrar, Jones & Kruttschnitt, for defendant and intervener.

BILLINGS, District Judge. This case arises as follows: On January 26, 1893, the defendant, C. J. Barrow, made a surrender to his creditors under the insolvent laws of Louisiana, which was on that day accepted, and on January 31st a provisional syndic was appointed. On January 31, 1893, the complainant, R. Milliken, who held a mortgage which was executed by the defendant, C. J. Barrow, upon certain real estate,—the mortgage containing the clause de non alienando,—issued what is known as "executory process" in this court. The syndic had not taken possession of the mortgaged property, and the marshal took the same into his possession under the writ. The complainant, Mr. Milliken, is a resident of this state, though an alien, being a subject of Great Britain. It is seen by this recital of the facts that the surrender of the defendant's property to his creditors had been accepted by the insolvent court prior to the issuance of the complainant's executory process. I think it is the settled law that after the acceptance of a surrender by the state court no process can issue against the debtor's property in the courts of the United States. *Geilinger v. Philippi*, 133 U. S. 246, 10 Sup. Ct. Rep. 266. At page 257, 133 U. S., and page 269, 10 Sup. Ct. Rep., the court says: "By the insolvency proceedings Green's [the insolvent debtor's] assets were placed in gremio legis, and could not be seized by process from another court." See *Tua v. Carriere*, 117 U. S. 201, 208, 6 Sup. Ct. Rep. 565; *Bank*

v. Horn, 17 How. 157; Peale v. Phipps, 14 How. 368; and Wiswall v. Sampson, Id. 52. In Peale v. Phipps, supra, at pages 374 and 375, the court enforce this doctrine without reference to whether the officer who represented the state court had taken possession of the property sought to be seized by the process issuing from the United States court.

But it is urged by the complainant that his mortgage contained the pact de non alienando, and that, therefore, the mortgagor could not alienate it so as to defeat or delay his right to seize it. Under the law of Louisiana, after a *cessio bonorum* of the mortgagor, the mortgagee cannot seize; the property must be administered by the syndic. *Bermudez v. Ibanez*, 3 Mart. (La.) 19; *Chiapella v. Lanusse's Syndics*, 10 Mart. (La.) 449; *Devron v. Creditors*, 11 La. Ann. 482; *Orr v. Lisso*, 33 La. Ann. 476. In *Wheeler v. Stewart*, 18 La. Ann. 673, it was so held where the mortgage contained the pact de non alienando. The complainant's mortgage is dated March 2, 1891, many years after the decisions which had thus settled the law had been rendered. It follows that, so far as citizens of Louisiana are concerned, mortgagees accepted mortgages with the interpretation given as part of the mortgages themselves. Nor does it affect the question that the complainant is an alien, so long as he has been for 40 years a resident of Louisiana. Alienage on the part of plaintiff gives jurisdiction to the United States circuit court as against citizen defendants. But with reference to an alien who was at the time of making his contract, which concerned real estate situated within this state, an actual resident here, the law upon this subject is the same as with reference to a citizen of this state. *Von Glahn v. Varrenne*, 1 Dill. 515, 521.

After the administration of a property mortgaged is finished in the insolvency court, provided the complainant is not made a party to the insolvent proceedings, it would seem that he could, by virtue of the pact contained in his mortgage, proceed against the mortgaged property in the hands of subsequent vendees. *Egerton v. Creditors*, 2 Rob. La. 201. But pending that administration he cannot assert his rights by a process and a seizure which would wrest this mortgaged property from a custody under which it is in contemplation of law placed, and which would, therefore, be contrary to the established comity of courts and the good order of society. The injunction restraining the marshal from enforcing the executory process must issue.

WATERHOUSE et al. v. COMER.

(Circuit Court, W. D. Georgia, S. D. April 8, 1893.)

1. RECEIVERS OF RAILROAD COMPANIES — DIFFICULTIES WITH EMPLOYES — ADJUSTMENT BY THE COURT.

Where the property of a railway or other corporation is being administered by a receiver under the superintending power of a court of equity, it is competent for the court to adjust difficulties between the receiver and his employees, which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership.

2. SAME.

It follows, then, that it is in the power of the court, in the interest of public order and for the protection of the property under its control, to direct a suitable arrangement with its employes or officers, to provide compensation and conditions of their employment, and to avoid, if possible, an interruption of their labor and duty, which will be disastrous to the trust and injurious to the public.

3. COMMERCE—AGREEMENTS TO RESTRAIN — ACT JULY 2, 1890 — COMBINATIONS OF EMPLOYES.

Rule 12 of an association of locomotive engineers, styled the "Brotherhood of Locomotive Engineers," which provides "that hereafter, when an issue has been sustained by the grand chief, and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of obligations if a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad run in connection with or adjacent to said road, to handle the property belonging to said railroad or system in any way that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues or differences of any nature or kind have been amicably settled,"—is plainly a rule or agreement in restraint of trade or commerce, and violative of section 1 of the act of congress of July 2, 1890.

4. SAME—CONSPIRACY—REV. ST. § 5440.

Construing several clauses of the interstate commerce law recited in the opinion with section 5440 of the Revised Statutes, it follows that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate commerce law, inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade or commerce of the country, will be obnoxious to the penalties therein prescribed.

5. SAME—RECEIVERS—ADVICE OF COURT.

In this case, the movants having avowed their purpose, in open court, to submit to the construction to be made by the court relating to rule 12 of the brotherhood, the receiver is directed to enter into an appropriate contract with them, subject to the general operation of this decision with reference to said rule.

(Syllabus by the Court.)

In Equity. Petition by Waterhouse and others, styling themselves the "Committee of Adjustment of the Brotherhood of Locomotive Engineers," against H. M. Comer, receiver of the Central Railroad & Banking Company of Georgia, asking that the receiver be directed to make a contract with the locomotive engineers. Granted.

R. W. Patterson, for the motion.

Lawton & Cunningham and Marion Erwin, opposed.

SPEER, District Judge. Cases are frequent where persons intrusted with corporate properties have applied to the courts for the prevention or redress of grievances threatened or inflicted by labor organizations. This is the first instance of which we have any information where members of such an association have by concerted action, in an orderly way, sought the arbitrament of a court to adjust a controversy relative to the wages and conditions of their employment. The recent application to this court of the Order of Railway Telegraphers, with similar purpose, was an attempt of this character. It was defeated in limine. The telegraphers, as a body, had abandoned the service of the receiver before they presented their petition. In the mean time, other telegraphers, with equal

right to employment by the receiver, had been engaged, and were performing the functions the striking telegraphers had surrendered, and, notwithstanding the solicitude of the court to spare a large number of intelligent young men the distress resulting from their indiscreet action, it was found to be impracticable. The members of the Brotherhood of Locomotive Engineers, who have presented this petition, have a proper standing in court. There are 250 locomotive engineers in the employment of the receiver, upon the various divisions of the Central Railroad & Banking Company of Georgia. Of these 211 are members of the Brotherhood of Locomotive Engineers, and the petitioners are a committee from that membership. They recite in their petition the facts that they have been for several years working under contracts made between a general committee of the brotherhood and the officers of the railroad. Since the 1st day of December, 1891, they have been working under the contract, of which they attach a copy, and since that time the properties have been intrusted to the control of Hugh M. Comer, as the receiver of the court. This contract expired on the 1st day of December, 1892. A few days prior to that time they gave notice to George D. Wadley, general superintendent of the company, that they desired certain changes in the contract. They state further that they have remained in the service of the company, although the superintendent and receiver refused to enter into any new contract or consider the old contract longer in force, unless ordered so to do by the court.

Pending the adjustment of the controversy, which was postponed for 90 days by virtue of a clause of the contract, which entitled the receiver to notice for that period, and of which he claimed the benefit, the court has continued the contract in force.

We have also caused several conferences between the receiver and the engineers, with the hope that an amicable agreement might follow. This expectation has been defeated by a strike on the Savannah, Americus & Montgomery Railroad, the refusal of one of the engineers to haul a train to which a car of that company was attached, his immediate discharge, and the friction between the receiver and the engineers which resulted therefrom. The engineers then applied to the court. They set forth the objects of their order, the advantages of a contract with their employers, and that such contracts are of force upon a very large proportion of the principal railroads of the country. They state that since it has been shown to them that the properties in the hands of the receiver are embarrassed financially, they are content to work in his service without any increase of wages, although they insist that the rate is less than that paid by competing and connecting lines, and they pray that the receiver be directed to continue in force the contract under which they were working at the time the receiver was appointed, subject to such modifications and changes as may be made by the order of the court. They annex a copy of this contract.

The receiver answers: First. That the Grand National Brotherhood of Locomotive Engineers is not incorporated, and that many of its rules and regulations, which have a bearing upon any con-

tract its members might make, are withheld from the public. This places him at a disadvantage, and renders uncertain the attitude of the brotherhood in any difficulty which might arise in connection with the contract. Second. That a number of the locomotive engineers employed by him are not members of the brotherhood, and that it is not proper for him to contract in this way with certain employes, while others are employed without such a contract. Third. That such a contract renders it impossible for the officers charged with the operation of the property to have such freedom in its administration as is necessary to its prompt and efficient management. Fourth. As a common carrier, the railroad under his control is liable for damages which may result from the disorganization of its service. That the Brotherhood of Locomotive Engineers is bound by secret obligations to withdraw from the service of railroad companies in a body, causing great damage. Fifth. That he should be at full liberty to select the best men and means of managing the business, without regard to organizations of any kind. That his superintendent has prepared a proper schedule of wages and conditions for the employment of engineers and firemen, a copy of which is attached. Sixth. If he should contract with the brotherhood, it would be holding out a premium for his employes to become members of that order, which respondent states is not to the interest of his trust. That the brotherhood renders it impossible for the officers of the railroad to come into direct contact with the employes, and prevents such free intercourse as is necessary to good and efficient service. That no contracts have been entered into with the Order of Railway Conductors and the Brotherhood of Locomotive Firemen, and that he has had no difficulty with the conductors and firemen. He denies that it is usual and customary for railroad companies of the United States to make such contracts with the Brotherhood of Locomotive Engineers.

It will be observed that much of the receiver's answer is an argument against the propriety and policy of contracts of any character between the officers of railway corporations and the representatives of labor organizations. The gravity and importance of the considerations thus presented are exceedingly great. The control, under any circumstances, by the courts, of contracts between representatives of the immense values invested with corporations engaged in the public duty of transportation, and the laborers employed in the same service, will doubtless appear to many as novel and dangerous. It is well, however, to consider if a proper provision, by appeal to the courts, in the frequent and destructive conflicts between organized capital and organized labor will not afford the simplest, most satisfactory and effective method for the settlement of such controversies. Is it not the only method by which the public, and, indeed, the parties themselves, can be protected from the inevitable hardship and loss which all must endure from the frequently recurring strikes?

It will not be wise for those engaged with the maintenance of public order to ignore the immensity of the changes in the relations of the employing and the employed classes, occasioned by the phe-

nominal development of commerce and the prevalence of labor organizations. We are in this case directly concerned with a corporation and a labor organization, and both engaged in railway transportation; and in this department of industry it is reported by the interstate commerce commission that there is invested, in the United States \$9,829,475,015, or nearly eight times the entire national debt of the country. Last year the railroads transported 530,000,000 passengers, or more than eight times the entire population of the United States. The operatives employed by them number 784,000, and it is no trifling testimony to the faithfulness and efficiency of this mighty army of railroad employes that of the vast population transported under their care only 293, or less than one twenty-thousandth of 1 per cent. lost their lives. It is, moreover, true that no operatives of a railroad more than locomotive engineers are charged with the preservation of life and property, and when we are advised by the proof that 32,000 of the locomotive engineers of the United States, more than 80 per cent., belong to the brotherhood, it is difficult to believe that their membership lessens efficiency to employers or fidelity to their supreme duty to the public. But whether these facts and other facts equally significant will justify judicial control of contracts essential to the uninterrupted transportation of the country, in which the public is so vitally concerned, it is clear that where the property of railway or other corporations is being administered by a receiver, under the superintending power of a court of equity, it is competent for a court to adjust difficulties between the receiver and his employes, which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership. Indeed, the power of the court to direct a contract between its officers does not appear to be questioned. The power of the court has always, on proper occasions, been exercised to protect the properties from the damaging and unlawful results of a strike of the laborers in its employ.

In the case of *The Telegraphers v. Comer*,¹ (decided at this term,) while this court, as above stated, was prevented by their own conduct from according to the petitioners the practical relief they sought, they were enjoined from any interference with the property, operations, or employes of the receiver, and rules were issued against individuals who were charged with such interference. In *Re Higgins*, 27 Fed. Rep. 444, the learned circuit judge of this circuit, the Honorable Don A. Pardee, declared:

"It is well-settled law that whoever willfully interferes with property in the possession of a court is guilty of a contempt of that court, and I regard it as equally well settled that whoever unlawfully interferes with officers and agents of the court, in the full and complete possession and management of the property in the custody of the court, is guilty of a contempt of court, and it is immaterial whether this unlawful interference comes in the way of actual violence or by intimidation and threats. The employes of the receiver, although pro hac vice officers of the court, may quit their employment, as can employes of private parties or corporations, provided they do not thereby intentionally disable the property; but they must quit peaceably and decently. Where they combine and conspire to quit, with or without notice, with the

¹Not reported, as the present case is controlling on the questions in issue.

object and intent of crippling the property or its operation, I have no doubt that they thereby commit a contempt; and all those who combine and conspire with employes 'o thus quit, or, as officials of labor organizations, issue printed orders to quit, or to strike, with an intent to embarrass the court in administering the property, render themselves liable for contempt of court."

Certainly, it follows, then, that it is in the power of the court, in the interest of public order, and for the protection of the property under its control, to direct a suitable arrangement with its employes or officers, to provide compensation and conditions of their employment, and to avoid, if possible, an interruption of their labor and duty, which will be disastrous to the trust and injurious to the public. There is no reason why the receivership, in this respect, should be conducted in a manner differing from the large preponderance of the successful and prosperous railroads of the country. It appears from the proof that about 90 per cent. of the railroads of the United States make contracts or schedules of rates and regulations for the employment of their operatives, which are agreed to by the representatives of both parties. We are satisfied from these facts that such arrangements, under proper restrictions, are praiseworthy and beneficial to both parties, and we therefore shall not longer hesitate to direct the receiver to enter into an appropriate contract or schedule of rates and regulations with the engineers. This contract, however, will not be restricted to members of the Brotherhood of Locomotive Engineers, although membership of that order is and will be no disqualification to service on railroads under the control of this court so long as the rules and regulations of the order are treated as subordinate to the law of the land. The contract will comprehend all engineers employed by the receiver, whether members or nonmembers of the brotherhood.

This brings us to the consideration—First, what is an appropriate contract; and, second, whether there is anything in the rules and regulations of the brotherhood and its relations to these properties which is inconsistent with the law, and which would make it improper for the court to place its receiver in a position where, in his exigent duty to carry on the business of transportation, for which the railroad was chartered by the state, he may find himself in the power of an organized body of his operatives who will be able to paralyze the operations of the properties. The appropriateness of the contract depends solely upon the arrangement of details. There is no difference between the engineers and the receiver upon the question of compensation. There is an apparent dispute about the effect of seniority of service of an engineer as affecting promotion. The court will provide, however, that, where merit and ability are equal, seniority of service shall prevail, and will arrange a fair tribunal for the purpose of testing the merit and ability of various candidates for promotion, with the privilege of either party in cases not reconcilable to appeal to the court. There are other instances of minor disagreement which the court will take time to adjust and to perfect the agreement.

We have noted with gratification the repeated statements made in judicio by the engineers and their counsel that they will accept

as final and satisfactory of every difference the conclusion and decision of the court. The receiver has also expressed more than once his purpose to abide the decision. This submission, so unlike the violent and irrational course pursued by either party, as their interests might prompt, and without the slightest regard to the rights of the public, in many conflicts between what are popularly called "capital and labor," is considerate, judicious, and strongly argues that the engineers who are before the court are good citizens,—indeed, patriots who respect and confide in the constituted authorities of their country. Fortunate will it be for our country if future differences of a similar character may be settled by a method so simple and so safe. This submission of the engineers applies as well to the remaining and most important difference between the parties, and that is the effect upon the duty to the court and to the property of the rule of the brotherhood, which is understood by the court to be as follows:

"(12) That hereafter when an issue has been sustained by the grand chief and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of the obligations if a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad run in connection with or adjacent to said road to handle the property belonging to said railroad or system in any way that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues of difference of any nature or kind have been amicably settled."

This rule is understood to have been adopted by the brotherhood in Denver three years ago. In his testimony, Mr. A. B. Youngson, the assistant chief engineer, frankly admitted that the effect of this rule, as applied to the properties in the hands of the receiver and the engineers in his employ, would be as follows: If, in the pursuance of the business of a common carrier, with which the receiver is charged, it should become necessary to convey over the lines of the Central Railroad a car belonging to a railroad company on which there was a strike of the engineers, that it would be the duty of the brotherhood men in the employ of the receiver to refuse to haul the train containing such car, and, if the officers of the road insisted that the car should proceed, loyalty to the brotherhood required that the engineer should at once resign his station, and abandon his duty. He might, he stated, if he thought proper, carry the train to the terminal point.

An illustration of the effect of this rule is afforded by the evidence. A strike was recently pending on the Savannah, Americus & Montgomery Railroad, which runs in connection with and is adjacent to the Central. Engineer Arden of the Brotherhood of Locomotive Engineers, in the employ of the receiver, was directed to carry a car of the Savannah, Americus & Montgomery road between two stations on the Central Railroad. He declined to do so, and was at once discharged. A committee of the brotherhood have insisted on his reinstatement. This the receiver has refused, and it is certain that but for the pendency of the proceedings now under consideration by the court, there would be, as a result of Engineer Arden's construction of his duty, and the receiver's action, a strike of the

engineers upon every line of the Central, with all the calamitous results to the public, to the road, and to the engineers which would inevitably ensue. The receiver relies upon this as the main and controlling reason why he should not be required to enter into a contract with the brotherhood, when this rule 12 will necessarily be written into the contract. Now, there can be not a doubt that this rule of the brotherhood is in direct and positive violation of the laws of the land, and no court, state or federal, could hesitate for a moment so to declare it.

It is plainly a rule or agreement in restraint of trade or commerce. Section 1 of the act of July 2, 1890, known as the "Sherman Anti-Trust Law," provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 7 of the act of February 4, 1887, entitled "An act to regulate commerce," provides—

"That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated as, one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act."

Section 8 of the same provides—

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as a part of the costs in the case."

This is the interstate commerce law, and, as amended by the act of congress of March 2, 1889, provides:

"Sec. 3. (a) Undue Preference. That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (b) Facilities for Interchange of Traffic. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith,

and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

"Sec. 10. Penalties for Violation of the Act. That any common carrier, subject to the provisions of the act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or who shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willfully suffer or permit any act, matter, or thing so directed or required by this act to be done, not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed \$5,000 for each offense: provided that, if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

The laws of the United States (section 5440 of the Revised Statutes) provide:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not more than two years."

Construing these several enactments together, it will be seen that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the interstate commerce law inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade and commerce of the country, will be obnoxious to severe penalties. This will apply with even greater force to persons in the employ of the railroads concerned.

Now, it is true that in any conceivable strike upon the transportation lines of this country, whether main lines or branch roads, there will be interference with and restraint of interstate or foreign commerce. This will be true also of strikes upon telegraph lines, for the exchange of telegraphic messages between people of different states in interstate commerce. In the presence of these statutes, which we have recited, and in view of the intimate interchange of commodities between people of several states of the Union, it will be practically impossible hereafter for a body of men to combine to hinder and delay the work of the transportation company without becoming amenable to the provisions of these statutes. And a combination or agreement of railroad officials or other representative of capital, with the same effect, will be equally under the ban of the penal statutes. It follows, therefore, that a strike, or "boycott," as it is popularly called, if it was ever effective, can be so

no longer. Organized labor, when injustice has been done or threatened to its membership, will find its useful and valuable mission in presenting to the courts of the country a strong and resolute protest and a petition for redress against unlawful trusts and combinations which would do unlawful wrong to it. Its membership need not doubt that their counsel will be heard, nor that speedy and exact justice will be administered wherever the courts have jurisdiction. It will follow, therefore, that in all such controversies it will be competent, as we have done in this case, for the courts to preserve the rights of the operatives, to spare them hardship, and at the same time to spare to the public the unmerited hardship which it has suffered from such conflicts in the past. It will be also found that by such methods organized labor will be spared much of the antagonism it now encounters, and in its appeal to the courts it will have the sympathy of thousands, where, in its strikes, it has their opposition and resentment.

But, if there were no statutory enactments upon the subject, no court of equity could justifiably direct its receiver to enter into a contract with a body of men who hold themselves bound to repudiate their contract, and disregard a grave public duty, because of real or alleged grievances, which some other person or corporation, not a party to the contract, inflicts or is alleged to inflict, not upon a party to the contract, but upon somebody else. To compel the receiver to do this would be monstrous. The receiver may be wholly just, considerate, humane, and even indulgent, to the engineers in his employ. They may, with reason, regard him not only as their kindly employer, but as their friend. The people of Georgia may have afforded to them every needed evidence of sympathy; the compensation may be ample; their future as bright as possible for intelligent, energetic, and courageous manhood; and yet, because of a difficulty with or without cause which originates in Maine or Minnesota, they will abandon the service of their kind employer, and forego the realization of their own hopeful anticipations, and bring dismay, and it may be ruin, upon the kindly and sympathetic people among whom they live. This is almost the inevitable consequence of this rule. It is in evidence, and is generally known, that almost the entire business of transportation of freight is carried on in cars which, without breaking the bulk of their freight, are forwarded from one railroad to another. This is an absolute necessity. The interests of the public and the economies of cheap and rapid transit demand it. There are 1,200,000 cars upon the railroads of the United States. There are 168,400 miles of railroad, or more than seven cars per mile.

The Central Railroad, according to the recent report of the superintendent, has less than two cars per mile. It is therefore indispensable that it should use the cars of other lines; but, if it were otherwise, it would be impossible, under the present system, to deny to the cars and freight of other lines transit over the lines of the Central without violation of the law. The receiver cannot violate the law, and the engineers cannot compel him to do so without themselves becoming obnoxious to the criminal statutes. And the court

does not doubt, from their bearing and testimony in the case, that they only need to be advised of these facts, when they will immediately recede from the unlawful and most dangerous attitude in which this rule has placed them. It is, indeed, a rule which, more than all others, has given strength and comfort to the enemies of organized labor.

It is true, however, that the learned counsel for the petitioners, when his attention had been called by the court to the insuperable difficulty in the way of a mutually beneficial contract presented by this rule, while insisting that it ought not to stand in the way of a contract, hastened to afford additional evidence of the good faith of his clients, by stating unreservedly that upon this, as upon all subjects, they were willing and anxious to take the direction of the court. This declaration is authoritative, and the court will act upon it. It is binding upon the engineers of the brotherhood, who are officers of the receiver, and who were represented by the committee and their assistant chief engineer, Mr. Youngson, all of whom were in the presence of the court when it was made. It is accepted as made in good faith, and as a condition of the contract which the court will direct the receiver to make. While, therefore, any engineer may, at any time, exercise his right as an individual to leave the services of the receiver, he may not do so in such manner as to injure the properties or impede its proper management.

In case of any issue with the management in which the brotherhood or its members are concerned, and the members in the employ of the receiver shall desire to leave his services, in a body or otherwise, in such manner as may in any way impede the operations of the road, they will be required to do so upon such terms and conditions as to the court may seem proper for the protection of the interest of the property and the maintenance of justice and fair play to all concerned. In the mean time the old contract will remain in force, always under the general operation of this decision with reference to rule 12 of the brotherhood, until the terms of the new contract are definitely settled by the court; and it will be specially directed that no engineer or other person in the employ of the Central Railroad shall be discharged or in any way injured in his station on account of this proceeding, or any step taken in regard to its inception or advocacy.

SOWLES v. WITTERS et al.

(Circuit Court, D. Vermont. January 11, 1893.)

1. ATTACHMENT—LIEN—LACHES—VOID JUDGMENT.

Though under Rev. Laws Vt. § 1542, the land attached on mesne process, unless set off to the creditor, or sold within five months after final judgment, becomes subject to attachment by other creditors, who may then seize and hold it as against the prior attachment, the right of such prior attaching creditor to sell after the expiration of the five months is not affected by attachment and sale under a void judgment, rendered upon the defendant's stipulation for the purpose of avoiding his rights.

2. EXECUTION—SALE OF LAND—ADVERTISEMENT.

Where the advertisement of the sale under execution of land situated in several towns describes each parcel in each town by towns, and specifies as to those in each town that the sale will be at an hour named, on the premises, the latter expression will be construed distributively as applying to each of the premises, and the advertisement is a sufficient compliance with Laws Vt. 1884, No. 139, § 2.

3. HUSBAND AND WIFE—EXECUTORS—TRUSTEE.

Where money is bequeathed to a wife in trust to pay the interest thereon to her daughter, and her husband, being the executor, collects the money, and never pays it over to his wife, the wife does not become liable to the daughter because of an understanding that she is to pay a certain annual sum in lieu of interest; and a judgment entered by consent in favor of the daughter against the mother for money assumed to be due under such agreement is void, as against an attaching creditor.

4. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Under Rev. St. § 916, adopting the laws of the states relating to remedies on judgments at law, the construction placed upon such laws by the highest court of the state, while not absolutely binding on the federal courts, is entitled to great, and almost controlling, weight.

In Equity. Suit by Susan B. Sowles against Wellington B. Witters and Chester W. Witters, receiver of the First National Bank of St. Albans, to remove a cloud on plaintiff's title to land. Bill dismissed.

Edward A. Sowles, for oratrix.

Chester W. Witters, for defendants.

WHEELER, District Judge. The oratrix is a daughter of Edward A. and Margaret B. Sowles. He was the executor of a will bequeathing \$25,000 to his wife in trust for, and for payment of the annual interest thereon to, this daughter. The wife had lands which the defendant receiver attached in a suit for an assessment upon stock in which he recovered judgment at the February term of this court, which ended May 9, 1889, for \$49,806.67, with costs, and took out execution thereon against her returnable in 60 days, instead of the next term, as required by rule 8 of this court, which was levied upon the lands attached. Upon the discovery of this mistake a suit was brought in the name of the oratrix against her mother in Franklin county court of the state. The receiver was summoned as trustee of the defendant, and the same lands, except one parcel claimed by the oratrix under a contract with Asa Owen Aldis, were attached therein. The receiver afterwards took out another execution, returnable to the next term, and caused the lands attached in his suit, in controversy here, to be levied upon and sold thereon to Wellington B. Witters. The sale was completed within five months after this levy, but not till more than that time after the judgment. The receiver was discharged as trustee from the suit of the oratrix, and afterwards judgment was rendered therein for the plaintiff on stipulation signed by the defendant for \$9,587, with costs. Execution was taken out upon this judgment, and levied upon the lands attached, which were seasonably sold. This suit is brought to remove the cloud of the receiver's levy, against which many defects are alleged, from the title of the oratrix. The defend-

ants answer that the contract with Aldis belonged to Margaret B. Sowles, set up that the judgment of the oratrix was had without foundation to avoid the rights of the receiver, and was void, and deny any material defects in the receiver's levy.

The case shows that Margaret B. Sowles did have an interest in the Aldis contract and lands covered by it which might be taken on execution; and that a new contract referring to it was made between the oratrix and Aldis, with her consent, which might leave her interest remaining, and still so liable. What that interest was does not exactly appear, and it cannot be now settled here. It was sufficient to show that the oratrix is not entitled to a decree here, because her mother had no interest in the lands.

By the laws of the state as resorted to and made a part of the laws of the United States, real estate attached on mesne process is "held five months after rendition of final judgment, and no longer." Rev. St. U. S. § 916; Rev. Laws Vt. 1542; rule 11. The highest court of the state has held that the sale must be completed within the five months to preserve the lien by attachment. *Whipple v. Sheldon*, 63 Vt. 197, 21 Atl. Rep. 271. That construction of the statutes of the state by that court, although not absolutely binding upon the meaning of them as a part of the laws of the United States, is entitled to great, and almost controlling, weight, and is followed here. *Butz v. Muscatine*, 8 Wall. 575; *Supervisors v. U. S.*, 18 Wall. 71. The defendants must therefore stand upon the levy and sale on the second execution of the receiver. This makes an inquiry into the validity of the judgment and proceedings in the name of the oratrix necessary. The statute 13 Eliz. c. 5, has long been a part of the statutes of this state. Rev. 1787, 111; R. L. § 4155. It provides that "all suits, judgments, and executions made or had to avoid a right, debt, or duty of another person shall, as against the party only whose right, debt, or duty attempted to be avoided, his heirs, executors, administrators, and assigns, be null and void." The testimony of Margaret B. Sowles has been taken by the defendants, in which she states that notes and leases reserving rent were delivered to her as trustee to nearly the amount of the legacy of \$25,000 for her daughter, in 1880, and assigned to her in 1883 or 1884, and refers to a specification not filed as of her indebtedness to the oratrix, on which judgment was rendered for "rents, moneys, etc., owing from January 18, 1884 to 1885, \$1,250," and so for each year to January 18, 1889, and for "Barney money, April 10, 1886, \$1,700;" amounting, without interest, to \$7,950, and with interest to \$9,587. She further states that the Barney money was principal, and was paid to her husband in her presence. She admits having testified repeatedly August 12, and 13, 1886, that she had not received any rents nor money as trustee for her daughter up to that time, except some which she had paid out for her schooling, which she states was correct; and that other money was paid to her husband for her, but when and to what amount she could not tell; that she had no account of money received; that the amounts specified were agreed to as due because she was to pay her daughter \$1,500 interest yearly.

The testimony of Edward A. Sowles has been taken for the oratrix
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without examination in chief as to the foundation of the judgment. He was asked: "Interrogatory 9. What was the consideration of the debt upon which said suit was brought? Answer. Margaret B. Sowles' indebtedness to Susan B. Sowles for moneys as trustee under H. Bellows' will, which she owed Susan B. Sowles, and agreed to pay her individually, and was individually liable therefor." The sums specified as accruing before August 12, 1886, amount, without interest, to \$4,200, and with interest to \$5,424.50. Thus considerably over half of the judgment appears to have been rendered as for moneys received which clearly had not been received, and the evidence does not show that any of the residue was for money actually received. The judgment seems to have been made up on the assumption that the trustee had received securities to the amount of \$20,833.33 $\frac{1}{2}$, and would be liable for interest on that amount, whether she had received it or not, and for the Barney money, although she had not received it, and it would be principal on which she was only to pay the interest.

The statute of the state authorizing married women to make contracts does not authorize becoming surety for the husband's debts. Laws Vt. 1884, p. 120. The husband was executor, and liable for assets of the estate received by him, and the wife could not make herself liable for the same by stipulating as trustee that they might go into a judgment against her. This judgment was without foundation; was obviously, from the circumstances, had to avoid the right of the receiver to levy his execution upon this land; and by the express words of the statute was, with the execution issued upon it, null and void as against the receiver, being so absolutely void it does not stand in the way of the receiver's levy and sale.

The principal objections against that levy are that the return of the marshal on the execution was not recorded in the town clerk's office, and did not, when made, show notice to the debtor, nor sufficient advertisement, or publication three weeks successively, of the time and place of sale. Formerly real estate was not sold on execution, but was set out on appraisal by freeholders to the creditor. The return of the officer was required to be recorded in the town clerk's office, and returned whence issued, and there recorded. Rev. Laws, §§ 1569, 1573, 1927. No deed was given. This record was the extent of the creditor's title. That the record in the town clerk's office had been made was to be shown by the return, and the return must be made within the life of the execution according to its command, but the record of the return need not be made till afterwards. *Perrin v. Reed*, 33 Vt. 62. At this time real estate might, (Laws 1884, No. 139, § 1,) "instead of being appraised and set off to the creditor, be sold on execution in the manner hereinafter prescribed." The manner prescribed was by public auction to the highest bidder, and deed, "which, being recorded in the town clerk's office," should "give to the purchaser all the debtor's title to the land so sold." Section 2: The auction must be on sixty days' notice in writing to the debtor, and advertisement, published three weeks next before, of the time and place. Section 3: The sale may be after the return day of the execution. The officer is to make return with-

in five days after the sale, "but the title of the purchaser shall not be affected by any failure on the part of the officer to make the return as aforesaid." Section 5: A form of deed is given which recites the proceedings, and nothing else is required to be recorded. The substitution of the sale and deed for the appraisal and set-off substituted the requirements of the former for those of the latter when the former is used. *U. S. v. Clafin*, 97 U. S. 546.

The notice to the debtor of the sale of real estate is required, "that the owner thereof may have an opportunity to redeem the same." Laws 1884, No. 139, § 3. It is no part of the levy or sale, and is somewhat like the demand required of the sum to be levied. *Rev. Laws*, § 1547. The failure to make such demand does not invalidate the levy. *Collins v. Perkins*, 31 Vt. 624. The notice is, however, shown to have been in fact given. The advertisement is shown in the bill, and shown by proof to have been in fact published as required.

The principal criticism upon that is that it relates to several parcels in each of several towns, and does not name time and place as to each parcel. But it describes each parcel in each town, by towns, and specifies as to those in each town that the sale will be at an hour named, on the premises. This expression is used distributively, and applies to each of the premises. The advertisement appears to have been fully understood by all concerned, as it was followed in making the sale, and to have been sufficient. As the title would not be affected "by any failure" to make return, the failure to make full return in these respects would not affect it.

These proceedings are similar to those of sales of lands for taxes, and such parts of them as are not required to be shown in a particular way may be shown otherwise by any competent evidence. *Chandler v. Caswell*, 17 Vt. 580. And if these are required to be shown by return made at some time as the best evidence, the return has by leave of court been amended according to the facts, which seems to be allowable. *Brainard v. Burton*, 5 Vt. 97; *Bent v. Bent*, 43 Vt. 42. Deeds not criticised were given by the marshal to the purchaser and recorded, which, according to the statute, appear to give the purchaser, the defendant Wellington B. Witters, "all the debtor's title to the lands so sold."

Suggestion is made that the bids are not paid, but that is a matter wholly between the purchaser, creditor, and debtor. The execution is returned satisfied to the amount of the bids, which is sufficient as to all. Bill dismissed, with costs.

SOWLES et al. v. RUGG et al.

(Circuit Court, D. Vermont. January 11, 1893.)

QUIETING TITLE—WHEN SUIT LIES.

One who has purchased land at execution sale under a void judgment obtained by him collusively with the defendant for the purpose of defeating the rights of a prior attaching creditor, cannot, by joining with

him defendant's husband, subject to whose alleged marital rights the sale was made, entitle himself to maintain a bill to remove the cloud created by the sale under such prior attachment.

In Equity. Suit by Susan B. Sowles and Edward A. Sowles against Benjamin F. Rugg and Chester W. Witters, receiver, etc., to remove a cloud on complainants' title. Bill dismissed.

Edward A. Sowles, for orators.

Chester W. Witters and Nathan N. Post, for defendants.

WHEELER, District Judge. The oratrix is a daughter, and the orator the husband, of Margaret B. Sowles, and the defendant Witters is receiver of the First National Bank of St. Albans.

He attached her real estate, and the oratrix attached the same. It was levied upon, and sold on his execution to the defendant Rugg, but not within five months of the judgment; and afterwards levied upon and sold, subject to the marital rights of the husband, to the oratrix, on her execution within five months of that judgment. This suit is brought to remove the cloud of his levy from the title of the oratrix and orator, and to prevent Rugg from interfering with their possession.

It has been heard with Susan B. Sowles vs. Wellington B. Witters and Chester W. Witters, receiver, upon like answer and the same evidence. See 55 Fed. Rep. 159. As it is brought by the oratrix and orator, it can be maintained only upon a joint or common title or right of both. That the judgment and execution of the oratrix are wholly void as to the defendant Witters, receiver, is found and held in this case as in that. The subjection of her levy and sale to the marital rights of the husband would not vary their effect. By the statute under which they were made they would, if valid, "give to the purchaser all the debtor's title to the land so sold." Laws 1884, No. 139, § 2. If the husband had any marital rights that would be left, they would not be included, whether noticed or not; if he had none, all the debtor's title would be conveyed, although treated as subject to them. *Perrin v. Reed*, 35 Vt. 2. If the receiver's levy was valid, the effect would be the same; neither purchaser would have any joint or common right with the husband, and neither could join with him against the other. Much less can the oratrix proceed jointly against the other after her right fails. His right, however, is to the use of the wife's lands; the rents, issues, and products of which have long been exempt from his debts. Rev. Laws, § 2324. But the statute relating to the contracts and liabilities of married women provides that execution may issue against them, and be levied on their "sole and separate goods, chattels, and estate." Laws 1884, No. 140, § 1. When her lands were levied upon and sold they were no longer her lands for him to have the use of. When the marital relation is ended by divorce, this right ceases. *Barber v. Root*, 10 Mass. 260; *Mattocks v. Stearns*, 9 Vt. 326. Whatever ends the wife's estate ends the husband's. Even after he becomes tenant by the curtesy, what would end her estate if she was alive will end his. Execution issues upon the acknowledgment of

a statute, merchant or staple. "If a woman, tenant in tail, acknowledge a statute and marry, and have issue and die, the land may be extended in the hands of her husband, tenant by the curtesy." *Bac. Abr. "Curtesy of England, E."* "Any circumstance which would have defeated or determined the estate of the wife if living will, of course, put an end to the estate by curtesy." 1 Washb. Real Prop. c. 6, par. 18; 1 *Rop. Prop.* 35. The husband has an estate in the wife's land which might be attached by his creditors, if not exempt by law, and be conveyed by him, if not prohibited by law. *Hyde v. Barney*, 17 Vt. 280. But it is of uncertain duration, and liable to be defeated by the failure of her estate, as well as by the termination of the marriage relation during the life of both.

The levy of the oratrix seems to be good against all but the receiver, whose right was sought to be avoided, and would terminate the rights of the orator; and both could not proceed together against the defendants after the failure of his rights.

Let a decree be entered dismissing the bill, with costs.

EQUITABLE MORTG. CO. v. LOWRY et al.

(Circuit Court, N. D. Texas. February 4, 1893.)

No. 203.

1. HOMESTEAD—DESIGNATION—CONTIGUOUS TRACTS—INCUMBRANCES.

A husband and wife owned and lived with their family upon, and used as one tract, three tracts of land containing 133, 280, and 5 acres, respectively, all adjoining. The 133-acre and the 5-acre tracts constituted, with a small parcel of the 280 acres, between them a continuous body of land. They also owned a tract of 59.82 acres in the same county, but at a distance of three fourths of a mile from the land on which they lived. The husband made a written designation of the 133-acre, the 5-acre, and 59.82-acre tracts as his homestead; the 280-acre tract being, at the time, under a mortgage. *Held*, that under the Texas statute the designation was effectual as to the 133-acre and the 5-acre tracts, and that a deed of trust thereof was invalid; but that it was ineffectual as to the 59.82 acres, and that a deed of trust thereof was valid.

2. SAME—MORTGAGE—ESTOPPEL BY REPRESENTATIONS.

Representations under oath, made by husband and wife for the purpose of obtaining a loan upon the security of their homestead lands, that the lands are not their homestead, but that other lands therein specified are, do not estop them from claiming their homestead exemption under the Texas statute, such representations being contrary to the visible and actual facts.

3. SAME—COLORABLE TRANSFER TO THIRD PARTY—MORTGAGE—SUBROGATION.

A husband and wife conveyed their homestead to a third party by general warranty deed for an expressed substantial consideration. The grantee borrowed money on the security of the lands. The agent of the lender knew that the conveyance to the borrower was only colorable; that the real interest in the land remained in the grantors, and that they continued to occupy the land as their homestead. The lands were reconveyed, and thereafter the husband and wife, by false representations that the lands were not their homestead, borrowed money upon them, a part of which the lender, at their request, applied in payment of the first loan. *Held* that, although the deed of trust to secure the latter loan was invalid, the lender was entitled to be subrogated to the debt and lien of the first lender, and that the knowledge of the agent of the latter was not imputable

to the former, as the payment of the first loan had been made by the second lender at the request of the owners of the homestead, and in ignorance of the facts as to the colorable conveyance.

In Equity. Bill by the Equitable Mortgage Company against James P. Lowry and others to foreclose a deed of trust on real property. Decree for complainant.

W. A. Bonner, for complainant.

McCormick & Spence, for respondents.

RECTOR, District Judge. In this cause it is admitted by the plaintiff and defendants—

That in May, 1883, James P. and Martha A. Lowry were the owners of about 413 acres of land on the John C. Bates, A. J. Heffner, and W. H. Sowell surveys, all in one body, and adjoining; that in 1883 J. P. Lowry and wife gave a deed of trust to the Texas Loan Agency upon the 280 acres out of the lower part of the J. C. Bates survey and the west end of the A. H. Heffner and W. H. Sowell surveys, colored green on the plat; that said deed of trust was renewed in 1885, and had not been paid, and was in force November 30, 1888; that on November 13, 1884, Martha A. Lowry and J. P. Lowry executed a general warranty deed to William Lowry, conveying to him the 133-acre tract out of the Bates survey and the 59.82-acre tract out of the Moore survey, colored yellow on the plat; that the consideration shown in said deed was \$4,000 cash, paid by William Lowry, the grantee; that William Lowry, on January 15, 1885, executed a note for a loan of \$1,300 from the J. B. Watkins Land Mortgage Company, and gave a deed of trust on the said 133-acre and the said 59.82-acre tracts to secure it; and that November 1, 1886, William Lowry conveyed the said 133 and 59.82 acre tracts back to M. A. Lowry, the consideration recited in the deed being \$1,300, paid by M. A. Lowry, and the assuming payment of a certain mortgage for \$1,300, dated January 1, 1885, given by William Lowry to the J. B. Watkins Land Mortgage Company; and that in October, 1887, James P. Lowry made a written designation, duly executed, acknowledged, and recorded, wherein he designated as his homestead the 133-acre tract out of the Bates survey and the 59.82-acre tract out of the Moore survey; that in November, 1888, when the loan was made by the Equitable Mortgage Company, J. P. Lowry and wife, M. A. Lowry, owned the 133-acre tract, the 280-acre tract, the 59-acre tract, and the 5-acre tract, but the deed of trust to the Texas Loan Agency on the 280-acre tract was still in force at that date.

McCormick & Spence, Sols. for Defts.

W. A. Bonner, Atty. for the Equitable Mort. Co.

In addition to the facts stated in the foregoing agreement of counsel, the court finds that James P. Lowry and his wife, Martha A. Lowry, on November 1, 1888, executed a note to the complainant for \$3,450, with interest at 6 per cent., as shown by five coupons attached; that at the same time they executed to S. M. Finley a deed of trust upon the 133 acres of land, part of the John C. Bates survey, upon 59.82 acres of land, part of the James Moore survey, and on about 5 acres, part of A. J. Heffner survey, to secure the payment of said notes and coupons; that as an inducement to the payee to make the loan of said money James P. Lowry and his wife, Martha, represented to it, under oath in writing, that said land was not their homestead, but that other land, mentioning lots in the town of Campbell, was their homestead. The 59.82 acres, part of the James Moore survey, is in the same county with the land upon which James P. Lowry and his wife, Martha, lived, but separated three fourths of a mile from it. James P. Lowry and

wife, M. A. Lowry, at the time they executed said mortgage sued on by complainant, were actually (contrary to their representations to complainant) living with their family on said 133 acres, part of the John C. Bates survey, and were actually using the 280 acres, then under mortgage to the Texas Loan Agency, and the 5 acres, part of the A. J. Heffner survey; all constituting the 413 acres in one body. John I. Nicholson was the agent of the J. B. Watkins Land Mortgage Company in negotiating the loan to William Lowry of \$1,300, January 1, 1885, and knew that the sale to William Lowry by J. P. Lowry and wife, the mortgage debt of \$1,300 thereon, and the reconveyance back by William Lowry to Martha A. Lowry, were all devices to put a mortgage on the 133 acres of land out of the Bates survey on which J. P. Lowry and wife lived as a homestead. This mortgage to the J. B. Watkins Land Mortgage Company was paid by complainant out of the money sued for in this case. Martha A. Lowry, wife of James P. Lowry, died in 1890. Default having been made in the payment of the indebtedness of James P. Lowry and wife, this suit was brought to establish the same, and foreclose the deed of trust against James P. Lowry, the trustee, and the children of Mrs. Lowry.

There is no contest in the case except over the liability of the land for the debt sued on. Under the facts and issues joined, the following questions of law arise:

First. Was the land mortgaged by James P. Lowry and wife their homestead at the time of the deed of trust to complainant?

Second. If the land, or part thereof, so mortgaged was the homestead of Lowry and wife when mortgaged, did the false representations of Lowry and wife, made to complainant to induce it to make the loan, estop Lowry and wife from setting up the homestead in the land mortgaged?

Third. Will the payment of the debt by complainant of the J. B. Watkins Land Mortgage Company, amounting to \$1,601.90, when paid, subrogate it to the lien of said indebtedness on the 133 acres and the 59.82 acres?

The constitution of the state of Texas provides that "no mortgage, trust deed, or other lien on the homestead shall ever be valid except for the purchase money thereof, or improvements made thereon, as hereinbefore provided, whether such mortgage or such trust deed or other lien shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void." Const. art. 16, § 50. The laws of the state provide "that the homestead of a family not in a town or city shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon: provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family." Article 2336, Rev. St. Tex.

1. On the first proposition the evidence seems clear that the 133-acre tract was the homestead of Lowry and wife, and when they executed the mortgage to secure the debt sued on in this

case they were then living on it, cultivating and using it, with their family, as a homestead. The small tract of 5 acres off of the A. J. Heffner survey had a gin on it, and some land in cultivation, and constituted, with the 133 acres, and a small tract between the 133 acres and the 5 acres, a continuous body of land. It may fairly be taken as a part of the homestead at the date of the mortgage. As to the 59.82 acres about three quarters of a mile off from the homestead, it was no part of the homestead at the date of the mortgage. There were 413 acres in a solid body in the home tract, all under fence, and being cultivated, or otherwise used by said Lowry and wife, when the mortgage was given by them. It is true there were 280 acres of the home tract under mortgage on November 1, 1888, to the Texas Loan Agency; and it is also true that in 1887 Lowry and wife had designated this 59.82 acres as part of their homestead. Such designations are not valid as against the patent fact in the case. A homestead is to be determined by the visible facts of use and enjoyment.

2. The 133 acres of the John C. Bates survey and the 5 acres of the Heffner being part of the homestead of Lowry and wife at the date of the deed of trust sought to be foreclosed thereon, this brings us to consider the effect of their declarations made to complainant that said land was not their homestead, but that lots 6, 7, 8, 9, and 10, in block 10, in the town of Campbell, were their homestead. There can be no doubt that the purpose of those declarations, which were untrue, was to induce the complainant to believe them, and thus obtain a loan on the homestead. The defendants were not estopped by their declarations in this case from setting up their homestead exemption. In *Land Co. v. Blalock*, 76 Tex. 89, 13 S. W. Rep. 12, Chief Justice Stayton, delivering the opinion of the court, says:

"The fact of actual possession and use as the home of the family was one against which the lender could not shut its eyes. Every person dealing with land must take notice of an actual, open, and exclusive possession; and where this, concurring with interest in the possessor, makes it a homestead, the lender stands charged with notice of that fact, it matters not what declarations to the contrary the borrower may make."

2. This brings us to the claim of complainant to be subrogated to the \$1,300 debt of the J. B. Watkins Land Mortgage Company, and its lien on the 133 acres of land out of the Bates survey, on which James P. Lowry and wife lived, and also on the 59.82 acres out of the James Moore survey. As to this latter survey, there is no difficulty in allowing complainant to be subrogated to the debt and lien of the J. B. Watkins Land Mortgage Company thereon. As this 59.82 acres was never, in our view, the homestead of Lowry and wife, that fact leaves it subject to the lien of the debt sued on without invoking the doctrine of subrogation. The fact that John I. Nicholson was the agent of the J. B. Watkins Land Mortgage Company in negotiating the loan of \$1,300 to William Lowry and in taking a lien on the 133 acres of land out of the Bates survey, and that he knew at the time he took said lien on said tract of land that it was in fact the homestead

of J. P. Lowry and wife, and that the conveyance to William Lowry by J. P. Lowry and wife, and reconveyance back to Martha A. Lowry by William Lowry, were all devices to put a lien on the homestead of Lowry and wife, it is insisted makes the lien on said 133 acres invalid in behalf of said J. B. Watkins Land Mortgage Company, and in behalf of any one who may be subrogated to the rights of said company. These facts, we think, would destroy the lien of said debt on the homestead tract of 133 acres of Lowry and wife in the hands of said Watkins Company.

A surety can ordinarily make such defenses as his principal could make, and when he pays the debts of his principal he is subrogated to all the rights of the creditor. The present, however, is not the case of a surety, but of a stranger to the debt of J. B. Watkins Land Mortgage Company against William Lowry, and assumed by Martha Lowry upon the reconveyance back to her by William Lowry of the said tract of 133 acres. Not only was complainant a stranger to the debt, but comes in at the instance of Lowry and wife, and pays it off. Pomeroy, in the third volume of his Equity Jurisprudence, (section 1212,) says:

"The doctrine of equitable assignment is also justly extended by analogy to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment at the instance of a debtor party, and for his benefit."

The fact that Lowry and wife might have set up the claim of homestead in the said 133 acres of the Bates survey against the lien of the J. B. Watkins Land Mortgage Company debt, by reason of notice to said company, through its agent, that said land was the homestead of Lowry and wife when said debt was contracted, will not enable them to set up such claim against this complainant. There is nothing in the record to show that it had other knowledge of the debt or lien than what the county records show. There is nothing in the case to show that complainant had knowledge, when it paid off the J. B. Watkins Land Mortgage debt, of the devices adopted by Lowry and wife to put a mortgage on their homestead, which assumed the shape of a vendor's lien note in the reconveyance back to Mrs. Lowry. *Heidenheimer v. Stewart*, 65 Tex. 321; *Hurt v. Cooper*, 63 Tex. 363.

The court finds for complainant its debt, and that the lien thereof be foreclosed on the 59.82 acres out of the Moore survey as no part of the homestead when said debt was created. The court further finds that complainant is subrogated to the debt and lien of the J. B. Watkins Land Mortgage Company, and that same be foreclosed on the 133 acres of the John C. Bates survey. The court finds that the 5 acres of the Heffner survey, not being included in the mortgage to the J. B. Watkins Land Mortgage Company, is not liable for any of the debt sued on.

HERSHBERGER et al. v. BLEWETT et ux.

(Circuit Court, D. Washington, N. D. December 7, 1892.)

No. 25.

EQUITY PRACTICE—DISMISSAL WITHOUT PREJUDICE—RIGHTS OF DEFENDANT

In a suit in equity involving the title to real estate plaintiff cannot dismiss without prejudice and without the consent of defendant, on payment of costs, even though no cross bill has been filed, after issue has been joined, and after interlocutory decrees practically deciding the controversy have been entered on demurrer and exceptions to the pleadings. *Chicago & A. R. Co. v. Union Rolling Mill Co.*, 3 Sup. Ct. Rep. 594, 109 U. S. 702, followed.

On Rehearing.**1. STATE AND FEDERAL COURTS—CONFLICTING JURISDICTION.**

Under the laws of Washington Territory the probate court was a court of record, and the facts essential to the jurisdiction of that court to appoint an administrator were required to be set forth in a written petition filed therein. Furthermore, the letters of administration granted thereon were required to show the fact and date of the death of the intestate, his place of residence, his intestacy, and the existence within the territory of property subject to administration. On motion to dismiss an action involving the title to land brought in the federal court, on the ground that the probate court had acquired exclusive jurisdiction of the subject by administration proceedings, the record of the letters produced omitted these essential particulars, and the omission was not explained or supplied by any part of the record or by proof aliunde. *Held*, that there was not a sufficient showing that jurisdiction had been acquired as claimed.

2. SAME—ESTATES OF DECEDENTS.

The jurisdiction over the estates of deceased persons which the federal courts, as courts of chancery, have concurrently with the state courts when the other conditions of federal jurisdiction exist and the state courts have not already acquired exclusive jurisdiction, cannot be abridged, in an action by heirs involving title to land, by a law of the state which withholds from the heirs any title or right to litigate concerning the same until the administration is closed.

3. PUBLIC LANDS—OREGON DONATION ACT—SETTLERS' HEIRS.

The land which plaintiffs alleged to be subject to administration was alleged in the bill to have been entered on by one S., by virtue of the "Oregon Donation Act" of September 27, 1850, (9 Stat. p. 496,) and the act of February 14, 1853, (10 Stat. p. 158,) amendatory thereof; that, by occupancy and cultivation between named dates, he "became the equitable owner" thereof, and entitled to a patent; and that he then died. The patent, which did not issue until several years after his death, granted the land to "the heirs of S." Both the original and amendatory act provided for the issue of patents to the heirs of settlers who died before completing the required period of occupancy. *Held*, that the heirs took by purchase from the United States, and that the land was never the property of S., and was not subject to administration as such.

4. SAME—TERRITORIAL LAWS.

Code Wash. T. § 551, which provided that a settler's interest in a claim under said donation act might descend to his heirs as real estate, cannot affect the case, for it is void, as being an attempt to control the construction of a congressional grant.

In Equity. Suit by Sarah Hershberger and John B. Hershberger, her husband, against Edward Blewett and wife. Plaintiffs move, after issue joined, to dismiss without prejudice. Denied.

T. B. Hardin, for plaintiffs.

T. R. Shepard, for defendants.

HANFORD, District Judge. The original bill in this case was filed August 9, 1890. After hearing the arguments of counsel thereon, a demurrer to said original bill was by the court sustained. 46 Fed. Rep. 704. By leave of court an amended bill was subsequently filed, and a demurrer to the same was argued and overruled. The defendants have answered, and exceptions to their answers have been submitted to the court, and overruled. The case was at issue on the 2d day of July, 1892, on which day a general replication was filed. More than three months thereafter, to wit, October 6, 1892, the complainants filed a motion to dismiss without prejudice on payment of the costs, without assigning a reason for dismissing. No evidence has been taken, and no application has been made to the court to enlarge the time for taking evidence. The defendants oppose the motion on the ground that the plaintiffs' claim affects the title to Denny & Hoyt's addition to the city of Seattle, (the premises in which the plaintiffs claim to have an interest,) and prevents the sale of lots therein, and that any disposition of the case which will leave the controversy open to future litigation will be a serious injury to them, and to every owner of property in said addition.

By the court's decisions of the questions which have been argued, and decretal orders, the claims and rights of the parties have been adjudicated. The defendants have been put to expense in making their defenses, and, in my opinion, they are now entitled to secure by a final decree the fruits of the litigation. The motion to dismiss without prejudice I regard as a request to the court for its consent to the use of judicial process for the mere purpose of harassing and oppressing the defendants. To grant the motion, the court will have to make a record which will be equivalent to a public announcement that the plaintiffs have leave to renew in this court the attack upon the title to the premises, and a warning to every person who buys or improves a lot in said addition that the expense of defending against such attack may be forced upon him or her whenever the plaintiffs shall be so minded.

The authorities cited do not sustain the solicitor for plaintiffs in maintaining that in equity a plaintiff may dismiss without prejudice, and without consent of the defendant, at any stage of the case, upon payment of costs. In section 291 of Foster's Federal Practice the learned author says:

"After appearance, and before a decree or decretal order, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared, but not if they, or any of them, would be injured thereby. * * * After a decree or decretal order, however, the plaintiff may not discontinue without the consent of all parties who have acquired rights by the decree."

The same rule is given in 1 Daniell, Ch. Pr. (5th Ed.) 793, which is another of the authorities cited by plaintiffs' solicitor; and the same chapter, on page 790, contains the very explicit statement that—

"Where, however, there has been any proceeding in the cause which has given the defendant a right against the plaintiff, the plaintiff cannot dismiss his bill as of course. Thus, where a general demurrer had been overruled on argument, Lord Cottonham was of opinion that the plaintiff could not dismiss his bill as of course, the defendant having a right to appeal against the order overruling the demurrer, which right he ought not to be deprived of on ex parte application."

House v. Mullen, 22 Wall. 42, is not in point, but the case of Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. Rep. 594, is analogous. The decision of the supreme court in that case is based upon the rules of chancery practice given in the chapter of Daniell's Chancery Practice above referred to, and other authorities in harmony therewith. After quoting from several, including the decision in Watt v. Crawford, 11 Paige, 472, and referring to a number of other authorities, Mr. Justice Woods, in the opinion of the court, says:

"The authorities cited sustain the refusal of the circuit court to allow Dumont to dismiss his bill. * * * After all these proceedings, and when the controversy between the parties was practically ended by the interlocutory decree of the court, the motion to dismiss his original bill was made by Dumont, the complainant therein. The rolling mill company insisted that if the original bill, carrying with it the cross bill, were dismissed, its claim would be barred by the statute of limitations. It would be hard to conceive of a clearer case for the application of the rules laid down by the authorities we have cited. If the court, under these circumstances, had allowed the original bill to be dismissed without the consent of the rolling mill company, it would have inflicted a palpable wrong on that company, and trifled with the administration of justice."

The remarks quoted are applicable to this case. Although no cross bill has been filed, the case is not so materially different on that account as to require the application of a different legal principle. The filing of a cross bill would not ipso facto deprive the court of discretionary power to dismiss without prejudice. No evidence has been taken, but the evidence is shut out by the rules, and the controversy between the parties has been practically ended by the interlocutory decrees upon the demurrers and exceptions to the answers. It is my opinion that the defendants are now entitled to have the cause set down for hearing upon the bill and answer, unless the court shall for good cause grant an application to enlarge the time for taking evidence according to the rules. Fost. Fed. Pr. § 292. Motion denied.

On Rehearing.

(April 3, 1893.)

By leave of court the plaintiffs have renewed their motion to dismiss this suit without prejudice, and, in support of their new motion, affidavits and copies of certain records have been filed, whereby they attempt to show that in the year 1868 the probate court of King county, in which the land in controversy is situated, appointed an administrator of the estate of William A. Strickler, the original claimant of the land under the Oregon donation law, and that said probate court, and its successor, the superior court of King county, have ever since retained jurisdiction of said estate. The record of

the probate court, offered in evidence, consists of a document purporting to be letters of administration, an inventory of said estate filed by the person named as administrator, (which inventory includes said donation claim, and nothing else,) and an order for publication of notice to creditors, dated February 10, 1869; and it appears that from the date of said order until November 15, 1892, no steps were taken in the administration of said estate. On the last-mentioned date the complainant Sarah Hershberger filed a petition in the superior court of said county for a citation to said administrator to render an account. Thereupon a citation was issued, and in response to it said administrator returned an account, in which he strikes a balance by debiting himself with the land at its appraised value, and taking credit for the same amount; and he certifies that he has all of said land on hand; that no claims against the estate have been presented; and that he waives compensation for his services. The affidavits allege that said superior court is about to proceed to settle up said estate, and to close the administration thereof, and distribute said land to the heirs of Strickler, and assign dower therein to whomsoever may be entitled to such an interest, and that the complainants are about to inaugurate an administration of the estate of Mary Strickler, whose interest, as one of the heirs of William A. Strickler, they claim to have acquired through a conveyance thereof made by Mary Strickler in her lifetime to William L. Rider, deceased, the former husband of the complainant Sarah Hershberger. As reason for having an administration upon the estate of said Mary Strickler, it is said that complainants' attorneys are of opinion that the decisions of the supreme court of Washington, particularly the case of Balch v. Smith, 30 Pac. Rep. 648, have established a rule of law in this state which operates as a bar to any suit or action by a person claiming title to real estate, or an interest therein as successor to the rights of an intestate deceased person, to recover such property or interest, until the estate of such intestate shall have been administered upon, and the property distributed by a decree of the probate court.

The argument is that, by the proceedings of the probate court referred to, the land was placed in *custodio legis*, so that this court is deprived of jurisdiction of a suit in personam to determine between the parties the validity of their respective claims thereto; and that, even if the court is not absolutely without jurisdiction, the suit must nevertheless fail of its object, for the reason that, under the peculiar laws of this state, as declared by its supreme court, until the administration of the estates of said William A. and Mary Strickler shall have been completed, and the property distributed to their heirs, the land is liable to be sold by order of the probate court to pay the expenses of administration, and therefore no title or right to litigate concerning the same has passed to the heirs. In other words, the court cannot try the title to said property in this suit, or render a decree which will close the controversy, because the complainants are not the proper parties to sue, no legal title having become vested in them.

The showing made will not bear close inspection. It is certainly reasonable to suppose that when the court is asked to deny its jurisdiction of a case on the ground that another court has, by taking the res into its custody, acquired exclusive jurisdiction of the subject of the action, the fact of such exclusive jurisdiction in another court would be made apparent. But that has not been done in this instance. The laws of Washington Territory wisely provided that the probate court should be a court of record, and prescribed that the facts essential to the jurisdiction of said court to appoint an administrator should be set forth in a written petition, and filed, and that the main essentials, including the fact and date of the death of a person, the place of his residence at the date of death, his intestacy, and the existence of property within the territory subject to administration, should be recited in the letters of administration. The probate court was a court of special and limited jurisdiction, deriving all its powers from statutes. Being a court of record, its proceedings cannot be shown otherwise than by its record; and its jurisdiction to grant letters of administration must be denied, unless the record contains proof of the existence of all the facts essential to confer upon it jurisdiction of the particular estate, or shows affirmatively by recitals that the court found and adjudged that sufficient facts were shown. No presumption in favor of the jurisdiction arises from the mere fact that the court assumed it. *Cooper v. Sunderland*, 3 Iowa, 114; 1 Smith, Lead. Cas. (7th Ed., Hare & W. Notes) p. 1095; *Hornthall v. Collector*, 9 Wall. 560. The record of the probate court brought here does not contain a petition, or anything purporting to be one. The letters of administration do not recite or certify to any facts whatever, and the omissions are not in any manner supplied or accounted for by any part of the record, nor by proof aliunde. The pleadings in this case show that the land in controversy is now of great value, and that the defendants deraign title thereto through a judicial sale made in the year 1887. The contemplated attempt to set at naught the proceedings of a court of general and superior jurisdiction, and a sale of real estate made under the sanction thereof, by resuscitating a supposed administrator of William A. Strickler from a slumber of 25 years' duration, and by initiating administration upon the estate of Mary Strickler, who died in Ohio, 12 years ago, leaving no estate subject to administration in this state, goes a long way towards impeaching the good faith of this litigation. If, under the rule of property supposed to be established by the decision in *Balch v. Smith*, there be necessity for administration upon the estate of Mary Strickler, then, necessarily, there must also be administration upon the estate of the grantee of her interest, William L. Rider, who died, intestate, more than 21 years ago, his alleged interests as an heir of William A. Strickler and as grantee of Mary Strickler being the subject of this suit; and, if the pending proceedings in the superior court of King county may be looked to as furnishing a measure of the time required for settling up estates of deceased persons, future generations of litigants may wait while administrations and administrations follow each other. There is a popular

idea that, if a man attempts to dispose of his property by a will, the bulk of it will be consumed in legal contests, but, if the argument on this motion be not founded upon false premises, we may reasonably conclude that in this state, under rules of property formulated in the decisions of its supreme court, the estates of persons dying intestate must also descend to the probate court and lawyers. If it is practicable at this time to commence administrations upon the estates of persons whose deaths antedated the judicial sale, and defeat titles of vendees of the purchasers thereat, by subjecting the land to another sale to pay expenses of such administrations, land titles in this state are in general unreliable, for within the past 40 years many persons have died intestate who owned land within the state, and, because they left no creditors or uncompleted business transactions, their heirs have succeeded to their holdings without being aware of any necessity for probate proceedings. Property worth millions of dollars is under operation of such a rule exposed to attacks from schemers who may reasonably hope for a rich reward for industry in the business of probating the estates of the forgotten dead.

The laws of the state, even if as represented, cannot operate to abridge the jurisdiction of this court. By virtue of its powers as a court of chancery, it has, concurrently with the courts of the state, jurisdiction over the estates of deceased persons, when the requisite citizenship and other conditions exist. *Ball v. Tompkins*, 41 Fed. Rep. 486. As remarked by Judge Severens in the case just cited:

"In the exercise of this, as well as of other, branches of its authority, this court cannot invade the possession of the subject-matter of controversy already taken by the state court having concurrent authority, and in the exercise thereof; for the rule is here, as elsewhere, that the court which first acquires possession of the subject will retain it, and the power to dispose of it by its own adjudication."

The present case, however, does not require this court, in adjudicating between the parties, to disturb any substantive thing or right which another court has by its process drawn into its dominion. As the courts of the state have not acquired exclusive jurisdiction by having taken actual possession of the land in controversy, there is nothing to prevent the complainants from obtaining in this suit directly all the relief ultimately obtainable through the agency of the state courts in any style of proceeding, if it shall transpire that they are entitled to any relief.

Another question to be considered is, did William A. Strickler acquire an inheritable estate in this land, or die seised thereof? The patent is evidence that the United States did not convey the title to him, but did convey it to other persons, viz. his heirs. In the opinion upon the demurrer to the first bill of complaint filed in the case (46 Fed. Rep. 704) I stated that "presumably only the heirs of Strickler living at the date of the patent were entitled to share as beneficiaries by that grant, and they would take by purchase, as grantees of the government, and not by inheritance, as the heirs of Strickler." In their amended bill the complainants

aver that the source of the title which they claim is an act of congress entitled "An act creating the office of surveyor general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," approved September 27, A. D. 1850, (9 St. p. 496;) and the act amendatory thereof, approved February 14, 1853, (10 St. p. 158;) that on February 1, 1854, said William A. Strickler entered upon said land by virtue of the aforesaid acts of congress, and thereafter continuously resided on said land and cultivated the same until the year 1861, except when temporarily absent by being driven off by the Indians, and in all respects conformed to the provisions of the said original donation law and the act amendatory thereof, whereby the said William A. Strickler became the equitable owner of said land, and entitled to a patent therefor from the United States; that in the year 1861 said Strickler died intestate, and said Mary Strickler and his brothers and sisters then and thereby, by inheritance, became the equitable owners of said land; that on November 15, 1872, the United States, under and by virtue of said acts of congress, and the taking, entry, settlement upon, and the cultivation of, said land by said William A. Strickler, and upon proof having been duly made of full compliance by the said William A. Strickler with all the requirements of the various acts of congress hereinbefore referred to, caused to be issued and delivered a patent to said land to the heirs of said William A. Strickler. The pleader has avoided making a clear statement of the facts in regard to Strickler's performances pursuant to the donation law. Instead of saying that he resided upon and cultivated said land for four consecutive years or any definite period, it is only vaguely alleged that, between certain dates, and while he was not temporarily absent therefrom, he did reside upon and cultivate the land. No particulars are given as to when or by whom the final proof was made. Instead of pleading facts showing that Strickler, by fulfilling the law, became entitled to the land as a grantee thereunder, the bill avers that he conformed to the requirements of the several acts of congress whereby he became the equitable owner. This is significant. I think the court is justified in refusing to assume that Strickler ever became a grantee of the United States, since the bill stops short of alleging facts showing that he performed the acts necessary to qualify him as a grantee, and pleads as a conclusion something quite different, and shows that in fact the government issued a patent to other persons.

According to the practice of the land department, if Strickler had during his lifetime fully perfected his right to the land, the patent would have named him as the grantee; and although not issued until after his death, by virtue of the act of congress of May 20, 1836, entitled "An act to give effect to patents for public lands issued in the names of deceased persons," (5 St. p. 31, Rev. St. § 2448,) the title to the land would have inured to, and become vested in, the persons entitled to the land according to the provisions of the donation law. *Davenport v. Lamb*, 13 Wall. 418. It is fair to presume from the fact that the patent is not issued in the name

of Strickler that something prerequisite to the issuance thereof remained for others to do after his death, and that the patent was issued to his heirs upon a finding by the officers of the land department from proofs that they were lawfully entitled to the land. If, in fact, the conveyance to them is based upon such a finding, the land is not, and never was, part of Strickler's assets, and the title cannot be affected by a decree of distribution in probate court proceedings upon his estate. No matter what the facts may be in reality, the decision of the land department in regard thereto is controlling and determinative of rights under the donation law, as well as under other laws of the United States relating to the acquisition of titles to public land. *Vance v. Burbank*, 101 U. S. 514. Counsel for the complainants have argued that Strickler, by residing upon and cultivating the land as alleged in the bill, perfected his right without making the final proof required by the act, and that, notwithstanding the issuance of the patent to his heirs, the title of the heirs is by descent from Strickler, and subject to be defeated if a sale of the land should be found necessary in the course of administration of Strickler's estate; that is to say, the title passed by virtue of the donation law itself, and vested in the settler immediately upon completion of the prescribed four-years residence and cultivation, and that final proof and the issuance of a patent are not necessary to work a transfer of title from the United States to the grantee; and in support of this proposition the following authorities have been cited: *Hall v. Russell*, 101 U. S. 503; *Roeder v. Fouts*, (Wash.) 31 Pac. Rep. 432; *Proebstel v. Hogue*, 15 Fed. Rep. 581; *Blakesly v. Caywood*, 4 Or. 280; *McKay v. Freeman*, 6 Or. 456; *Love v. Love*, 8 Or. 23; Code Wash. T. 1881, § 551. I will refer to these in reverse order. Section 551 of the Code of Washington Territory is a legislative attempt to prescribe a rule of construction to be applied to the donation law in actions to recover possession of real property if either party claims the property as a donee of the United States under said law. The attempt to control the construction of a congressional grant of public land by an enactment of the territorial legislature must be futile, for the reason that the legislature was without power to add to or take from the grant. Answering a similar argument, Chief Justice Waite, in the opinion of the supreme court of the United States in the case of *Hall v. Russell*, *supra*, says:

"We have not overlooked the fact that by the territorial enactments of Oregon a settler's claim might descend to his heirs as real estate, and that his possessory rights might be disposed of by will; but all these enactments are in conflict with the act of congress, and therefore inoperative. The heirs of the settler took only such title as congress gave them. The territorial government could not add to or take from that grant."

In *Love v. Love* the facts were that the land in dispute was taken as a donation claim by a married couple in 1852. They resided upon and cultivated the same for over four years. Before making final proof, the husband died intestate, leaving two children. The widow made the required proofs, and thereupon a patent was issued. By this the widow took one half the land in

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her own right, and the court decided that, by virtue of the provisions of the fourth section of the act, she was also entitled to one third of the husband's half, "by survivorship," and also entitled, by virtue of the laws of Oregon, to dower in the other two thirds of the husband's half. The decision is irreconcilably inconsistent with itself, as well as with the law. The claim having originated in 1852, the rights of the parties were founded upon the fifth section of the act, and the provisions of the fourth section were not applicable. The decision is to the effect that the rights of parties under said fourth section are by the amendatory act of July 17, 1854, (10 St. p. 305,) so far modified as to subject the land to the local laws of Oregon, and cause them to descend under such local laws, where the settler had in all respects complied with the donation law so as to have become during his lifetime fully entitled to receive a patent; and that a patent, when issued, relates back to the time of making final proof, and is in legal effect the same as a conveyance made, dated, and completed simultaneously with the issuance of a patent certificate upon the making and acceptance of final proof. Upon this theory that the patent only relates back to the date of final proof, and because Love's death antedated the proving up of his claim to a donation, the court awarded to his surviving widow one third of his half of the donation, in fee, by force and virtue of said fourth section; and yet the reason assigned for also awarding a dower interest in the children's portion is that "a grant to a settler under the donation act is a grant in praesenti of an estate in fee." And in the opinion it is asserted that the supreme court of the United States had affirmed a holding to that effect in the case of *Barney v. Dolph*, 97 U. S. 652. On the contrary, the opinion of Chief Justice Waite in that case is perfectly harmonious with his opinion in the later case of *Hall v. Russell*, supra, in which it is expressly held that the act cannot be construed as a grant in praesenti, and that beyond a present right to occupy and maintain possession, so as to acquire a complete title to the soil, nothing passed by virtue of the act, until all was done that was necessary to entitle the settler to a grant of the land.

The decision in *McKay v. Freeman*, so far as it touched the question under consideration, appears to have been based upon a statute of Oregon giving a legislative construction of the donation law similar to section 551 of the Code of Washington Territory. For reasons already given, I regard the Oregon statute and the decision based upon it equally unsound.

In *Blakesly v. Caywood* the court held that an heir of an alien settler who had lived upon the land in dispute, and cultivated it for the prescribed period, and had declared his intention to become naturalized, had a right to the land superior to that of an adverse claimant who had obtained a patent. The facts of the case, as recited in the opinion, show that it is not in point, for it was not necessary to the decision to hold that the heir took by inheritance. The decision can be upheld on the ground that the heir was fully entitled to the land in her own right, as a donee of the government.

Proebstel v. Hogue is not in point. In that case the second wife of Proebstel, after his death, claimed the wife's half of a donation claim to which the husband and his first wife had acquired a perfect title, final proof having been made while the first wife was living. The patent was issued after her death, but she was named therein as a grantee. By virtue of the act of 1836, above cited, the title to her half of the land became vested in her heirs. Judge Deady held that the title was granted by the fifth section of the act, and that the husband was not by virtue of the fourth section entitled to take the wife's half upon her death, and therefore no title to that part of the land descended through him to his second wife.

The opinion of Judge Deady in the case of Cutting v. Cutting, 6 Fed. Rep. 259, comes nearer to the point under discussion. In that case Cutting had done everything required by the terms of the donation law to perfect his right, including the making of final proof, but had not paid the land-office fee for issuing a patent certificate. After his death his administrator paid the fee, and thereupon the patent was issued to the widow for a designated half, and to the heirs at law of said Cutting for the other half of the land. Upon said facts Judge Deady held that the interest of Cutting "in his donation, whatever it was, terminated with his life, and that the land was not thereafter liable for his debts, or subject to sale by his administrator, but thereupon became and was the absolute property of his wife and children, as the direct donees and grantees of the United States. In other words, they took by purchase, and not descent."

The reported decision of the supreme court of this state in the case of Roeder v. Fouts, 31 Pac. Rep. 432, has a syllabus indicating that the court upheld a sale of part of a donation claim by an administrator of the deceased settler. But the facts recited in the opinion are different. In the opinion there is an argument which in some respects favors the contention of counsel for the complainants in this case, the most of which is a quotation from the opinion of Chief Justice Greene in the case of Brazee v. Schofield, 2 Wash. T. 209;¹ and the pith of it is that the act is a grant as well as a law, and passes title by its own force upon compliance by the settler with its provisions; that four years' continued residence and cultivation is full compliance; that final proof is only essential for the purpose of obtaining a patent; and that a patent is not a conveyance, but mere evidence of a transfer of title. The point which the case decides is that a warranty deed made by a settler after four years' residence upon the land, and before proving up, was valid and effective to convey the land. The court also fortified its decision by finding that the party making the attack was barred from claiming the land by an estoppel and laches. In the case of Brazee v. Schofield, 124 U. S. 495, 8 Sup. Ct. Rep. 604, the judgment of the supreme court of Washington Territory in the same case was affirmed; but the opinion of that court, by Mr Justice Field, gives a construction to the donation law quite different from the

¹8 Pac. Rep. 265.

construction given by Chief Justice Greene, in so far as the latter seems to support the dictum in *Roeder v. Fouts*, that the conditions necessary to qualify a grantee to receive title under the act "are residence and cultivation for the prescribed time." Mr. Justice Field shows the essential quality of other requirements of the act by saying:

"It is undoubtedly true that the donation act requires for the completion of a settler's right to a patent not only that he should reside upon the land and cultivate it for four years, but that he should notify the surveyor general of the precise land he claims. The object of the law was to give title to the party who had resided upon and cultivated the land, and who was therefore in equity and justice better entitled to the property than others who had neither resided upon nor cultivated it. But it was also of importance to the government to know the precise extent and location of the land thus resided upon and cultivated. It was necessary to enable the government to ascertain what lands were free from claims of settlers, and subject to sale or other disposition."

The reasons given in this extract for holding the requirement as to notice to be imperative apply with equal force to the provision requiring final proof. Notice of a claim cannot be of greater importance than definite information of the ripening of a mere inchoate right into a perfect and vested right.

I find nothing in *Hall v. Russell* to give colorable support to the argument of complainants' counsel except a quære in the syllabus, suggested by the following passage in the opinion:

"Whether the fee passed out of the United States before the claim was 'proved up' it is not necessary now to consider. For the purposes of the present suit it is enough to show that the occupant got no title himself, beyond a mere right of possession, until he had completed his four years of continued residence and cultivation."

I think that an answer to this quære, in harmony with all the decisions of the national courts, is found in the general principle that title does not pass from the United States by a conditional grant of public land so long as the patent is withheld, and any act required of the grantee as a condition of the grant remains uncompleted. *Railroad Co. v. McShane*, 22 Wall. 444; *Shepley v. Cowan*, 91 U. S. 330; *Colorado Co. v. Commissioners*, 95 U. S. 265.

In *Wilcox v. Jackson*, 13 Pet. 498, the supreme court stated the rule even broader than I have stated it. In the opinion of the court by Mr. Justice Barbour it is said "that, with the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is where an act of congress grants land, as is sometimes done, in words of present grant. * * * The general rule is what we have stated, and it applies as well to pre-emptions as to other purchases of public lands."

The donation law prescribes the conditions under which, after the death of the settler, his rights descend to his heirs, so that they become entitled to take as grantees in his place. Section 8 of the original act provides that, in case of a settler's death before expiration of four years' continued possession, his heirs may become so entitled, upon proof of compliance with the conditions of the act by the settler up to the time of his death; and the first section of the amend-

tory act of February 14, 1853, contains a similar provision. In both sections the right of heirs to make proof and become entitled to a patent is made to depend upon the death of the settler before the expiration of the prescribed period of continued possession. I reiterate, therefore, that from the fact of the issuance of the patent to Strickler's heirs a presumption arises that the officers of the land department must have found facts to bring the case within the provisions of one or the other of said sections, and that the heirs of Strickler were considered by the land department to be the qualified grantees, and entitled to receive said patent. This presumption has not been overcome by the facts appearing in the case, nor by the authorities which I have been required to review. It remains as the controlling feature of the case, and the land which is the subject of this suit did not become Strickler's property. Therefore an administrator of his estate cannot lawfully meddle with it. A dismissal of this suit without prejudice will make a record which will be equivalent to a public declaration that the property is menaced by the claims of the complainants, and liable to be again brought into litigation whenever it may be their pleasure to do so. I consider that such a disposition of it would be unjust. Motion denied.

MANHATTAN TRUST CO. v. DAYTON NATURAL GAS CO.

(Circuit Court, S. D. Ohio, W. D. April 8, 1893.)

No. 4,594.

1. GAS COMPANIES—MUNICIPAL REGULATION OF CHARGES.

Rev. St. Ohio, § 2478, provides that municipal councils shall have power to regulate, "from time to time," the prices to be charged for natural or artificial gas furnished to citizens or public buildings within the town or city; and section 2479 provides that where the council fixes a minimum price for a period not exceeding ten years, and the gas company accepts it in writing, the council shall have no power to fix a less price during the period of time agreed on. An ordinance passed pursuant to these sections fixed a schedule of monthly charges for fuel gas, and in its second section declared that these should be the minimum charges required by the council for five years, and the ordinance was accepted by the company. Thereafter it was provided that consumers might elect to have the gas furnished by meter instead of at the schedule rates, and the same ordinance declared that "the contract heretofore made as to the schedule of prices shall be in full force, except as herein altered, and for the unexpired time of the original contract." Held that, while the contract, which relates solely to the minimum price to be fixed by the council, expires in five years, the provisions of the original ordinance fixing a maximum price remain in force until repealed or otherwise superseded.

2. SAME—EQUITABLE RELIEF.

Where the company duly accepted the maximum rate fixed by the ordinance, the fact that it is, or has become, inadequate compensation for the gas furnished is no ground for equitable relief, the company being in the hands of a receiver, but appeal must be made to the council.

In Equity. Bill by the Manhattan Trust Company against the Dayton Natural Gas Company. Heard on exceptions to the answers of the plaintiff and others to an intervening petition filed by the city of Dayton, Ohio. Exceptions sustained.

Walter B. Richie, for complainant.

Lawrence Maxwell, Jr., and John A. McMahon, for receiver.

Wm. Craighead and Frank Conover, for city of Dayton.

SAGE, District Judge. The defendant company was organized as a corporation under the laws of the state of Ohio on the 24th day of November, 1886, under the name of the Southwestern Natural Gas & Petroleum Oil Company. On the 18th of March, 1887, the council of the city of Dayton, Ohio, adopted an ordinance in pursuance of the provisions of title 12, div. 8, c. 3, Rev. St. Ohio, authorizing the defendant to occupy streets, alleys, and public grounds of the city to lay pipes for the purpose of lighting the same, and furnish gas to the citizens and public buildings. By the terms of this ordinance the company had 18 months within which to introduce gas into the city. The eighth section enacted that if the company should fail to furnish a supply of natural gas for lighting and heating purposes by the 1st of January, 1889, the franchises and privileges granted by the ordinance might, by resolution of the city council, be declared forfeited, and thereupon all rights granted by the ordinance should cease and determine. The company, having accepted the ordinance and executed the bond required by it, proceeded to the work of laying pipes, but the 1st of January came and passed, and the company wholly failed to perform its contract. On the 2d of February, 1889, the city council, by resolution, in pursuance of section 8 of the ordinance, declared all the rights granted thereby forfeited. Meantime, on the 23d of December, 1887, the council had passed an ordinance to fix and regulate the prices to be charged by the defendant company for natural gas to be furnished by it for fuel purposes for and during the period of five years next ensuing from and after the date at which the ordinance should take effect, which was to be at the expiration of ten days after the date of its first publication. The rate fixed by that ordinance related exclusively to gas to be furnished for fuel purposes by mixers. It contains a schedule of monthly charges and discounts for cooking, for laundry purposes, for heating, and for furnaces, graduated by the capacity of the mixers as indicated by numbers, and for furnaces by letters. Section 2 of the ordinance is as follows:

"Sec. 2. The foregoing is fixed as the minimum price at which said city council requires said company to furnish gas to the citizens of said city and to the public buildings of said city for said term of five years, and said company is hereby required to assent thereto by written acceptance filed in the office of the city clerk of said city."

This ordinance was duly accepted by the company.

On the 28th of March, 1889, the name of the company having been changed to the Dayton Natural Gas Company, the council of the city of Dayton passed an ordinance granting to the company the right and privilege to lay, maintain, and operate gas pipes in the city for the purpose of supplying natural gas, or produce gas for heating, fuel, and power purposes only. By section 1 the grant to the company, its successors and assigns, subject to the terms,

conditions, and limitations of the ordinance, was of "the right and privilege, for the term of twenty years, to lay, maintain, and operate mains, pipes, branches, and conduits through the streets, lands, alleys, avenues, and public grounds of said city, for the purpose of supplying said city and its inhabitants with natural gas or produce gas for heating, fuel, and power purposes only." Section 10 of the ordinance is as follows:

"Sec. 10. Any consumer within said city shall have the right to require gas to be furnished by meter measurement, and not by the schedule rates. In cases where a meter is used, said company shall have the right to charge and receive any sum, not exceeding ten cents per thousand cubic feet, if paid within ten days, or twelve and one-half cents per thousand cubic feet if not so paid, for the gas used. Such meter shall be furnished and set in place upon the written application of any consumer, without cost to such consumer, by said company; but said company shall be entitled to charge a rent of three dollars per year in advance therefor."

In section 13 it is provided that the company shall be compelled to furnish gas to all applicants whenever applied for, and in section 14 that "said company shall supply natural gas to consumers and to said city so long as said gas shall last." Section 15 prescribes the diameter of the openings of the mixers according to numbers and letters; also the thickness of the metal through which the outlet for gas is made in the mixers. It also provides that "the contract heretofore made between the city and this company, as to schedule of prices, shall be in full force, except as herein altered, and for the unexpired time of said original contract, and all property rights heretofore acquired by this company shall be preserved to it, except as modified herein."

Section 20—the final section—provides "that this ordinance shall take effect at the date when said company shall file its written acceptance of the provisions hereof with the city clerk of said city." This ordinance, also, was duly accepted in writing by the defendant company.

The contract under the ordinance of December 23, 1887, expired on the 10th of January, 1893. Upon the institution of this suit on the 18th of February, 1893, the property of the defendant company was placed in the control of a receiver appointed by this court, who has qualified and taken possession. The receiver, claiming that there was after the 10th of January, 1893, no rate fixed by the council of Dayton which was operative and in force, proceeded to carry into effect a resolution of the defendant company passed in December, 1892, in anticipation of the termination of the contract created by the ordinance of December 23, 1887, and its acceptance by the defendant, and the modification thereof by the ordinance of March 28, 1889, and its acceptance, advanced the rate for gas to 20 cents per thousand cubic feet, and sent out his bills accordingly. Upon the application of the city of Dayton the court made a temporary order requiring the receiver to accept 10 cents per thousand cubic feet, and credit the same upon the bills sent out, subject to and until further order. The city of Dayton was made a party defendant, and has filed its intervening petition, to which the receiver and the complainant have made answer. Exceptions to

these answers for insufficiency have been filed. They present the question, what is the present force and effect of section 10 of the ordinance of March 28, 1889? The sections of the Ohio Revised Statutes bearing upon this question are as follows:

"Sec. 2478. The council of any city or village in which electric-lighting companies, natural or artificial gas companies, or gaslight or coke companies may be established, or into which their wires, mains, or pipes may be conducted, are hereby empowered to regulate, from time to time, the price which said electric-lighting, natural or artificial gas, or gas and coke companies may charge for electric light, or for gas for lighting or fuel purposes, furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves, and landing places; and such electric-lighting, natural or artificial gas, or gaslight and coke companies shall in no event charge more for any electric light or natural or artificial gas furnished to such corporation or individuals than the price specified by ordinance of such council; and such council shall also have power to regulate and fix the price which such companies shall charge for rent of their meters.

"Sec. 2479. In case the council fixes the minimum price at which it requires any company to furnish gas to the citizens, or public buildings, or for the purpose of lighting the streets, alleys, avenues, wharves, landing places, and public grounds, for a period of not exceeding ten years, and the company assents thereto by written acceptance filed in the office of the clerk of the corporation, it shall not be lawful for the council to require such company to furnish gas at a less price during the period of time agreed on, not exceeding ten years, as aforesaid."

It is first to be observed that the ordinance of December 23, 1887, fixes a schedule of prices, "and no more;" in other words, an absolute schedule, which is referred to in section 2 as the minimum price, but section 1 makes it also the maximum price. Turning to section 15 of the ordinance of March 28, 1889, we find a recognition of a subsisting contract, under the ordinance of December 23, 1887, between the city and the company, which it is expressed shall be in full force "as to schedule of prices," "except as herein altered, and for the unexpired time of said original contract." What are the alterations referred to? Certainly, one of them is to be found in section 10, for by that section any consumer is given the right "to require gas to be furnished by meter measurement, and not by the schedule rates." Here is a plain reference to the ordinance of December 23, 1887, for there only is any mention of schedule rates, excepting in section 15 of the ordinance of March 28, 1889, where it occurs in the sentence relating to the modification of the contract stated in the ordinance of December 23, 1887. Then follows, in section 10, the provision giving to the company, where a meter is used, "the right to charge and receive any sum, not exceeding ten cents per thousand cubic feet, if paid within ten days, or twelve and one-half cents per thousand cubic feet if not paid, for the gas used."

In *State v. Gas Co.*, 37 Ohio St. 45, the supreme court said that a provision in an ordinance for continuing the price of gas, as therein fixed, for the period of five years, "operated, under section 2479, as a proposition to the company, which, if accepted as therein provided, would preclude the council from lowering the price for the period named; but if not thus accepted, the power of the council to regulate the price from time to time was as ample as it would

have been had the ordinance contained no such provision as to time." The ordinance in that case was by its terms to take effect and be in force from and after passage and legal publication, but another ordinance of the same date provided that, if any gas company should agree to furnish gas at the price fixed by council for five years, it should be granted certain specified privileges. It was by construing these ordinances together that the court reached the conclusion above stated. In this case the ordinance itself, after fixing the price in the same manner as in the Ironton Case, contains in its final section a provision making it effectual only upon the company filing its written acceptance of the provisions thereof with the city clerk. There is no substantial difference between the two cases, and the case cited seems to be decisive. Section 2479 was enacted manifestly for the protection of gas companies, by affording a certainty that the price to be paid for gas would not be reduced below the minimum within the period, not exceeding 10 years, accepted by the company. Section 2478 was manifestly for the protection of the corporation and of individual consumers, by limiting the maximum which might be charged to the price specified in the ordinance, and it may well be doubted whether a municipal corporation has a right to make any contract upon the basis of section 2478, inasmuch as the power vested in the municipality is to regulate the price "from time to time," and therefore one council could not limit or abridge the power of any subsequent council under that section. That was the ruling in *Coke Co. v. Avondale*, 43 Ohio St. 268, 1 N. E. Rep. 527, where the court said, referring to section 2478, that in agreeing to place beyond the control of the village the price and quality of gas, the council exceeded its powers, and the agreement was ultra vires and void. The contract in this case, as modified by the ordinance of March 28, 1889, expired by its own limitation on the 10th of January, 1893; but it by no means results that the provisions of the ordinance of December 23, 1887, fixing the price for gas furnished by mixer, or of section 10 of the ordinance of March 28, 1889, fixing the price where a meter is used, are no longer in force. The contract provision of the ordinance of 1887 is in a separate section. It amounts to nothing more than a stipulation that for five years from the date of the first publication of the ordinance the prices fixed by section 1 should be the minimum prices. That was its only operation upon the provisions relating to prices. The first section fixing the price has, by reason of the contract provision in section 2, a double bearing: First, under section 2478, fixing the maximum prices; and, second, under section 2479, by reason of section 2 of the ordinance, and of its acceptance by the company, fixing the minimum prices for the term of five years. Neither section 1 of that ordinance, nor section 10 of the ordinance of March 23, 1889, was repealed by the expiration of the contract. Both sections remain in force, and will continue in force until repealed or superseded. There was no necessity for stating any limit for their duration. The power given by the legislature to regulate prices "from time to time" was sufficient to make the provisions effective

until repealed or superseded. The exceptions will be sustained, and the restraining order continued until the final hearing of the cause.

On Petition for Rehearing.

(April 18, 1893.)

SAGE, District Judge. An application has been made, in the nature of a petition for rehearing, which brings up for consideration the proposition that the provisions of section 10 should be no longer enforced for the reason that gas cannot be furnished without loss to the company at the rate thereby fixed. The company filed its written acceptance of the ordinance of March 28, 1889, and thereby assented that the rate fixed by section 10 was reasonable. It is averred in the answers of the receiver and of the complainant that 10 cents per thousand cubic feet for the use of natural gas furnished by meter is an utterly inadequate price. That averment must, for the purposes of this consideration, be taken as true. The inadequacy may bear heavily upon the complainant, but it cannot affect the construction or the validity or force of the section. The complainant accepted the ordinance, and its only remedy now is to appeal to the council.

My attention has been called to the fact, inadvertently misstated in the last paragraph of the opinion on file, that the first section of the ordinance of December 23, 1887, expired by its own limitation five years from and after the date at which the ordinance took effect; that is to say, at the same time as the contract. That circumstance, however, does not affect the ruling of the court. The expiration of section 1 of the ordinance of December 23, 1887, was by its own limitation, and not by reason of the contract. Section 10 of the ordinance of March 28, 1889, does not in the least depend upon section 1 of the ordinance of December 23, 1887. In so far as it fixes a maximum, it is simply a legislative provision. It is in full force, and will remain in force until amended or repealed. That maximum was by section 15 adopted as the minimum under the contract, but that adoption did not in any way affect the operation or duration of the price fixed by section 10 as the maximum. When the contract expired, that price ceased to be operative as a minimum, but it remained in full force as a maximum.

The application for rehearing will be denied.

BOUND v. SOUTH CAROLINA RY. CO. et al.

(Circuit Court, D. South Carolina. April 3, 1893.)

1. FORECLOSURE OF MORTGAGE--FINAL DECREE--POWER TO POSTPONE SALE.
A court of equity, pending an appeal without supersedeas, from a final decree in a foreclosure suit, settling the priority of liens, and fixing a day for sale, has power to postpone the sale, if a sale on the day fixed would be oppressive or unjust.

2. SAME--APPEAL--POSTPONEMENT.

Such a postponement should be made in a suit to foreclose a railroad mortgage, when an appeal has been taken from the decree of sale, the

result of which might be disastrous to the purchaser, or where the sale, if incapable of being rescinded, would render nugatory a decision in favor of appellants.

In Equity. Bill by Frederick W. Bound against the South Carolina Railway Company and others to foreclose a mortgage. Motion to postpone sale granted. For the history of this litigation, see prior reports: 46 Fed. Rep. 315; 47 Fed. Rep. 30; 50 Fed. Rep. 312 and 853; 51 Fed. Rep. 58.

Saml. Lord, W. H. Peckham, E. E. Anderson, Mitchell & Smith, and G. W. McCormack, for the motion.

Smythe & Lee, T. W. Bacot, and Asher D. Cohen, opposed.

SIMONTON, District Judge. On the 23d day of February, 1893, a motion was made in this court to postpone the sale of the South Carolina Railway Company, ordered for 11th April, 1893. The cause had come on to a hearing on 2d day of May, 1892, and an opinion was filed on 29th day of June, 1892. See 50 Fed. Rep. 853. That opinion was formulated into a final decree on 23d day of November, 1892. The chief matter of contest was as to the mode of sale. There were a number of liens upon the property, differing in priority. The judgment obtained by Henry Thomas Coghlan—a decree for sale—was the first lien; then, some outstanding bonds issued under the first mortgage, of 1868; the consolidated first mortgage bonds, issued in 1881; then, consolidated second mortgage bonds, and the lien of income bonds. The bill had been filed in behalf of second consolidated mortgage bondholders, praying foreclosure of the second mortgage. In the proceedings cross bills were filed by Coghlan, and the trustees of the first mortgage of 1868, and by the trustees of the first consolidated mortgage, each of these praying foreclosure and sale. To this end the trustees of the first consolidated mortgage had exercised a power conferred on them in their mortgage, and had declared all the first mortgage bonds past due. So, also, had the trustees of the second mortgage. At the hearing a large number of first consolidated first mortgage bondholders earnestly insisted that the foreclosure should be of the second mortgage, and that the sale, when ordered, should be subject to all liens preceding the second mortgage. All parties concurred in the necessity for a sale. The only question was, should the sale be free of all liens, or subject, as stated, to the liens anterior to the second mortgage? No contest or issue of any kind was made over the time of the sale. In its final order this court decided this contest, and ordered the sale to be made free of all liens. The day selected for the sale was 11th April, 1893. The final decree having been filed, appeals therefrom were taken by the representative of these holders of the first consolidated mortgage bonds, who opposed the sale free of all liens, and also by the representatives of the complainant, in behalf of second mortgage bondholders. These appeals were not taken within 60 days from the filing of the final order, and could not operate as a supersedeas. Pending these appeals a motion was made in this court on 23d February, 1893, looking to the postponement of the sale from the 11th April until such time as the

decision of the circuit court of appeals upon the errors assigned could be had. Inasmuch as the appeals had taken the cause out of this court, the motion was refused, because of the conviction in the mind of the court that it could not interfere with the final decree. Thereupon the motion was renewed in the circuit court of appeals, and that court, being of opinion that the circuit court was competent to act in the matter, refused to interfere, especially as no supersedeas had been obtained. The motion was again made in this court. It is based upon the existence of the pending appeals, and the consequent chilling of the bidding because of the uncertainty attending the validity of the sale, and upon the depressed condition of railroad property in this state, because of adverse legislation. This motion is favored by the trustees of the first consolidated mortgage; by many, perhaps a majority, of the bondholders under the first consolidated mortgage; by a part of the income bondholders and stockholders. It is resisted by the trustees of the mortgage of 1868; by several first consolidated mortgage bondholders; by the trustees, and many bondholders of the second mortgage by income bondholders and stockholders.

The first question to be decided is as to the power of this court at this stage of the case—the appeal pending—to grant the motion. It is manifest that, if this postponement is to operate as a supersedeas, it could not be granted. The supersedeas is a right secured by statute, and of imperative obligation on the court and its officers. If the provisions of the statute are complied with, the right exists. If these are not complied with, it cannot exist. Without such compliance, no court can confer it. *French v. Shoemaker*, 12 Wall. 100; *Kitchen v. Randolph*, 93 U. S. 92; *Sage v. Railroad Co.*, Id. 416. Nor can the motion be made if it is a material amendment to, or alteration of, the final order. The term at which the final order was made has ended. *Muller v. Ehlers*, 91 U. S. 250; *Bronson v. Schulten*, 104 U. S. 415.

What, then, was the final decree in this case? It fixed the date, amount, and priority of each of the liens, and ordered a sale free of all liens whatsoever; transferring this lien to the fund, and providing for, and ordering, their payment out of this fund, so far as it will go. This was the response made by the court to the issues presented to and argued before it. Over this conclusion the circuit court has now no control whatever. It cannot modify, annul, or alter it. These issues having been definitely settled, a day was fixed upon which the property should be sold, in order that the principles of the decree should be carried into action; that is to say, the day on which execution and sale should take place. Can the court make any postponement or change in this? In *Monkhouse v. Corporation*, 17 Ves. 380, a decree was obtained at the rolls by a mortgagee, in the usual form. A motion was made to suspend the execution of the decree until six months after an appeal could be heard. Lord Eldon heard the motion, and granted it on terms, saying:

"This decree must therefore be taken to be right, to the extent of letting execution proceed on it, unless the court sees that if it should turn out to be wrong the party cannot be set right again."

In 2 Daniell, Ch. Pr. 1018, the doctrine is recognized that in decrees of foreclosure the court can, on application, enlarge the time for the payment of the money, and this without imposing terms. Of course, this means postponing the sale. And he cites instances in which, on terms imposed, the time was enlarged for six months, and again for three months; and in one case (*Edwards v. Cunliffe*, 1 Mad. 287, 289) a fourth order was made for enlarging the time though the third was directed to be peremptory. In *Spann v. Spann*, 2 Hill. Ch. Pr. 122, the court say:

"The order of 21st February, 1884, was made on the application of the plaintiffs themselves, and is in its nature final, and not interlocutory. It awards execution against the parties, and, if erroneous, was the subject of appeal. I am therefore clearly of opinion that the chancellor had no authority to set it aside on account of any supposed error in point of fact or law. But it is equally clear that the courts, both of law and equity, or a judge or chancellor sitting at chambers, have the power, and duly exercise it, of suspending the execution of even final process on account of subsequent matter which would render the execution of it oppressive or iniquitous. And I would say, in general, that, whenever subsequent occurrences would render the execution of a judgment or order of the court at law or in equity oppressive or unjust, the execution of it ought to be restrained, and, if this should happen in vacation, it can only be done by an order at chambers."

It would seem, therefore, that notwithstanding that the court has no power whatever, after final decree, to amend, modify, or alter the principles of the decree, it retains and possesses the power of controlling the time of its execution.

Is there any reason why there should be a change made in the time of executing this decree? The final decree orders the sale free of all liens, and transfers these liens to the fund. The appeal directly antagonizes this. If the sale took place before the appeal is heard and decided, and the purchaser get a good title,—in other words, if the sale cannot be rescinded,—the appeal will be, and is, absolutely nugatory. And if the circuit court could exercise a discretion, and suspend the sale, and refuses to do so, then by the action of the circuit court the decision of the appeal court is either anticipated, or rendered of no value whatever. If, on the other hand, a decision of the appeal court, reversing the decree of the circuit court, will have the effect of annulling and setting aside the sale, we have consequences almost as disastrous to the purchaser, who will advance his money, and assume possession, relying upon the decree and action of the circuit court. The learned counsel who opened, in opposition to this motion, in his exhaustive argument referred to a line of cases showing that the sale, notwithstanding the appeal, will bind all parties to this cause. Without deciding—indeed, without entering into—this question, and accepting the doctrine as stated, this case comes within the exception stated by Lord Eldon, and quoted above:

"This decree must therefore be taken to be right, to the extent of letting execution proceed upon it, unless the court sees that if it should turn out to be wrong the party cannot be set right again." *Monkhouse v. Corporation*, 17 Ves. 382.

If the sale take place, and is final, the lien of the first consolidated mortgage bondholders will be gone, forever, and their appeal and

contention rendered nugatory and void. They would lose their right beyond possibility of remedy or compensation. It may be said that a supersedeas bond would have prevented this. But filing a supersedeas bond is optional, and not obligatory. The right of appeal is absolute. The right of review in the appellate court is equally absolute. It cannot and should not be defeated by the action or nonaction of the lower court. This consideration alone, and the uncertainty upon this point, must effectually deter bidders, except of the most reckless character; and the exposure of the rights of parties to this suit to possible destruction would, in the language of Johnson, J., quoted *supra*, be oppressive or iniquitous. The sale will be postponed from 11th April next to the 12th day of December next, 1893.

LEICESTER PIANO CO. v. FRONT ROYAL & RIVERTON IMP. CO.

(Circuit Court of Appeals, Fourth Circuit. March 11, 1893.)

No. 42.

1. SPECIFIC PERFORMANCE—FALSE REPRESENTATIONS.

A land company agreed to donate land and money and erect a building for a manufacturing company, in consideration that the latter would move its plant there and operate it on a specified scale. In a suit by the manufacturing company for specific performance, the defense was that the contract was induced by plaintiff's false representations and fraudulent concealment of material facts. A soliciting agent of the land company had visited plaintiff's factory pending negotiations for the contract, and had seen its machinery, but he was not a scientific or practical machinist, and he was not furnished with any means of investigation of plaintiff's financial condition. *Held*, that it could not be said that in executing the contract the land company relied on its own knowledge and judgment, as derived from the investigations of its agent.

2. SAME—CAVEAT EMPTOR.

In the execution of such contract the maxim caveat emptor has no application, for the land company (defendant) was the vendor, and it had a right to rely on the representations of the general manager of the manufacturing company, who owned most of its stock, and who had reorganized it after it had lain dormant some 10 years or more.

3. SAME—CHANGE OF CIRCUMSTANCES—OPPRESSION.

Where such contract was consummated during the time of great speculative enterprise and activity, known colloquially as a "boom," in contemplation of the establishment of a successful and paying industry on the land donated by the land company, but after a part performance in good faith by such company a collapse occurred, which renders it extremely improbable that the venture would be successful or benefit either party, while completion of the contract would absorb all the assets of the otherwise solvent land company, the court is authorized to refuse to decree specific performance, on the ground that, in view of the changed circumstances, it would operate unjustly and oppressively on the land company.

4. SAME—MUTUAL PERFORMANCE.

It was shown that the land company had already donated more money than it was required to do by the contract; that money donated to the plaintiff for the expense of moving its plant had been used by it for other purposes; that plaintiff was operating its factory with borrowed money; and the bill contained no specific allegations that it was in a position to effect the removal of its plant, as required by the contract. *Held*, that specific performance was properly refused on the ground that mutual performance of the contract could not be secured by the decree.

5. SAME—RESCISSION—CROSS BILL.

Relief based upon an alleged rescission of the contract by the land company cannot be granted in such suit when it is not prayed for in a cross bill.

6. SAME—APPEAL—REVIEW.

On an appeal from a decree granting or refusing the specific performance of a contract, the appellate court has the power not only to decide all questions of law and fact presented by the record, but also to determine whether the court below acted wisely and justly, under the special circumstances of the case, in exercising its extraordinary and discretionary jurisdiction relating to specific performance.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

In Equity. Suit by the Leicester Piano Company against the Front Royal & Riverton Improvement Company for specific performance. There was a decree for defendant, and plaintiff appeals. Affirmed.

The following statement and opinion were filed in the court below by the Honorable JOHN PAUL, District Judge:

On the 18th day of September, 1890, plaintiff and defendant companies entered into this agreement:

"Articles of agreement made and entered into this eighteenth day of September, eighteen hundred and ninety, between the Front Royal and Riverton Improvement Company, a corporation under the laws of Virginia, of the first part, and the Leicester Piano Company, a corporation under the laws of Michigan, by Geo. V. Leicester, president, of the second part, witness: That said improvement company agrees to and with said Geo. V. Leicester, president as aforesaid, that the said improvement company will erect on three acres of its land between Front Royal and Riverton, Va., situate on the Virginia Midland Railroad, suitable buildings for a piano factory, at a cost not exceeding fifteen thousand dollars, (\$15,000,) said buildings to be erected under the supervision and direction of said Geo. V. Leicester and C. A. Macatee, who shall have the right to call upon said improvement company for installments of said fifteen thousand dollars as the same may be needed in the erection of said buildings; and the said improvement company further agrees that it will furnish the said Geo. V. Leicester, president as aforesaid, twenty thousand dollars (\$20,000) in money to be paid in installments as hereinafter provided,—in consideration of which the said Geo. V. Leicester, president as aforesaid, agrees to transfer to said improvement company seventeen hundred and fifty (1,750) shares of the stock of said piano company of the par value of twenty-five dollars (\$25) per share, said stock to be paid-up and nonassessable stock. And said Geo. V. Leicester, president as aforesaid, agrees and covenants that as soon as said buildings are ready for use, that said Leicester Piano Company's plant shall be removed to said building, and that at once the said piano company will commence and continue the active work of manufacturing pianos therein. And it is further agreed by and between the parties hereto, that said improvement company shall be represented in the directory of the said piano company in the same proportion that its stock bears to the entire stock of said company, and shall be entitled to have chosen from its own stockholders at least one of the officers of the piano company. The twenty thousand dollars in money hereinbefore agreed to be furnished in installments, from time to time, as needed by said piano company, and as may be agreed on by the presidents of said companies, respectively, but the whole amount of said twenty thousand dollars shall be paid within one year from the completion of the building, provided that no payment in excess of six thousand dollars (\$6,000) shall be called for or made until said plant shall have been removed from its present location to the buildings to be erected, as hereinbefore mentioned. The paid-up, nonassessable stock hereinbefore agreed to be transferred to said improvement company to be preferred stock to the extent of

receiving a maximum annual dividend of six (6) per cent. before any dividend shall be declared on the other stock of said company. The three acres of land hereinbefore mentioned, with the buildings thereon, are to be deeded by the Front Royal and Riverton Improvement Company to the Leicester Piano Company; and the lot herein referred to is bounded by Virginia Midland Railroad and Happy creek on the west, the Buck reservation on the south, and the streets next adjoining thereto on the north and east. Witness the following signatures and seals:

[Signed by]

"H. H. Downing. [Seal.]

"Leicester Piano Company. [Seal.]

"Geo. V. Leicester, President.

"Witness to signatures: C. B. Samuels."

In pursuance of this agreement, work was commenced on the building in October, 1890, and about \$17,000 was expended on it, and it would have required from \$1,000 to \$2,000 to complete it. About \$6,000 of the \$20,000 agreed to be paid by the defendant in the suit to the plaintiff had been paid over to Geo. V. Leicester, the president of the said piano company, and 950 shares of the stock of the said company had been transferred by the said Leicester to the Front Royal and Riverton Improvement Company. On the 24th day of June, 1891, the Front Royal and Riverton Improvement Company gave notice to the Leicester Piano Company, declaring the contract of September 18, 1890, canceled and void. The following is the notice:

"To Geo. V. Leicester and the Leicester Piano Company: Take notice that the contract entered into September 18, 1890, between the undersigned, the Front Royal and Riverton Improvement Company, of the one part, and the Leicester Piano Company, by Geo. V. Leicester, president, party of the second part, is hereby declared canceled, and null and void.

"This action is taken upon the following ground: That said the Front Royal and Riverton Improvement Company was induced to enter into and conclude said contract by representations made to it by said Leicester Piano Company through its president, Geo. V. Leicester, which said representations said the Front Royal and Riverton Improvement Company believed to be true, and entered into said contract because it believed them to be true. These representations the Front Royal and Riverton Improvement Company has recently discovered to be false and fraudulent, and, being so false and fraudulent, the consideration and inducement moving said the Front Royal and Riverton Improvement Company to enter into said contract has wholly failed.

"You are further notified that the resolution by the board of directors, appointing Geo. V. Leicester one of its agents to superintend the erection of buildings under said contract, has been rescinded, and such agency annulled.

"You are further notified and required to account to this company for all moneys paid to Geo. V. Leicester or Geo. V. Leicester, president, under said contract, which have not been expended in the legitimate cost of erecting said buildings, and that, if this latter demand is not complied with in a reasonable time, legal proceedings will be instituted against Geo. V. Leicester and against the Leicester Piano Company to enforce the same.

"Witness the following signature and seal, the Front Royal and Riverton Improvement Company causing this notice to be signed by its president, H. H. Downing, and its official seal to be hereunto affixed at Front Royal, this 24th day of June, 1891:

"Front Royal & Riverton Improvement Co.

"H. H. Downing, Prest."

On the services of this notice, work on the building at once ceased, and no further business transactions were had between the said companies under the agreement of September 18, 1890. On the ——— day of July, 1891, the plaintiff instituted this suit for a specific performance of the contract of September 18, 1890. In its bill it recites the history of its dealings with the defendant; alleges that it has in good faith performed all its obligations under the contract of September 18, 1890; and asserts its readiness, willingness, and ability to perform all of its obligations under said contract, except so far as it is prevented by the acts of the defendant. It prays that the said building may be completed by the defendant with reasonable diligence, according to the

said contract, and that the court will decree the payment by the defendant to the complainant the sum of \$14,000, the remaining portion of said \$20,000 agreed to be paid under the contract, upon compliance with said contract by the complainant, and that a conveyance be made by the defendant of the said tract of land with the buildings and improvements thereon, according to the terms of the contract.

The defendant files two pleas,—one denying the complainant's citizenship; another alleging a variance between the writ and the bill filed. It also files a general demurrer to the bill. It answers the bill, and alleges as a defense to the specific enforcement of the contract of September 18, 1890, that the said contract was procured and was entered into on the part of said defendant by reason of the false representations of Geo. V. Leicester, who represented himself to be the president of the Leicester Piano Company, then located and doing business in the state of Massachusetts. That said Leicester represented said piano company as owning a valuable plant; that it was doing a good and profitable business, was entirely free of debt, had never lost any money in its business, and had a capital of one hundred and fifty thousand dollars, of which one fifth, or the sum of thirty thousand dollars, had been actually paid into its treasury in money and property; that the defendant had no means of verifying or testing the truth of these statements; that it had to, and did, rely entirely upon the statements of said Leicester. It alleges that all of these statements and representations were untrue, and were known to be untrue by the said Leicester at the time he made them. It also charges the said Leicester with wasteful and reckless extravagance in the construction of the said piano building, with a failure to render proper accounts, and with a diversion of the money paid to him for building purposes to his own uses.

PAUL, District Judge. The two pleas and the demurrer filed in this cause, not having the certificate of counsel and supported by the affidavit of the defendant, as required by rule 31, Rules of Practice in Equity, will be stricken out and not further considered. A great deal of testimony has been taken in this case by both the plaintiff and the defendant which the court considers irrelevant and immaterial to its proper decision. Of this character, especially, is the great mass of the testimony taken relative to the conduct of Geo. V. Leicester as one of the superintendents of the erection of the buildings, in the purchase of material, controlling the work, failure to keep proper account and make accurate and timely reports of the disposition of the money paid him. The said Leicester and C. A. Macatee were the agents of both the plaintiff and defendant companies for the construction and supervision of the building, and, as such agents, were responsible to their principals for a faithful performance of their duties; but the conduct of both or either of them cannot be made the basis of a refusal by their principals to specifically comply with the contract of September 18, 1890. The court deems it unnecessary to further consider this testimony for a proper decision of this case.

With all this extraneous matter eliminated from the case, the one question presented to the court for its decision is this: Was the contract which it is sought to specifically enforce honest, fair, just, and reasonable? Is it such a contract as the court, in the exercise of a sound legal discretion, can see its way clearly to decree its specific performance? This question must be determined by the evidence bearing on the allegations of the defendant in its answer that it was induced to enter into the contract of September 18, 1890, by the fraudulent and false representations of the plaintiff. It is charged that the plaintiff, through its president, Geo. V. Leicester, by whom it entered into the contract, was represented as "owning a valuable plant; that it was doing a good and profitable business; was entirely free from debt; that it had never lost any money in its business, and had an authorized capital of one hundred and fifty thousand dollars, of which one fifth, or the sum of thirty thousand dollars, had been actually paid into the treasury."

That these representations were made by Leicester, the president of the plaintiff company, to the defendant company is abundantly shown by the testimony of Downey, the president, and Cook, King, and Macatee, directors, of the defendant company. From the testimony of these witnesses it is clear that these representations were the inducing cause to the defendant company for entering into the contract of September 18, 1890, and that but for these

representations, and the belief that they were true, said defendant company would not have made the contract. It is clear from the testimony of these witnesses that the defendant company believed it was contracting with a solid, substantial, well-established industry, free from debt, with a capital of \$30,000, which, with the \$20,000 to be paid it by the Front Royal and Riverton Improvement Company, would establish the enterprise on a successful basis. That these representations were made by the plaintiff to the defendant is not denied by the only witness introduced by the plaintiff, George V. Leicester, its president, through whom the contract was made, except as to the amount of paid-in capital, \$30,000, which he says he meant to include both money and property put into the piano company; but this position cannot be sustained in face of the evidence of the defendant, given by the four witnesses above named, who all testify that Leicester represented the piano company as having a paid-in capital in money of \$30,000. Leicester also admits that he knew, at the time of entering into the contract for his company, that it owed \$6,000 to Trowbridge and Johnson, but insists that he communicated this fact to the defendant, and that the defendant knew of this indebtedness at the time it made the contract.

Says Mr. Downing: "Mr. Leicester told me that \$30,000 in cash had been put into the business at Westboro." "This is a big thing; you have no idea of its size. It will take a number of cars to remove it to Virginia, and more than a month to pack the machinery." "The first intimation I had that the company was in debt was the latter part of June, 1891. I learned from the secretary and treasurer that it was in debt to the extent of \$6,000 when Leicester first visited Front Royal; that not more than \$10,000 altogether had ever been put into the business of the piano company; that part of this—some \$3,000 or \$4,000—had been expended in the purchase of machinery." "I also found, if it had not been for the sum of \$6,000 or \$7,000 sent by Leicester to Trowbridge, the company could not have held its own." "Also learned in court and saw the papers where an attachment had been placed upon all the property of the Leicester Piano Company, and the whole thing was tied up and the subject of litigation." This is admitted by the witness for the plaintiff, and that the attachment was not released until August, 1891, after the institution of this suit. Mr. Cook says Leicester stated to him "that the piano company had never lost a dollar," and declared most positively "that it did not owe a dollar, and had a paid-up capital of \$30,000; that the company was on the high road to prosperity," etc. Mr. Macatee says Mr. Leicester stated to "our directory that he had a piano factory at Westboro, Mass., organized with an authorized capital of \$150,000, of which \$30,000 had been paid in in cash; that they were doing a large and lucrative business; that they had never lost a dollar in the prosecution of their business. He said that the company did not owe a dollar in the world." W. P. King says: "Mr. Leicester represented the Leicester piano factory as with an authorized capital of \$150,000 cash, paid-in capital of \$30,000; that it did not owe a dollar in the world; and that it was a money-making institution, and had never lost a dollar." All of these witnesses were officers of the defendant company; all testify that these representations were the inducement to enter into the contract of September 18, 1890, and that, if they had known these representations were not true, their company would not have entered into the contract.

Now, as to the truthfulness of these representations. A careful and thorough examination of all the testimony leads the court to the conclusion that not more than \$10,000 was ever paid into the business of the Leicester Piano Company. The reports from the company's books, purporting to be a statement of its assets, are so confused and unintelligible as to be entirely unreliable. The deposition of Geo. V. Leicester, the plaintiff's only witness, is so obscure, contradictory, and unsatisfactory as to furnish the court no reliable evidence as to amount of capital paid into the company. On page 62 of his deposition he says there was no paid-up capital stock. On page 95 he gives the value of the plant at \$30,000, including franchises, personal property, and material manufactured. That includes all the plans and drawings and specifications and patents and machinery and stock on hand, manufactured and unmanufactured. The amount of cash capital paid in is a fact peculiarly within the knowledge of the plaintiff company. If \$30,000 had been

paid in, it could easily have shown it. Its failure to do so when the fact is put in issue, as it has been in this case, compels the court to conclude that it never was paid in, and that, instead of having a working capital of \$30,000, as the defendant was induced to believe, doing a flourishing money-making business, never having lost a dollar, and not owing a dollar, it really had no working capital, was doing but a feeble business, which it shut down in October, 1890, and was \$6,000 or \$7,000 in debt. That this piano company had never done a flourishing business is shown, we think, by the fact that from its organization, in 1880, up to the time of making the contract, September 18, 1890, it had made only eight or nine pianos, only three or four of which it had sold.

But the plaintiff claims that the defendant is estopped from alleging that it was deceived as to the character of the factory, the extent of its business, etc., because it sent its agent, Henry Cook, to examine and investigate the plant. Mr. Cook and Mr. Downing both testify that he was not sent there for that purpose; that his single object in going to Westboro, Mass., was to induce Mr. Leicester to come to Front Royal to confer with his company about removing the piano plant. Mr. Cook says he was not in the factory more than thirty or forty minutes; that he merely casually looked through several rooms, and made no effort to investigate the machinery of the company or its financial condition. Clearly, this case cannot be brought within the decision in *Slaughter v. Gerson*, 13 Wall. 379, *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. Rep. 771, and *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. Rep. 164, which are cited by counsel for the plaintiff. This defense cannot avail the plaintiff. The plaintiff, as to the \$6,000 of indebtedness shown to have existed at the time of the contract, claims it was unknown to its agent, Leicester, and therefore he could not misrepresent the financial condition of his company when he said it was out of debt. If this were true, which the court thinks is not the case, the company, the principal in the contract, knew it, and is bound by the representations of its agent.

There is but one other point in this case to which the court thinks it necessary to give its attention. In their supplementary argument, counsel for the plaintiff claimed that the stock to be transferred by the Leicester Piano Company to the Front Royal and Riverton Improvement Company is not the stock of the Leicester Piano Company, but the individual stock of Geo. V. Leicester, and that Leicester, as an individual, is to have, out of what is to be paid by the defendant, \$20,000 in money, while the Leicester Piano Company is to have the land with a building upon it of the value of \$15,000. The contract will not bear the construction here attempted to be put upon it, and the case presented by the plaintiff in its bill admits of no such view. If this position be correct, the plaintiff has no standing in court, certainly so far as the sum of \$14,000 is concerned. It cannot be decreed to Leicester, for he is not a party to the suit claiming it. To sustain this position would be to require the defendant company to pay \$20,000 to an individual which by its contract it supposed was to be paid to the Leicester Piano Company, and to constitute with the paid-in capital of said company its working capital in the new enterprise at Front Royal; and further to require it to deed to the plaintiff, the Leicester Piano Company, property which has cost it over \$17,000, and leave the defendant empty-handed, except as to the 1,750 shares of individual stock to be transferred to it by Geo. V. Leicester.

A simple statement of the case is the strongest argument against the injustice of such a decree. The principles upon which a court of equity will decree the specific performance of a contract may be briefly stated: "Upon the principle that it is in the discretion of courts of equity whether they will decree specific performance, or leave the plaintiff to his remedy at law, unless he comes with perfect propriety of conduct, clear from all circumvention and deceit, and the agreement be certain, fair, and just in all its parts, specific performance will not be decreed." 2 White & T. Lead. Cas. Eq. pt. 1, p. 524. "And not only where there has been actual misrepresentation, but also where there has been a suppression of the truth, specific performance will not be decreed." Id. 525. "There are few cases in which equity will insist on the maxim that he who seeks equity must do it, with more rigor than in suits for specific performance." Id. 550. It should be clear that he who seeks specific

performance is in a condition to perform his own part of his contract, and that he has shown himself ready, desirous, prompt, and eager to perform the contract. 2 Story, Eq. Jur. § 750. "An agreement to be entitled to be carried into specific performance, ought to be certainly fair and just in all its parts. Complainant must show that his conduct has been clean, honorable, and fair. It is a principle in equity that the court must see its way clear before it will decree specific performance, and that it must be satisfied as to the integrity and good faith of the party asking its interference." *Stearns v. Beckham*, 31 Gral. 388.

Applying these principles to the facts established in this case, the court cannot see its way clearly to decree a specific performance of the contract entered into on the 18th day of September, 1890. The plaintiff clearly misrepresented the character and extent of its business, its solvency and freedom from debt, and the amount of its paid-in capital. These misrepresentations were the inducements to the defendant to enter into the contract sought to be enforced. A court of equity cannot aid in the enforcement of such an agreement. The bill will be dismissed, with costs to the defendant.

Willoughby & Willoughby, for appellant.

Marshall McCormick and S. S. Turner, for appellee.

Before GOFF, Circuit Judge, and HUGHES and DICK, District Judges.

DICK, District Judge. As the appellant was plaintiff in the court below, we will, in the course of our opinion, refer to the parties as plaintiff and defendant. This case was heard in the court below upon the pleadings and proofs; and the rights of the parties were considered and determined as they existed at the time of filing the bill of complaint, and without much reference to the changed circumstances and condition of things that subsequently occurred.

This court has plenary jurisdiction, on an appeal in equity, to review a case upon its merits as disclosed by the pleadings and the proofs, and decide every question of law and of fact presented by the record and insisted upon in the court below. But an appellate court sits, not to do original justice between the parties, but to determine whether the court below committed manifest and injurious error in its decree. The decree is presumed to be according to the law and truth of the case until the contrary is made clearly to appear.

As specific performance is not a matter of absolute right in either party, an appellate court has not only the power to decide all questions of law and fact presented by the record, but also whether the court below acted wisely and justly, under the particular circumstances of the case, in exercising the extraordinary and discretionary jurisdiction of granting or refusing the specific performance of a contract. In such cases the judge in the court below is invested with the discretion of deciding a controversy according to the principles of equity, dependent on the facts and circumstances of a particular case. In so doing he exercises an extraordinary power of a court of equity, and the decree is presumed to determine correctly the substantial merits, and to adopt the best means of securing the ends of justice. Such decree may be reviewed and reversed by an appellate court if it clearly appears from the record that the judge acted unwisely or unjustly in disregard of some well-

established principle of law or equity. A different rule is applied to cases where a judge in the court below exercises the ordinary discretion of deciding incidental questions that arise in the usual course and practice of the court. In *Gwynn v. Lethbridge*, 14 Ves. 585, a case heard on appeal from a decree for specific performance, the lord chancellor said:

"The court must give a certain degree of credit to the decree, supposing it to be right, unless a strong ground is shown for the contrary conclusion, more than the mere dissatisfaction of the party appealing."

The general rule, with some exceptions, is well settled by numerous decisions, that objections will not be considered by an appellate court in reviewing a case unless they were presented and insisted on in the court below, as shown by the record. This question was somewhat discussed in the argument in this court, but the rules of practice and the principles involved are so well settled and familiar as not to need citation of adjudged cases.

The relief sought by the plaintiff is a decree for the specific performance of the contract set forth as an exhibit to the bill of complaint. The due execution of such contract is admitted in the answer. We will first consider the relations of the parties, and the nature, objects, and purposes of the contract at the time of its execution, and determine whether it is, on its face, such a contract as could have been, and, in view of the proofs, ought to have been, performed at the time when the defendant took steps to rescind the contract, and the plaintiff filed its bill to enforce specific performance. The contract, on its face, appears to contain the requisites to bring it within the well-established and long-recognized principles which govern courts of equity in exercising the jurisdiction of specific performance. The contract relates to the sale and conveyance of land, it is binding at law, and it is founded upon a valuable consideration, which the parties deemed adequate. Contracts for the sale and conveyance of real property are considered as proper subjects for specific performance, as courts of equity generally regard the legal remedy, by way of damages for a breach, as inadequate.

As a general rule a court of equity will not undertake to enforce, specifically, contracts for building houses or other structures which may require its supervision for any length of time; but when the work to be done is sufficiently definite, and the plaintiff has an interest in its being performed which is not capable of adequate compensation by action at law, and no long continuous supervision of the court will be required, specific performance will be decreed. The contract in this case imposed mutual and reciprocal obligations upon the parties, which they at the date of execution deemed just, fair, and reasonable, within the power of each party to perform, without injustice or oppression to either party. They dealt together in mutual confidence, with anticipations of benefit to both parties. The terms of the contract are expressed in plain, simple, and intelligible language, which presents to the court no difficult question for construction. There is no uncertainty as to the subject-matter, or as to

the obligations respectively assumed, or as to the objects which the parties had in view, and the extent and manner of their engagements. The surrounding circumstances are made so apparent by the record that the court can readily avail itself of the same light which the parties possessed when the contract was made. We would have no doubt as to the intention of the contracting parties, and would have no difficulty in determining their mutual and respective rights, duties, and obligations, but for the allegations made in the answer. There is no attempt on the part of the defendant to have the meaning of the written agreement varied or modified by construction of its terms.

The grounds of defense set up in the answer are that the contract was induced by false and fraudulent representations and improper concealments made by George V. Leicester, the agent of the plaintiff, who well knew the objects and purposes of the contract, and also knew that his statements were relied upon by the defendant. These allegations constitute important ingredients in this case, and give rise to questions of fact, to be determined by the court upon the pleadings and evidence presented by the record. These allegations charge positive fraud, and the burden of proof would be upon the defendant to sustain them by strong evidence if they were material and essential to its defense. As to how far it is necessary for the defendant to sustain those allegations of positive fraud will be considered and determined in a subsequent part of this opinion.

The plaintiff is certainly bound by the representations of its agent, made within the scope of his authority, operating as an inducement to the contract, for it is seeking the specific enforcement of the contract which he negotiated. The evidence tends strongly to show that Leicester was not only the agent, but was, for all practical purposes, the company itself. The plaintiff cannot properly insist that the evidence proves that the defendant sent Judge Cook to Westboro to examine the machinery of the factory, the extent of the plant, and the financial condition of the plaintiff, and thereby had opportunity and convenient means of correct information, and relied upon its own knowledge and judgment in executing the contract. Judge Cook was only the soliciting agent of defendant, and went to Westboro before the date of the contract to solicit Leicester to come to Front Royal for the purpose of negotiating the contract. He was not a scientific or practical machinist. He did not make, or attempt to make, a careful examination of the plant, and he was not furnished with convenient means of inquiry and investigation as to the financial condition of plaintiff, and only spoke to the defendant in general terms of the handsome machinery. He doubtless regarded the kind attention of Mr. Leicester as acts of courtesy to a stranger, and, should Mr. Leicester put any other construction upon his acts of intercourse, his conduct would tend strongly to show that he at that time contemplated deception and fraud. Mr. Leicester was in a position to have accurate knowledge upon the subjects which he represented, and the defendant had a right to rely,

and the evidence shows it did rely, upon his statements, properly presuming that he could and would give the expected and essential information fully and correctly.

The mere fact that Leicester, in erecting the factory buildings, acted with "bad judgment and management," and with "reckless and wasteful extravagance," and in other ways misapplied the funds with which he had been intrusted, is not available to defendant as a defense in this suit. The defendant had agreed to erect the buildings at a cost not to exceed \$15,000, and Leicester was its contract agent for such purpose, and was in matters of expenditures under its supervision and control. If this mismanagement were the only defense, the court in a decree for specific performance would doubtless have made provision for compensation to defendant for excess of expenditures, as Leicester was in many respects the agent also of the plaintiff.

It is unnecessary for this court to determine the question as to the legal force and effect of the action of the defendant purporting to rescind the contract on the ground of false and fraudulent representations as to matters that were material, and were an inducement to the contract. It certainly acted promptly, and gave a notice that could not be misunderstood. A rescission of the contract is not insisted upon in the answer, and such affirmative relief could not be granted in this case except upon the prayer of a cross bill.

As the counsel on both sides, in oral arguments and elaborate briefs, discussed with much learning, logical force, and earnest confidence questions of law relating to charges of false and fraudulent representations and the proofs necessary to sustain such charges, we will briefly state our views upon the subject.

When a party seeks the rescission of a contract upon the ground of actual or positive fraud he must distinctly and directly charge the fraud, and by evidence clearly sustain such definite charges; and in doing so courts will allow him large latitude in the admission of evidence, as fraud is odious to a court of justice, and vitiates everything into which it enters. With respect to what will constitute fraud, it is impossible to lay down a specific rule, as there are great diversities of fraud which arise out of the peculiar facts of each case, as to the relations, condition, and connection of parties to a transaction, and as to their respective means of information. The rules, principles, and relieving methods of equity jurisprudence are sufficiently elastic and flexible to enable chancellors, by their learning, experience, wisdom, and natural and cultivated sense of justice, to meet every emergency, and by their exercise of judicial power prevent wrongs and injuries about to occur from deceitful practices and artful devices, contrary to the rules and principles of common honesty, and also to remedy the consequences when such wrongs and injuries have been effected. Examples are given in many adjudged cases which have established some general rules and principles that will apply to most cases that arise in the course of transactions among men, in the various departments of business and inter-

course. In relation to frauds in the procurement of contracts by willful misrepresentations, Mr. Adams formulated the following comprehensive definition:

"In order to constitute a fraud of the first class there must be a representation, expressed or implied, false within the knowledge of the party making it, reasonably relied on by the other party, and constituting a material inducement to his contract or act." Adams, Eq. 176.

The author then illustrates the principles of this definition as applicable to the rescission of contracts. In the course of the discussion of the subject he says:

"But if a warranty or covenant is not given, a mere representation honestly made, and believed at the time to be true by the party making it, though not true in fact, does not amount to fraud."

This last proposition of law may be correct in cases of rescission where positive fraud—the intention to deceive—must generally be shown; but it is not correct as to implied fraud, or fraud in law, as will appear by reference to many English and American cases, some of which are cited in 1 Story, Eq. Jur. § 193 et seq. The power of a court of equity to rescind a contract at all, instead of leaving parties to an action at law for damages, is properly deemed an extraordinary power, and to justify its exercise the alleged fraud or mistake must be made very manifest. The burden of proof to show these grounds for a rescission rests on the plaintiff, and not on the defendant. A court of equity is always reluctant to rescind unless the parties can be put back in statu quo. If this cannot be done, it gives such relief only where the clearest and strongest equity imperatively demands it. *Grymes v. Sanders*, 93 U. S. 55; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. Rep. 29.

There is another class of contracts referred to in numerous adjudged cases, where misrepresentations do not invalidate the agreements of parties that come within the rule of caveat emptor. This maxim is a rule of the common law applicable to contracts of purchase of both real and personal property, and is recognized and observed, both in courts of law and courts of equity, where there is no positive fraud in the transaction. Under this rule, where a purchaser of real or personal property asks a court of equity to rescind a contract, or withhold the equity of specific performance, on the ground of misrepresentations on the part of the vendor, he must establish his allegations by clear and irrefragable evidence; and if it appears that he had resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries and judgment, or if the means of investigation and verification were at hand readily accessible, and his attention was drawn to them, or reasonable suspicion might have been excited by the attendant circumstances, relief will be denied. The law never presumes positive fraud, and in such cases, when alleged, a party who seeks affirmative relief on the ground of such fraud, either by original or cross bill, must establish his specific charges by clear and strong proof.

These views of the law which we have presented are not in conflict with the cases referred to in the brief of the counsel of plaintiff, and seem to be in harmony with the many and well-selected cases

cited in the briefs of counsel of defendant. We do not cite these and other authorities, as the principles announced are fundamental, founded in reason and natural justice, they are clearly and fully discussed by text writers, and the court would find some difficulty in selecting a reasonable list of the best cases from the large array of learned and able decisions of eminent judges. These rules and principles are not strictly applicable in all cases where courts of equity exercise the discretionary jurisdiction of specific performance of contracts. The specific enforcement of the agreements of parties is a matter entirely of equitable jurisdiction, and depends upon the sound discretion of the court in the due administration of equitable justice. The difference between that degree of unfairness which will induce a court of equity to interfere actively by rescinding a contract, and that which will induce a court to withhold its aid in enforcement in specie, is well settled by adjudged cases. *Manufacturing Co. v. Gormully*, 144 U. S. 224, 237, 12 Sup. Ct. Rep. 632. A court of equity will often refuse to enforce a contract specifically when it would refuse also to rescind it. *Adams*, Eq. 84; *Jackson v. Ashton*, 11 Pet. 229.

A plaintiff always has a remedy at law for the breach of a binding contract, and can obtain such pecuniary compensation as a jury may think he is justly entitled to. If he seeks the extraordinary relief of specific enforcement, he must come into a court of equity with clean hands, and show that the contract was the result of honest and candid dealings on his part, and that the contract is certain, fair, and just in all its terms. It must be such a contract as would not be obnoxious to the sense of natural justice and sound morality, under the circumstances of the parties. If a plaintiff possesses peculiar and superior knowledge on the subject-matter of the contract, and knows, or has good reason to believe, that he is relied on by the other party for full and correct information, he must impart such information, or refer the inquirer to ready and accessible sources of information, and do nothing to retard or mislead investigation.

The principles involved in the rule of caveat emptor are not applicable to this case. The maxim in its terms applies only to purchasers who are dealing with vendors on equal footing, where neither party is presumed to trust each other, and where the means of knowledge are at hand, equally available to both parties, and the subject-matter of sale and purchase is alike open to their inspection, or where they rely and act upon their own judgment. In this case the defendant was a vendor, and not a purchaser, and received no pecuniary compensation, but freely and readily advanced its money to promote and secure the speedy performance of the contract. It had no immediate interest in the plant of the plaintiff company that was to be located near Front Royal, except as a stockholder, and the anticipated advantages to be derived from the building up of the contemplated city.

The nature of representations and the presumptions that arise therefrom are often dependent upon the condition, relations, and circumstances of the contracting parties. It is in this sense that the remark of Lord Hardwicke is to be understood when he said: "Fraud

may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is that fraud must be proved, not presumed." 1 Story, Eq. Jur. § 190. When the circumstances are such that the parties may rely upon the representations of each other, the courts in England and this country seem to hold a party liable for representations not known by him to be true, as well as for those which he actually knows to be false. 1 Story, Eq. Jur. § 193. In many kinds of business transactions the law does not require a prudent man to deal with every one as a sharper or a rascal, and make full and accurate precedent investigations, or require express warranty to guard against the falsehood of every representation which may be made as to matters that constitute material inducements to a contract. There must be a reasonable reliance upon the truth and integrity of men, or the transactions of business, trade, and commerce would not be conducted with the facility, confidence, and advantage which are essential to successful enterprise, and the advancement of individual and national wealth and prosperity. The rules and principles of law and equity are founded on natural justice and cultivated reason, and are shaped and applied by the wisdom of human experience.

The principles and methods relating to the doctrines of specific enforcement of contracts originated in early times in the English court of chancery, and were designed to afford complete relief when the remedy at the common law by way of damages was inadequate; the purpose of the court being to do equal and full justice in the exact accomplishment of the intention and objects of the parties, as disclosed by the well-understood terms of their agreement. These rules and principles of equity jurisprudence have been developed, defined, and established by a long line of precedents which are recognized and regarded as authorities. As these numerous decisions have been made upon the facts and circumstances of each case, some seeming diversities and conflicts have arisen which cannot be reconciled without a careful consideration of the shades of difference which were caused by the peculiar facts and circumstances involved. All decisions concur in the general rule that a court of equity will not exercise this extraordinary jurisdiction, dependent on judicial discretion, unless the plaintiff has dealt fairly in good faith, and with moral honesty, where he is so expected to act by the other party, and the contract is such as from its express terms can be clearly understood, and when the defendant can, without grievous hardship, and ought in common honesty to, perform his engagements.

A plaintiff may have acted in good faith, and still not be entitled to specific enforcement of a contract, if the defendant placed an erroneous construction upon the propositions of negotiation, and by doing so committed an honest mistake, which a fair and reasonable man, under the circumstances, might have made without inexcusable ignorance or negligence. When the terms of a contract are reduced to writing, and are expressed in plain, simple, and intelligible language, that in its ordinary meaning admits of but one fair and reasonable construction, a party cannot be heard to complain if he

placed a contrary construction upon the language employed to express the intention and purposes of the parties, if there has been no fraud, accident, or excusable mistake arising from the conduct of the other party. *Seitz v. Machine Co.*, 141 U. S. 510-517, 12 Sup. Ct. Rep. 46.

In entering into the contract now before the court, we are of opinion, in view of all the surrounding circumstances, that the defendant could reasonably rely upon the representations made by the president and general manager of the plaintiff company, and was not required by any principle of law or equity, or by ordinary prudence in business transactions, to resort to any other source of information. He was the chief promoter and organizer of the plaintiff company in Detroit in 1880. After the company had remained dormant for nearly 10 years he was its reorganizer, in 1890, and reported to the stockholders a balance sheet of its financial condition. He had the management of the business at Westboro, and owned nearly all the stock of the company. That which he ought, by proper diligence, to have known as to the financial condition and general course of business of the plaintiff company, he might well be presumed to have known when he was conducting the negotiations which were consummated in the contract now before the court. *Martin v. Webb*, 110 U. S. 7-15, 3 Sup. Ct. Rep. 428.

The defendant in its answer alleges that the representations of Leicester were relied on, were material inducements to the contract, and they were false and fraudulent. When a defendant in a case like this makes allegations of fraud in his answer as a defense, he is not required to prove the fraud as conclusively as a party who seeks affirmative relief on such grounds. The burden of proof in such a case is upon the plaintiff to show that the contract which he seeks to have enforced specifically is reasonable, fair, equitable, and free from any taint of fraud. If the evidence on the part of the defendant shows suspicious facts and circumstances sufficient to cast a taint of fraud on the transaction, and creates in the mind of the court a reasonable doubt as to the fairness and justice of the contract, or the honesty and truth of the negotiations that led to its execution, the court can properly refuse the extraordinary relief prayed for, and leave the plaintiff to the ordinary legal remedy for compensation in damages. *Hennessey v. Woolworth*, 128 U. S. 438, 9 Sup. Ct. Rep. 109.

After carefully reading and considering the record, we concur with the judge in the court below as to his findings of fact and his conclusions of law. The presumption of the correctness of a decree in a court of original jurisdiction is especially strong and influential in a case when all the evidence is in writing and remains unchanged, and the arguments of counsel are substantially the same, and the judge, after a full and patient hearing, exercises the discretionary jurisdiction of granting or refusing the specific enforcement of a contract. There can be no doubt that untrue representations were made by Mr. Leicester as to the indebtedness and financial condition of the plaintiff company at the time of the negotiation and execution of the contract now before us. As it is unnecessary

in this case to determine the question whether such misrepresentations amounted to actual or constructive fraud, or were honestly believed when made, and were ignorantly and innocently untrue, we leave this matter just as it was determined in the court below.

For the purpose of showing additional reasons sustaining the decree in the court below, we deem it proper to refer to two other questions which are usually involved in cases of this character. They appear in the record, were presented in the oral arguments and briefs of counsel, and were partly considered by the judge at the original hearing.

First. Would a decree for specific performance have operated oppressively and unjustly as to defendant under the changed circumstances and condition of affairs existing at the time of the hearing in the court below?

Secondly. Was the mutual enforcement of the contract in specie practicable,—could its fulfillment by both parties have been judicially secured?

The defendant company was organized for the purpose and had for its object the building of a town between Front Royal and Riverton, in Virginia. Like numerous other land companies and thousands of men, its stockholders were animated by the spirit of speculative adventure and enterprise that pervaded many states, misled the judgments of some of the most honest and best business men in the country, and resulted in much financial embarrassment and disaster. We have the charity to suppose that the stockholders of defendant company honestly expected, in the near future, to see a large and thriving town, filled with an energetic and busy people engaged in the prosperous pursuits of active trade and mechanical industry and enterprise. The president of the plaintiff company seems, from the evidence, to have been infected with the same contagious and speculative spirit, and we may judge of the brightness and vastness of his hopes by the name of the company which he organized and called "Samarcand," the name of an imperial city which, in a former century, was enriched and adorned with immense wealth and oriental magnificence.

The real essence of this contract was the establishment of a large and successful piano factory near Front Royal, not solely for the benefit of the plaintiff, but also for the anticipated benefit of the defendant. It showed its integrity of purpose and sincerity of faith by its prompt expenditure of \$23,000 in the piano factory enterprise. The plaintiff well knew the objects and purposes of the defendant, and concurred in the enthusiasm and anticipations of the "boom." The only damages that were sustained by the plaintiff was the stopping of its operations at Westboro, and the extent of this injury can be readily ascertained and assessed by a jury as damages, and adequate compensation can be obtained by process of execution against the solvent defendant. If the plant was prosperous and lost no money at Westboro, it could, by resuming its operations, have again prospered, and gratified its neighbors who had indulged regrets at the prospect of removal.

Now, under the changed conditions and circumstances produced

by the unexpected collapse, it certainly would not be just and equitable to allow the plaintiff to escape all material losses, and enable the president of the company to seize upon, as a *tabula in naufragio*, the balance of the money mentioned in the contract. At the time of the execution of the contract the piano factory scheme was, in the estimation of the parties, a plausible and hopeful adventure and enterprise, but now the removal of the piano factory plant to Front Royal would certainly be an injudicious and hazardous experiment, which reasonable and prudent men would not undertake. A considerable part of the remaining assets of the now solvent defendant would be wasted by being applied to the doubtful venture, or would be claimed and appropriated by Mr. Leicester as the purchase money of his individual stock. We may reasonably suppose that such a disposition of the money would greatly embarrass the defendant in its future enterprises, and would not secure the success of the piano factory scheme, the primary object of the contract. A court of equity will not usually rescind a contract on the ground that subsequent events have rendered it burdensome on one of the parties; but the rule is, in some respects, different in cases of specific performance, where the court exercises a wise and sound discretion for the purpose of subserving the ends of justice, in view of all the circumstances of the particular case. This discretion of withholding its aid is exercised even when the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties. *Willard v. Tayloe*, 8 Wall. 557-566; 2 Story, Eq. Jur. §§ 750-769.

We will now consider the question whether the fulfillment of the contract could have been judicially secured by a decree in the court below. A decree, in such a case as this, that did not secure the mutual performance of the contract, would have been manifestly unjust and inequitable. The mutual enforcement of contracts is one of the imperative duties of a court of equity in exercising this extraordinary jurisdiction. From the facts disclosed in the record we are of opinion that the removal of the piano factory plant from Westboro to Front Royal could not have been secured by a just decree. The plaintiff alleges in its bill of complaint that it is ready, willing, and able to perform all its obligations, "except so far as it is prevented by the said acts of the defendant." The defendant did furnish \$6,000 for the purpose of removing the plant, and this amount was sufficient, but was applied by Leicester to other purposes than those contemplated in the contract. The plaintiff does not allege and prove its independent ability to furnish means for the removal of the plant. The evidence shows that at the date of the contract, and for some time thereafter, the works were operated by means of borrowed money, for which it had incurred indebtedness that was only in part relieved by the \$6,000 advanced by the defendant, as in April, and for several months thereafter, the plant was in custody of the law by virtue of process of attachment to secure other debts. The defendant had expended more than \$17,000 in the erection of the buildings, and had advanced

\$6,000 for the purpose of removing the plant, and was under no contract obligation to render further financial assistance to the plaintiff to accomplish such removal, as the contract in express terms provides "that no payment in excess of \$6,000 shall be called for or made until said plant shall have been removed from its present location to the buildings to be erected as hereinbefore mentioned." The defendant had expended more money than it agreed in the contract to expend.

If a party has done all that could reasonably be expected of him to perform as to his part of an agreement, he certainly cannot be considered, in a court of equity, as having failed to meet his obligations, and as having afforded the other party a just excuse for non-performance. This proposition of law is certainly correct as to the present case, where the plaintiff has not shown its independent ability and ready means to perform its obligations, and is seeking a specific performance of the contract.

Had the court below by decree ordered the defendant to pay all, or any part, of the balance of money mentioned in the contract before the removal of the plant by the plaintiff, such decree would have violated, instead of have justly enforced, the plain terms of the contract of the parties.

It appears from the evidence that the sum of four or five thousand dollars would be required to remove the plant as contemplated by the parties, and the plaintiff has not shown that it possessed the available means to meet this obligation, to be performed before it would be entitled to further pecuniary assistance from the defendant. Independent of the question of fact as to false and fraudulent representations which were principally considered in the court below, it seems to us that the plaintiff's prayer for the relief of specific performance could have been properly denied upon the grounds that specific enforcement of the contract would have been unjust and oppressive to the defendant, and also that the fulfillment of the contract on the part of the plaintiff could not have been secured by decree.

As to the last contention mentioned in the opinion of the judge in the court below, we deem it only necessary to use his appropriate language: "A simple statement of the case is the strongest argument against the injustice of such a decree."

The decree of the court below is affirmed, with costs.

PULLMAN'S PALACE-CAR CO. v. BOARD OF ASSESSORS et al.

(Circuit Court, E. D. Louisiana. March 23, 1893.)

No. 12,163.

1. TAXATION—REMEDIES—BILL FOR INJUNCTION.

Acts La. 1890, No. 106, § 26, which requires that "all taxpayers in the parish of Orleans" shall appear before the board of assessors, and commence suit for redress, only in the manner therein prescribed, applies only to taxpayers who desire to claim that there has been error either in the description or valuation of the property assessed, and does not apply to

those taxpayers who complain of error in the proportion of the property assessed, the description and valuation being conceded to be correct; and this last class of taxpayers, without complying with section 26, may, by bill in equity, enjoin the collection of taxes illegally assessed against it.

2. SAME—INTERSTATE COMMERCE—SLEEPING CARS.

A foreign corporation owning sleeping cars which are engaged in interstate traffic, and only come into the state for the purpose of receiving and discharging passengers, and for the purpose of having such minor repairs made as they casually require, is not wholly exempt from taxation under the laws of the state, but may be assessed "in the ratio which the number of miles of the line within the state has to the total number of miles of the entire line," pursuant to Acts La. 1890, No. 106, § 29.

3. SAME—FOREIGN SLEEPING-CAR COMPANY—ASSESSMENT.

The total value, employed in Louisiana, of the cars of a foreign sleeping-car company, was \$100,000. An assessment was made against the company, in which the sum of \$100,000 was inserted as the value of cars, etc., and the value to be taxed was placed in the column where cars, carriages, and vehicles of all kinds were placed, and not in a column under the head of "trackage within this parish of railroads within this state, or partly within this state and another state." *Held*, that the company was assessed on the total value of the property employed within the state, and not "in the ratio which the number of miles of the line within the state has to the total number of miles of the entire line," as required by Acts La. 1890, No. 106, § 29, and that the assessment was invalid.

In Equity. Bill to enjoin the collection of a tax alleged to have been illegally assessed against the Pullman's Palace-Car Company, of Illinois.

Percy Roberts, for complainant.

E. A. O'Sullivan and Richard Lyons, for respondents.

BILLINGS, District Judge. This case is submitted on the bill of complaint, supplemental or amended bill, and agreed statement of facts and exhibits, upon an application for an injunction pendente lite. The bill is an injunction bill. By the bill and the agreed statement of facts it appears that the complainant is a corporation created under the laws of, and domiciled in, the state of Illinois, whose business it is to manufacture and lease out sleeping cars, etc., under contracts with various railroad corporations in the United States, Canada, and Mexico; that its property, consisting in sleeping cars to the value of \$100,000, comes into the state of Louisiana and into the city of New Orleans, but solely for the purpose of receiving and discharging passengers, and for the purpose of having such minor repairs made as they may casually require, and immediately thereafter goes out of the state of Louisiana into other states of the Union, and is employed in the business of transportation of interstate passengers; that the complainant has no branch establishment in the state of Louisiana to carry on traffic, unless the fact that, under its contracts with the railroads, its tickets are placed for sale with the agents of the railroad, constitutes the offices of such railroads its branch establishments.

The bill then avers that the state tax officers and those of the city of New Orleans have imposed, and are about to collect, a tax upon the full valuation of complainant's cars, as above given. In other words, the averment of the bill in this respect is that the tax has been

levied upon their cars as it would be upon real estate or other property permanently within the state of Louisiana, i. e. without considering that it is property which is only occasionally within this state, for a brief period of time, and is constantly moving through many other states besides the state of Louisiana. There has been a tender made of the tax which would be due if the ratio or proportion of assessment had been observed as is prescribed in section 29 of Act No. 106 of the Acts of 1890, which section will be set out subsequently.

The questions submitted by the complainant are (1) whether the complainant can be taxed at all; and (2) whether, if it can be taxed at all, it can be taxed except ratably and according to the proportion of the miles which its cars taxed traverse within this state, as compared with the number of miles which they traverse in this state and other states.

Before considering these questions, I will consider the objection urged by the defendants to the bill on the ground that the complainant has not appealed to the assessors, nor commenced its suit as required by the revenue act of 1890, above referred to. The respondents rely upon section 26, p. 132, of said revenue act, as containing a provision which must defeat this suit. But that provision requires that taxpayers shall present their claims for the correction of errors in description or valuation. The objection in this case came from an error in neither of these particulars. The cars were correctly described, and the valuation was correct. The error consisted in assessing the complainant for the entire value, and not merely for that proportion of the value fixed by the statute. Therefore the complainant was not required to ask within a given time to have the error corrected. I conclude, therefore, that the complainant is not debarred, by section 26, from maintaining this suit.

As to the bill upon its merits. Section 29 of Act No. 106 of the Acts of 1890, under which this tax is levied, is as follows:

"Sec. 29. Be it further enacted," etc., "that the real estate, roadbeds, roads, iron, track, superstructures, excavations, and channels of railroads, canals, and other transportation or telegraph companies shall be assessed and taxed in the parish or assessment district where located; and all other property, not specially exempted from taxation by article 207 of the constitution, belonging to said railroads, canals," etc., "shall be assessed and taxed at the domicile or principal office of said railroads, canals," etc., "as contemplated by article 245 of the constitution; but the rolling stock or movable property of any railroad company, telegraph company, canal company, or other transportation company, whose line lies partly within this state and partly within another state or states, or whose sleeping cars run over any line lying partly within this state or partly within another state or states, shall be assessed in this state in the ratio which the number of miles of the line within the state has to the total number of miles of the entire line."

I think this section compels the conclusion that the first ground taken by the complainant is not maintainable, and the second ground is well taken. This section provides that "any transportation company whose sleeping cars run over any line lying partly within this state or partly within another state or states shall be assessed in this state in the ratio which the number of miles of the line within the state has to the total number of miles of the entire line." This

is a provision for taxation which applies alike to resident and non-resident companies, and is therefore unlike the provision construed in *Marye v. Baltimore & O. R. Co.*, 127 U. S. 117, 8 Sup. Ct. Rep. 1037. Since it is applicable to all companies, it does not violate the constitution, as being, in effect, an imposition upon the interstate commerce. It is also just and reasonable. *Delaware Railroad Tax Case*, 18 Wall. 208; *State Railroad Tax Cases*, 92 U. S. 575, 607; *W. U. Tel. Co. v. Attorney General*, 125 U. S. 530, 8 Sup. Ct. Rep. 961; and *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876. While the statute defining the manner in which the tax shall be levied, to wit, that there shall be levied a tax within this state only upon that proportion of the valuation of the cars which results from comparing the miles traversed within this state with the aggregate of miles traversed within and without the state, is binding upon the complainant, it is binding also upon the taxing officers.

It was submitted to the court as to what was the meaning of the assessment roll,—i. e. in what manner the tax had been levied,—whether upon entire property of the value of \$100,000, or upon a portion or percentage of property whose value was such that the portion or percentage taxed was that amount. The sum \$100,000 is put down as the value of cars, etc. Furthermore, the value to be taxed is placed in the column where cars, carriages, and vehicles of all kinds are placed, and not in the column under the head of "trackage within this parish of railroads within this state, or partly within this state and another state." I think that the tax was assessed upon the entire value of all the cars of the complainant, and not upon them in the ratio of miles, as required by the statute. My conclusion is that the injunction pendente lite should issue.

GARES v. NORTHWEST NAT. BUILDING, L. & I. ASS'N.

(Circuit Court, D. Oregon. September 14, 1892.)

No. 1,947.

MANDAMUS—JURISDICTION OF FEDERAL COURTS.

The United States circuit courts have no jurisdiction to issue writs of mandamus, even when, by the law of the state where the court sits, mandamus is regarded as a civil action, except in cases where the writ is ancillary to some other proceedings. *Rosenbaum v. Bauer*, 7 Sup. Ct. Rep. 633, 120 U. S. 450, followed.

Suit for mandamus, brought by T. M. Gares against the Northwest National Building, Loan & Investment Association, to compel defendant to hold a stockholders' meeting for the election of a board of directors. Defendant demurs. Demurrer sustained.

G. H. Gorman, for petitioner.

C. B. Bellinger, for respondent.

GILBERT, Circuit Judge. This is a suit for a mandamus to compel the defendant corporation to hold a stockholders' meeting for

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the election of a board of directors. A demurrer to the petition raises the question of the jurisdiction of this court to issue the writ. It has been repeatedly decided by the supreme court that the circuit courts of the United States are not authorized to issue writs of mandamus in original proceedings, or otherwise than as necessary to the exercise of their respective jurisdictions. *McIntire v. Wood*, 7 Cranch, 504; *Bath Co. v. Amy*, 13 Wall. 244; *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. Rep. 633. These decisions are based upon the ground that the eleventh section of the judiciary act of 1789, which confers upon the circuit courts jurisdiction of all suits of a civil nature, at common law and in equity, between a citizen of the state where the suit is brought and a citizen of another state, does not include the proceeding for mandamus, which is neither an action at law nor a suit in equity, and this construction is held to be further supported by the language of the fourteenth section, which gives to the circuit courts power to issue "writs of scire facias, habeas corpus, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," thereby expressly limiting the power to issue the writ of mandamus to cases where it may be necessary for the exercise of a jurisdiction otherwise conferred by the act.

It is urged on behalf of the petitioner that this construction was adopted upon the theory that the writ of mandamus is here, as at common law, a prerogative writ, and it is contended that the reason of the rule does not exist in Oregon, where, by statute, the proceeding for mandamus is made a suit between private parties for the redress of private wrongs, and therefore becomes a suit of a private nature, at common law or in equity, within the language of section 11 of the judiciary act. The same contention was made in the case of *Rosenbaum v. Bauer*, *supra*, and the attention of the court was there expressly directed to the fact that in California, where that suit arose, the writ of mandamus was not prerogative, but on the contrary, by the adjudications of the state courts, had uniformly been held to be a civil action. Notwithstanding this fact, and the argument thereupon based, the majority of the court adhered to the rule previously followed, and refused to consider the proceeding for mandamus a suit of a civil nature, at common law or in equity. It must be regarded, therefore, the settled rule that the United States circuit courts have no authority to issue writs of mandamus except as ancillary to some other proceeding which shall have established a demand, or reduced it to judgment, in which case the mandamus may issue in the nature of process for executing the judgment, or otherwise for the enforcement of rights sought to be protected in the suit. The demurrer is sustained.

WILSON v. TOOTLE.

(Circuit Court, W. D. Missouri, St. Joseph Division. April 17, 1893.)

1. DEATH BY WRONGFUL ACT—ACTION BY APPOINTEE OF COURT—JURISDICTION.

Act Mo. April 20, 1891, provides that a cause of action accruing by virtue of the laws of another state "may be brought in any of the courts of this state by the person or persons entitled to the proceeds of such cause of action: provided, such person or persons shall be authorized to bring such action by the laws of the state when the cause of action accrued;" and that if the beneficiaries of such action are not allowed, by the laws of such state, to prosecute the action in their own names, the same may be prosecuted by a person to be appointed by the Missouri court in which the action is sought to be instituted. *Held*, that where a cause of action for death by wrongful act accrued in Minnesota, by whose laws the right of action is given to the personal representative for the benefit of the widow and next of kin, an appointee of the Missouri court could not maintain an action therein; for, as the right of action was given in contravention of the common law, and was dependent alone upon the statute creating it, the right must be taken with the limitations placed upon the remedy, and it was therefore not competent for the Missouri legislature to authorize any one to bring the suit other than the person designated by the Minnesota laws.

2. SAME—ACTION BY FOREIGN ADMINISTRATOR—TRUSTEES.

The administrator appointed in Minnesota, where the cause of action accrued, could maintain a suit in the Missouri court, notwithstanding the general rule that an administrator cannot sue in his official capacity without taking out letters of administration in the state where the action is brought; for the cause of action was vested in him, not in his character of administrator, but merely as the trustee of an express trust in favor of the widow and next of kin.

At Law. Action by James F. Wilson, administrator of William J. Kelly, deceased, against Milton Tootle, Jr., to recover damages for death by wrongful act. On demurrer to the petition. Overruled.

Statement by PHILIPS, District Judge:

This is on demurrer to the petition. The petition, in substance, alleges that on the 16th day of August, 1889, William J. Kelly died, intestate, in the state of Minnesota; that his death resulted from the wrongful act and negligence of the defendant, committed in said state; that thereafter, in September, 1889, the plaintiff was duly appointed administrator of the estate of said decedent by the probate court of the domicile of the deceased in said state, and that said administrator duly qualified, etc.; and that the plaintiff is a resident of said state, and the defendant is a resident of the state of Missouri. This suit is to recover damages in the sum of \$10,000 for the death of said Kelly, to the use of the father and mother of said deceased, who are his sole heirs. The petition also states that plaintiff had been appointed by the clerk of the circuit court of the United States for the St. Joseph division of the western district of Missouri, in vacation, to institute and prosecute this action; that said appointment was so made pursuant to an act of the legislature of the state of Missouri, approved April 20, 1891. To this petition the defendant demurs on the ground, principally, that the plaintiff cannot maintain this action in this jurisdiction.

Hall & Pike, for plaintiff.

H. K. White, for defendant.

PHILIPS, District Judge, (after stating the facts.) In the case of *Vawter v. Railway Co.*, 84 Mo. 679, the supreme court of this

state held that an administrator appointed under the laws of this state could not maintain an action in the state against a defendant railroad company for damages resulting from the death of the intestate, occurring in the state of Kansas, through the imputed wrongful act and negligence of the company, although a cause of action therefor was given by the statutes of that state to the administrator of the estate. This ruling was predicated mainly on the proposition that said action was given wholly by the statute of Kansas, and such statute has no extraterritorial force, and because of the fact that under the statutes of this state the administrator cannot maintain an action for personal injury to the intestate. In *Oates v. Railway Co.*, 104 Mo. 514, 16 S. W. Rep. 487, the intestate at the time of his death was a citizen of the state of Missouri, and died in the state of Kansas in consequence of injuries inflicted upon him there through the imputed wrong and negligence of servants of the defendant company. The suit was brought in the state court of Missouri by the surviving widow. The doctrine of the *Vawter Case* was reaffirmed. Although, by the statute of the state of Missouri, a right of action for the death, had the injury occurred here, was given to such widow, yet, as the right of action where the injury occurred was given alone by the statute of Kansas to the legal representative, the remedy, it was held, was imported into the forum of adjudication along with the right. Therefore, as the widow could not maintain the suit in Kansas, neither could she sue in Missouri. The decision in the *Vawter Case* was the occasion of the enactment by the Missouri legislature of the following statute, approved April 20, 1891:

"Section 1. Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action may be brought in any of the courts of this state by the person or persons entitled to the proceeds of such cause of action: provided, such person or persons shall be authorized to bring such action by the laws of the state or territory where the cause of action accrued.

"Sec. 2. Whenever any cause of action has accrued under or by virtue of the laws of any other state or territory, and the person or persons entitled to the benefit of such cause of action are not authorized by the laws of such state or territory to prosecute such action in his, her, or their own names, then in every such case such cause of action may be brought in any of the courts of this state, by a person to be appointed for that purpose by the court in which such cause of action is sought to be instituted, or the clerk thereof in vacation, and such person so appointed may institute such action, and prosecute the same, for the benefit of the person or persons entitled to the proceeds thereof under the laws of the state or territory wherein the cause of action arose.

"Sec. 3. The proceeds of any action brought under section number two of this act shall be distributed by the person bringing such suit, and paid to the person or persons entitled thereto, according to their respective interests therein, under the laws of the state or territory wherein the cause of action arose."

We do not see very clearly how this statute can be relied upon to maintain this action, for by the first section the right of action for such death occurring without the state is given to "the person or persons entitled to the proceeds of such cause of action, provided such person or persons shall be authorized to bring such action by

the laws of the state or territory where the cause of action accrued." As by the statute of Minnesota the cause of action in question is given to the legal representative of the deceased, and by the statute of Missouri is given to the parent or parents, or wife, or children, as the case may be, it is apparent that the person authorized to bring such action by the laws of Minnesota, where the cause of action accrued, is not the party entitled to the proceeds of such cause of action. Exactly why the legislature of the state, while passing a remedial act, should have thus restricted its terms is not apparent. It must suffice, however, for the purposes of this case, that such is the statute. While section 2 of the act authorizes the appointment of a person in this state by the clerk or the court to prosecute the action, where the person or persons entitled to the benefit of such cause of action are not authorized by the laws of the state where the injury occurred to prosecute such action, yet I very much question the power of the legislature of Missouri to authorize any one else to maintain such action than the person named by the enabling act of Minnesota. It is true that the person designated in this case to prosecute the action is the legal representative of the deceased in Minnesota, and the plaintiff is entitled to any vantage ground, if any, on account of this coincidence. The right of action given being in contravention of the common law, and being dependent alone upon the statute creating it, the right must be taken with the limitations placed upon the remedy.

If I am correct in this view, we are brought to face the question whether or not the administrator appointed in Minnesota can maintain this action without the aid of the foregoing enabling act of the legislature of Missouri. Neither of the Missouri cases above cited presents the precise question whether the legal representative appointed under the laws of the state where the injury occurred can maintain such action in this state. The rule which forbids a non-resident administrator or executor from going into another state to recover property of the estate is based largely upon the proposition that letters testamentary or of administration have no force or effect beyond the territorial limits of the state by whose authority they are granted; that the property of the deceased is subject to the rules of devolution, succession, and administration under the statute laws, where situated; and that the property of the decedent within the state, being subject to the claims of creditors, will not be permitted to be withdrawn from the local jurisdiction until such claims are satisfied. This is what a recent author terms "the necessity of the rule." 1 Woerner, *Adm'n*, p. 358. On principle, I cannot perceive why the maxim should not apply here, as elsewhere, that rules cease with the reason that gave them birth. By the statute of Minnesota (1878, p. 825, § 2) the cause of action in such case is given to "the personal representative of the deceased," and "the amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased person."

Story in his *Equity Jurisprudence*, (page 531,) defines assets as follows:

"In an accurate and legal sense, all the personal property of the deceased which is of a salable nature, and may be converted into ready money, is deemed 'assets.' But the word is not confined to such property, for all other property of the deceased which is chargeable with his debts or legacies, and is applicable to the purpose, is, in a large sense, 'assets.'"

The money recoverable in this action is in no sense of the term an asset. It never was of the property of the intestate. It arose only upon his death. By the express provisions of the statute it is exempt from the debts of the intestate or the usual incidents of administration. No question, therefore, can arise as to its devolution under the succession laws of this state, or of its liability to the claims of local or other creditors. On the contrary, by the very terms of the statute of Minnesota the fund which would arise from the action would be a trust fund, held by the administrator for the sole benefit of the widow and next of kin. To all intents and purposes, therefore, the administrator is made by the statute the trustee of an express trust. The legislature of Minnesota could as well have named and empowered any other person to bring such action as the legal representative. Could it be denied, had the legislature named and empowered John Smith, sheriff of the county, or John Jones, clerk of the county, of the residence of the deceased, to bring such action to the use and benefit of the widow and next of kin, that such person would have been the trustee of an express trust, or that such trustee would have been recognized in any court in Missouri to maintain the action? What difference, then, on principle, can it make that the legislature which gave the cause of action designated the legal representative of the deceased as the party to maintain it? Neither the administrator nor John Smith, sheriff, nor John Jones, clerk, would derive his authority merely from his office, as inhering therein, but from the statute designating such person as the trustee to perform the particular office of suitor. His being administrator may be the condition on which the legislature clothes him with the particular trust, the same as being sheriff or clerk would confer on John Jones or John Smith the authority to sue. Either would be the trustee of an express trust derived from the statute.

In *Needham v. Railroad Co.*, 38 Vt. 294, the court points out a very important distinction between a statute which creates a survival and right of action to the administrator for a personal injury to the intestate where death does not result therefrom, but from some other circumstance, and another provision of the statute, which gives the right of action to the legal representative for the benefit of the next of kin, etc., where death ensues from the injury. In the first instance the cause of action arises during the life of the intestate, and the cause of action survives to the administrator, as such, under the statute, and the damage recovered becomes an asset of the estate, subject to general distribution as any other property of the estate; whereas, in the second instance, the cause of action does not arise until after the death of the person injured, and it is given for the purpose, and as a means, of compensating the designated kinsmen for the value to them of the life of him wrongfully taken away.

It is their loss alone which is to be compensated. The damage recovered, therefore, does not become an asset, but belongs and goes to the designated beneficiary. So the court says:

"Notwithstanding the action in such case is to be prosecuted in point of form by the executor or administrator, he is only a trustee of the sum recovered for the use of the widow or next of kin, and the sum so recovered cannot be treated as assets in his hands for distribution among the creditors. No right of action * * * exists during the lifetime of the injured party. When death occurs from the injury the right of action given arises after, and at the moment of, his decease. The damages resulting from his death are then prospective. Such damages to the widow and next of kin began where the damages of the intestate ended, viz. with his death."

In *Hulbert v. City of Topeka*, 34 Fed. Rep. 511, Judge Brewer noted this distinction as important, and that it was overlooked by the state court when he was on that bench. He followed, however, the ruling of the state court, as it involved the construction of the state statute. But it must be kept in mind that in the *Hulbert* Case the administrator was appointed by the probate court in Missouri, whose statute did not authorize an administrator, as did the Kansas statute, to maintain such action; and Judge Black, in *Oates v. Railway Co.*, supra, seemed impressed with this difference, for he observed: "If, by the laws of that state, she [the widow] could prosecute the suit there, a different question would be presented for our consideration." On principle, as we have already suggested, where the statute of the state which gives the right of action designates the legal representative to sue in trust for the use of the widow and next of kin, there can be no distinction between an action thus prosecuted and one by the widow or designated beneficiary, had the statute so authorized the action.

If there were anything in the Missouri statute which would indicate that it was contrary to the policy of the state that such legal representative should maintain such action, this court, in administering law within the state, would observe and enforce such local policy. No cause of action is given in Missouri to the administrator for injuries to the person of the intestate, where death does not ensue therefrom. While section 96, Rev. St. 1889, giving the right of action to the administrator in enumerated instances, if restrained in the interpretation to the exact language employed, would give little color to the idea that a cause of action was thereby designed and intended to be given for personal injury to the intestate, yet the legislature, out of abundant caution, in the succeeding section declared that anything in the preceding section should extend "to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator." This, too, made section 96 harmonious with sections 4426, 4427, of the statute, which gave the right of action where death ensues to the designated next of kin.

The case of *Dennick v. Railroad Co.*, 103 U. S. 11, bears more directly upon the question at issue than any case to which my attention is called. There the deceased was killed in New Jersey, and his widow obtained letters of administration in New York, presumably the domicile of the deceased. She sued in the state court, from

which the cause was removed into the federal court by the non-resident corporation. The statute laws of New Jersey were practically the same as those of Minnesota, respecting the right of action by the legal representative. The difference between that and this case is that by the statutes of New York the right of action for injuries inflicted there was also given to the legal representative. While it is to be conceded that Justice Miller, in his opinion, lays some stress upon the fact that the plaintiff was a domestic administrator as well as being authorized to sue in a foreign state, the strength of his opinion, sustaining the action, centers upon the following proposition of law: That, while the right of action depends upon the New Jersey statute, it is yet transitory, and follows the defendant into whatever state he may go. He said:

"Wherever, by either the common law or the statute law of the state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties. The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the circuit court of the United States for the northern district were competent to try such a case when the parties were properly before it."

He further argued that the language of the New Jersey statute, just as the Minnesota statute, does not bear the construction that the representative must reside in the state where suit is brought. He added:

"The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here, also, by construction, 'if they reside in the state of New Jersey,' as to say the representative must reside there? (See, also, *Railway Co. v. Cox*, 145 U. S. 604, 605, 12 Sup. Ct. Rep. 905; *Huntington v. Attrill*, 13 Sup. Ct. Rep. 230.)

There is strong analogy, too, between this case and that line of authorities which hold that wherever the right of the administrator or executor is not derived from the deceased through grant of letters, but is in a certain sense supervenient, the legal representative is recognized to sue in any other jurisdiction. For instance, he may sue in another jurisdiction on a judgment recovered in the state of his domicile, and he may sue in another state on a promissory note given him as administrator. 1 Woerner, Adm'n, p. 366, § 162; *Hall v. Harrison*, 21 Mo. 227. So, it has been held that an administrator to whom the patent is issued on an invention of his intestate may maintain in a foreign state an action for infringement, "because the legal title is in the administrator as trustee." *Goodyear v. Hullihen*, 3 Fish. Pat. Cas. 251, and loc. cit. It is on this idea that the supreme court of Missouri held in *Abbott v. Miller*, 10 Mo. 141, that, where an Illinois administrator insured the real estate of the intestate in Illinois in a St. Louis insurance company, he could recover thereon in this state; that the administrator acquired title in the state of Illinois. The court said:

"A valid title to property acquired in one country according to the local law will be deemed valid, and respected as a perfect title, in every civilized country. That Miller [the administrator] was a trustee for others can make no difference."

In *Lewis v. McFarland*, 9 Cranch, 151, where it was held that the executor, invested with title to the land by the will, may maintain ejectment in a foreign state, Chief Justice Marshall, after alluding to the general rule restricting the right of action to the jurisdiction from which the administrator derives his letters, said:

"But this decision has never been understood to extend to a suit for lands devised to an executor. In such case the executor sues as devisee. His right is derived from the will, and the letters testamentary do not give the title. The executors are trustees for the purposes of the will. This will may be considered as requiring that the executors shall act to enable themselves to take under the devise to them; but, when the condition is performed, those who have performed it take under the will."

So the Minnesota statute, while requiring that the person invested with the right of action shall have been appointed administrator as a condition precedent to his right of action for the death of his intestate, when that condition is fulfilled he derives his right to sue from the statute, and not under the appointment. He is, it does seem to me, clothed with an express trust; and, as such trustee, why he may not come into this jurisdiction and sue in execution of his trust I am unable to see; especially, inasmuch as by section 1991 of the state Code of Civil Procedure the trustee of "an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted." While the question raised by this demurrer is not free from doubt, the demurrer is overruled.

SANDERS et al. v. PALMER.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—PRIVATE MOTIVE.

In an action for malicious prosecution, however malicious may have been the private motives of the defendants in prosecuting the plaintiff upon a criminal charge, they are protected in doing so if there was probable cause to believe him guilty.

2. SAME—PROBABLE CAUSE—PROVINCE OF COURT AND JURY.

In such an action, if the facts are undisputed, or clearly established, it is for the judge to determine whether they constitute probable cause, and direct the jury accordingly; and when the facts are disputed it is the duty of the court to instruct the jury what facts, if established, will constitute a probable cause for the prosecution, and to submit to them only the question as to the existence of these facts.

3. SAME—PROBABLE CAUSE—LARCENY—BAILEE OF PROPERTY.

Plaintiff rented of defendants a farm, for a term of years. Before the term expired, defendants commenced proceedings to dispossess him. Pending these proceedings, plaintiff rented a neighboring farm, and caused certain logs and posts to be removed thereto from defendants' farm. On the complaint of defendants, plaintiff was arrested for larceny of the logs and posts, and an indictment was found against him, but on trial he was acquitted. He then commenced an action for malicious prosecution. He gave evidence tending to show that he cut the posts on an adjoining farm, belonging to defendants, and carried them to the farm he occupied, under an arrangement with defendants by which he was to use them to repair the fences. There was also evidence that the logs were cut by him on the leased farm to clear up one of the lots, upon the understanding that he was to have them for his trouble. Evidence was given for defendants

tending to show that the posts and the logs were not cut by plaintiff, but were on the farm when he went into occupation of it; having been cut by a former tenant, and piled in various places for defendants' use. *Held*, that the judge properly refused to direct a verdict for defendants, as the plaintiff was a bailee of the property, if the testimony given for him was true, and as the truth or falsity of the plaintiff's contention was necessarily within the actual knowledge of defendants.

4. SAME—PROBABLE CAUSE—INSTRUCTIONS.

Under the circumstances, defendants were entitled to an unqualified instruction that if, as the testimony for them tended to show, the jury believed that plaintiff was not a bailee of the property at the time he carried it away, and appropriated it to his own use, plaintiff had not established want of probable cause, and it was error to leave the jury to decide whether the facts proved constituted probable cause.

Shipman, J., dissenting.

In Error to the Circuit Court of the United States for the Southern District of New York.

At Law. Action by John E. Palmer against Charles W. Sanders and others for malicious prosecution. Verdict and judgment for plaintiff. Defendants allege error. Reversed.

Robt. D. Benedict, for plaintiffs in error.

John W. Boothby, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiffs in error were defendants in the court below in an action for malicious prosecution founded upon the arrest and trial of the plaintiff upon a charge of larceny. It appeared upon the trial that the plaintiff was arrested June 9, 1889, upon a warrant issued by a magistrate of Middlesex county, N. J., based upon a complaint made by the defendant Charles W. Sanders, which stated, in substance, that the plaintiff had feloniously stolen and taken away 120 red cedar posts, and 16 trunks of felled red cedar trees, the goods and chattels of Charles W. Sanders. On the next day an examination was had before the magistrate, and after a hearing he committed the plaintiff for trial, and admitted him to bail. At the September term of the Middlesex oyer and terminer an indictment was found against him by the grand jury; and on the trial of that indictment, in October, 1889, the plaintiff was acquitted. Thereafter the present action was brought. The facts shown were these: In March, 1888, the plaintiff rented of Charles W. Sanders a farm in Middlesex county, known as the "Sanders Farm," for a term of five years, and shortly after went into occupation as a tenant. In February, 1889, proceedings were taken by Mr. Sanders to dispossess him, and pending these proceedings he rented another farm near by, known as the "Jacques Farm." Shortly before the making of the criminal complaint against him, he caused to be removed from the Sanders farm to the Jacques farm the posts and logs mentioned in the complaint. The defendants, who lived at a distance, were informed by anonymous letters that the plaintiff had removed these posts and logs. Thereupon they consulted Mr. Shafer, a lawyer, who had been their professional adviser. He advised them to visit

the Jacques farm, and ascertain the facts in respect to the removal of the posts and logs. They did so, accompanied by Mr. Mead, a real-estate agent. They found the posts and logs at different places on that farm, and saw that some of them had already been used for making fences. Plaintiff was absent, but they ascertained from his hired man, then on the place, that he had brought the posts and logs there by the plaintiff's directions. They then returned to Mr. Shafer's office, informed him what had been ascertained, and were advised by him that there was a sufficient case for the arrest of the plaintiff for larceny. Thereupon the complaint was made, and laid before the magistrate who issued the warrant. At the examination before the magistrate, after the testimony for the prosecution was closed, the plaintiff, at the suggestion of his counsel, made a statement in exculpation of the charge. Among other things, he said that he had supposed he had a claim on the posts for the labor of getting them out, and that he had removed them under the advice of his counsel. His counsel immediately contradicted him, and stated to the magistrate that he had never given the plaintiff such advice. After the finding of the indictment, and before the trial thereon, the plaintiff returned the posts and logs to the Sanders farm. At the present trial, evidence was given for the plaintiff tending to show that he cut the posts upon an adjoining farm of Mr. Sanders, known as the "Tappen Farm," and carried them to the Sanders farm, under an arrangement with Sanders by which he was to use them for repairing the fences. By the terms of his lease he was to keep the fences in repair. There was also testimony tending to show that the logs were cut by him on the Sanders farm to clear up one of the lots, upon the understanding with Sanders that he was to have them for his labor. The plaintiff admitted the untruth of the statements made by him before the magistrate. Evidence was given for the defendants tending to show that the posts and logs were not cut by plaintiff, but were there on the Sanders farm when he went into occupation of it, having been cut by a former tenant, and piled in various places for the use of Mr. Sanders. There was evidence to authorize the jury to find that the criminal proceeding was begun by the defendants with the motive of getting the plaintiff out of possession of the Sanders farm. On the other hand, there was evidence to authorize them to find, not only that the defendants had reasonable and probable cause to believe that the plaintiff had been guilty of larceny, but also to find that the plaintiff was guilty of the offense. At the close of the testimony the court refused, as requested by the defendants, to direct the jury to render a verdict for the defendants upon the ground that there was not sufficient evidence of want of probable cause, or of malice. The defendants excepted to this ruling. The trial judge was then requested by the defendants to instruct the jury that if the defendants used due care, and honestly stated the facts as they understood them, and believed them to exist, to their counsel, and honestly acted under the advice of counsel, with no intent to injure the plaintiff, in violation of the law, then the jury

should find that there was no malice, and their verdict should be for the defendants. The trial judge instructed the jury substantially as thus requested. He was also requested by the defendants to instruct the jury, in substance, that if they found that the defendants, in view of the facts which had come to their knowledge at the time of making the complaint, had probable cause to believe the plaintiff guilty on grounds that would have satisfied a reasonable person, acting with reasonable care, then their verdict should be for the defendants. The court instructed the jury, with reference to this request, that they were to decide whether the defendants had reasonable grounds for starting the prosecution, and whether they started it honestly or maliciously, and that the plaintiff must make out malice and a want of probable cause; that if the defendants, when they consulted Mr. Shafer, omitted to state material facts, or unfairly stated their case to him, then want of probable cause had been shown by the plaintiff. The defendants excepted to this instruction, and also to the refusal of the judge to instruct the jury as requested upon the question of probable cause. The jury rendered a verdict for the plaintiff.

We have not deemed it necessary to consider any of the numerous exceptions taken upon the trial, as to which error has been assigned, except those to the refusal of the trial judge to direct a verdict for the defendants, and to his instructions upon the question of probable cause, and his refusal to instruct upon that question as requested by the defendants.

However malicious may have been the private motives of the defendants in prosecuting the plaintiff upon the criminal charge, they were protected in doing so, provided there was probable cause to believe him guilty of the offense. *Mitchell v. Wall*, 111 Mass. 492; *Munns v. Dupont*, 3 Wash. C. C. 37; *Foshay v. Ferguson*, 2 Denio, 617. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. Upon the trial of an action for malicious prosecution, where the facts are in doubt, or depend upon conflicting testimony, the question of probable cause is a mixed one, of law and fact, to be determined by the jury under the instructions of the court. But if the facts are undisputed, or clearly established, it is for the judge to determine their legal effect, and direct the jury accordingly. In other words, whether the circumstances alleged to show probable cause, or the contrary, are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law. When the facts bearing upon that question are disputed, it is the duty of the court to instruct the jury what facts, if established, will constitute a probable cause for the prosecution, and to submit to them only the question as to the existence of those facts. *Bulkeley v. Keteltas*, 6 N. Y. 384; *Besson v. Southard*, 10 N. Y. 236; *Stewart v. Sonneborn*, 98 U. S. 187.

It was not disputed that, pending the proceedings to remove the plaintiff from the Sanders farm, he caused the posts and logs men-

tioned in the criminal complaint to be taken from that farm to the Jacques farm, which he had recently hired. It was not disputed that all of this property had been previously the property of Charles W. Sanders. It was not disputed that the plaintiff had never asserted any title or claim of right to the posts to Mr. Sanders, or any person representing him, nor any lien or claim thereon for his labor in respect to it. It was not disputed that he caused the property to be removed without asking permission, and without the knowledge of Mr. Sanders, or any person representing him. It was not disputed that he had appropriated the property to his own use. It was clearly established upon the trial that he had appropriated part of it permanently, by using the posts for building fences upon the Jacques farm. It was not disputed that he had no title to the posts, or claim of right to them. He knew, as appears by his own testimony, that he had no right to use them except for the purpose of repairing the fences on the Sanders farm. It was undisputed that all these facts were known to the defendants when they applied for the warrant. But the fact was in dispute whether the logs and posts were upon the Sanders farm before the plaintiff became a tenant, and whether all of them were not cut by him,—the posts, pursuant to the arrangement that they were to be used by him in repairing fences; and the logs, pursuant to the agreement by which they were to be his for the labor. If the logs and posts were cut by him, and had always been in his possession, under such an arrangement as he testified to, there was not probable cause for his prosecution; and upon such facts he could not technically be guilty of larceny, however dishonest or fraudulent his conduct may have been in appropriating the property to his own use. According to this theory, he was a bailee, and at common law his acts would be but a breach of trust. Whether he could have been pursued for embezzlement under any of the statutes of New Jersey is a doubtful question, (1 Rev. Laws, § 44, par. 162,) and need not be considered. The fact whether the plaintiff had ever been in possession of the property as bailee was one within the personal knowledge of the defendants. One of them knew whether it was true, or not, that there had been such an agreement as was testified to by the plaintiff in regard to cutting the posts and logs; and, upon the theory that they were acting in concert, the knowledge of one of the defendants was imputable to the other. If they had been strangers to the agreement the question might have arisen whether there was any reasonable cause to believe that the plaintiff was a bailee; but, as it was, they were chargeable with knowledge of the fact, and, because of its existence, that he was not amenable to the charge of larceny. Because the vital fact, without which there was no larceny, and no probable cause to believe the plaintiff guilty of that offense, was in doubt, and presented a fair question for the jury, the trial judge correctly refused to take that question from them. There was consequently no error in his refusal to direct a verdict for the defendants.

If, as the testimony on the part of the defendants tended to show, the plaintiff was not a bailee of the property at the time he carried

it away, and appropriated it to his own use, the defendants, in our judgment, were entitled to the unqualified instruction to the jury that the plaintiff had not established want of probable cause. No element in the facts, that one being found to exist, was wanting to induce a reasonable man to believe that the plaintiff had larcenously taken the property of Mr. Sanders. The circumstance that the property was not taken clandestinely was not controlling. He had taken and appropriated it to his own use without color of right, and without permission. The felonious quality of the act was incapable of direct proof, but the patent facts authorized the inference that the plaintiff had taken the property with intent to defraud Mr. Sanders. Instead of such instruction to the jury, the trial judge first left it to them to find whether the plaintiff had established want of probable cause, thus leaving them to decide whether the facts proved constituted probable cause. This was error. *Bulkeley v. Smith*, 2 Duer, 261. And this error was supplemented by another, in the instruction that the plaintiff had shown want of probable cause if the jury found that the defendants had not fairly stated the case to their counsel. It was not at all controlling upon the question of probable cause whether the defendants had or had not acted on the advice of counsel, or procured that advice in good faith or unfairly. If they proceeded in good faith upon the advice of counsel, given upon a full representation of the facts, the defendants had an independent defense to the suit. But, whether they did or not, they were entitled to a verdict, if the evidence did not satisfy the jury that the plaintiff was not guilty, and was not apparently guilty when prosecuted, of the offense with which he was charged. In its bearings upon this defense, what was stated or omitted to be stated by the defendants to their counsel was only important as it tended to prove or disprove the real facts, and suggest malice. By the instructions given and withheld the defendants were practically deprived of the benefit of the defense of probable cause. The exceptions sufficiently reach the errors in the instructions, and the errors should lead to a reversal of the judgment. The judgment is reversed, and the action remitted for a new trial to the court below.

SHIPMAN, Circuit Judge, (dissenting.) I dissent from the result to which the court came in this case, but not from the correctness of the abstract rules of law which are stated in its opinion. I dissent because my examination of the record leads me to the conclusion that those rules have no adequate relation to the questions upon which the case was tried in the circuit court, and upon which it turned. The defendants put the strength of their defense upon the alleged fact that in ignorance of law, and seeking information as to the proper course to pursue, they fairly presented the facts to a competent lawyer, and acted upon his suggestion and advice. The defendant Charles W. Sanders testified that before he saw the lawyer he had no knowledge or information as to whether the facts constituted a ground for a criminal complaint; that he made no suggestion, in any form or shape, that criminal proceedings

should be taken; that the suggestion came from the lawyer, solely. In reply to the question whether he believed, on the day when the lawyer was consulted, that the posts had been taken with felonious intent, he said:

"Yes, by advice of counsel. Question. You believed so because your counsel so advised? A. That is it exactly. Q. Did you between the day you made the complaint that Mr. Palmer had stolen those posts feloniously? A. No, I did not believe anything about it until I saw my counsel."

The defendants thus substantially placed their case, as to the probable cause which they had for instituting the criminal complaint, upon their caution and care in obtaining legal advice, and submitting to counsel the question of their further action. The charge was full, in accordance with the repeated requests of their counsel in this regard. It is to be read in the light of the issue which was actually before the jury, and it is apparent that the judge charged the jury upon the points actually, and not theoretically, in issue. Whether there were reasonable grounds of suspicion, which should warrant belief in the plaintiff's guilt, arising from the facts which had come to the defendant's knowledge, apart from the knowledge and advice which they received from the lawyer, was a question which was not actually in the case. The first error which the court finds was committed was not, apparently, excepted to. The second, for the reasons already stated, did not exist.

BUCHANAN et al. v. DROVERS' NAT. BANK OF CHICAGO.

(Circuit Court of Appeals, Sixth Circuit. April 17, 1893.)

No. 47.

1. PROMISSORY NOTES—NEW NOTE—ILLEGALITY OF OLD NOTE.

A new note given to raise money with which to pay off a prior note, which had been given to obtain means whereby to prosecute an unlawful business, is not affected by the illegality of the first note.

2. SAME—RIGHTS OF BONA FIDE PURCHASER.

Even if such new note were illegal, a bank discounting it in ignorance of the purpose for which it was given might enforce it without regard to such illegality.

3. USURY—CONFLICT OF LAWS—PLACE OF DISCOUNT AND PAYMENT.

A note dated and signed by the makers in Tennessee, and payable in Chicago, Ill., and forwarded by them to the payees in Chicago, to be used by the latter in raising money wherewith to pay off a prior note made by the same parties, and actually used in Chicago for that purpose by discounting it at a bank there, must be held an Illinois contract, and governed by the laws of Illinois relating to usury.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

At Law. Action by the Drovers' National Bank of Chicago against R. G. Buchanan, J. L. Parkes, and G. R. Hill on a promissory note. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Statement by SEVERENS, District Judge:

This cause comes here from the circuit court for the middle district of Tennessee, on a writ of error prosecuted by the defendants in the court below, where, upon a trial before Circuit Judge Taft and a jury, the verdict and judgment were rendered for the bank. The facts shown by the record, so far as they are material for consideration upon the errors alleged and relied upon, are these:

In May, 1885, Buchanan and Parkes, residents of Tennessee, and Hill, a resident of Mississippi, the defendants below, associated with one Thompson, then resident in the Indian Territory, were engaged in laying, grazing, fattening, and selling cattle. The grazing and fattening the cattle for the market was carried on in the Indian Territory, into which they were brought for that purpose. The market principally had in view was that of Chicago. Needing funds for the prosecution of their business, they applied to James H. Campbell, who was engaged in the live stock and commission business at Chicago, under the name of Campbell, Lancaster & Co., to procure from or through him an advancement of money upon the joint note of the four for \$25,000, payable to his order in Chicago in four months from its date, which was May 20, 1885. The note was dated at Franklin, Tenn. As an inducement to Campbell to aid them in raising the money, they promised to ship all their cattle to him for disposition so long as their business relations with him remained pleasant. Contemporaneously with the making of this note the makers executed to Campbell, or his assignees, a chattel mortgage on a large number of cattle, to secure that note and all other liabilities they might incur to the mortgagee. This note was discounted at some bank—what one does not appear—by Campbell, upon his indorsement, and the proceeds were placed by him to the credit of Buchanan, who was the manager of this branch of the business, for all the parties interested in raising the money.

The note not having been paid at maturity, Campbell drew up two notes, each for the sum of \$12,500, and sent them to Buchanan in Tennessee, with the request that he should sign them, and, after getting the signatures of Parkes and Hill, and signing them himself as Thompson's attorney, return them to himself (Campbell) at Chicago. The manifest purpose of this was to provide the means for taking up the unpaid note for \$25,000. The two \$12,500 notes were signed by all the makers, except Hill, in Tennessee, and by him lastly, in Mississippi, and thereupon Hill transmitted them to Campbell at Chicago, as the latter had requested, by mail. One of these latter notes was discounted by Campbell with the Third National Bank of St. Louis. The other, which is the note in suit, was, upon his indorsement, discounted with the defendant, the Drovers' National Bank of Chicago. With the proceeds of the two notes Campbell paid off the \$25,000 note. The following is a copy of the note on which the present action was brought:

"\$12,500.

Franklin, Tenn., Nov. 6, 1885.

"On or before August 1st we promise to pay to the order of Campbell, Lancaster & Co. twelve thousand five hundred dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of ten per cent. per annum until paid, payable at the Drovers' National Bank, U. S. Yards, Chicago, Illinois.

"G. L. Thompson.

"By R. G. Buchanan, Attorney in Fact.

"R. G. Buchanan.

"J. L. Parkes.

"G. R. Hill."

Campbell was well aware of the purpose for which the money obtained on the original note for \$25,000 was to be used, and it inferentially appears that it was in fact used for that purpose, though this is not positively shown; but there is nothing in the record tending to show that the Drovers' National Bank had any knowledge of the purpose of the original note, or, indeed, of its existence. Buchanan and his associates never at any time obtained permission from the Indians or their officials, or from the United States, to graze cattle upon the grounds of the Cherokee nation, the country in which that part of the business was prosecuted.

Various grounds of defense were taken at the trial, only two of which are now relied upon, but these are strenuously urged, namely:

First, that the business in which these notes, all of them, were employed, was an unlawful one, in that the bringing cattle into the territory of the Cherokee nation and keeping them for grazing there was in violation of the laws of the United States and of said Cherokee nation; that Campbell, the payee, knew the facts which showed the unlawful use intended to be, and in fact, made of the moneys raised on said notes, and was a party to such use, and that the note in question was therefore void in its inception; and—

Second, that the note in suit must be deemed to have been made in Tennessee, and as, by its terms, it is made payable with interest at a rate prohibited by the law of that state, it is void by that law, which declares that consequence upon usurious contracts.

The circuit judge ruled that neither of these defenses was maintainable, and, no other sufficient defense being offered, instructed the jury that the contract manifested by the note was an Illinois contract, and while, by the law of that state, it was usurious, and the consequence was that no interest was recoverable, yet that the plaintiff was entitled to recover the principal of the note. The jury rendered a verdict accordingly, and judgment was entered for the sum of \$12,500.

By the law of Tennessee, interest at 6 per cent. is allowable, and an agreement for a higher rate renders the contract void. By the law of Illinois, 8 per cent. is allowable, and an agreement for more forfeits all interest, but does not invalidate the agreement for the principal.

Vertrees & Vertrees and J. G. Wallace, for plaintiffs in error.
Albert D. Marks, for defendant in error.

Before BARR, SAGE, and SEVERENS, District Judges.

SEVERENS, District Judge, (after stating the facts.) Upon these facts we are clearly of opinion that the defendants could not maintain their defense upon either ground taken by them. In respect to the contention that the note in suit is void because of illegality in the consideration, it must be answered that the facts fall far short of establishing it. Extended reference is made by counsel for the plaintiffs in error to various acts of congress enacted for the purpose of protecting the Indian tribes and their lands from a great variety of wrongful aggressions, and where penalties are imposed upon transgressors, for the purpose of showing the general policy of legislation in regard to the Indians; and special reference is made to sections 2118, 2127, 2138, and 2147 of the Revised Statutes, and to the act of July 4, 1884, which, it is said, prohibit the introduction of cattle into the territory of the Cherokees, for the purpose of grazing them there, without the consent of the Cherokee nation or of the interior department of the United States. We do not deem it necessary to determine whether those acts rendered the business carried on by these parties, without the consent of the Indians or of the United States, so far unlawful as to invalidate their contracts made with other parties for means to prosecute it, where such other parties knew of the intended use of such means, and actually promoted it, because, assuming that to be so, we think this defense must fail for other reasons.

It is argued for the defendant in error that whether or not the legislation, taken together, does in fact prohibit the introduction of cattle, (which is denied,) the bringing them into the territory for

such purpose being lawful in some instances, a party dealing with persons so employed might properly suppose that such conditions existed, and that he was not bound to suppose that they were acting in violation of law. This proposition would seem to be a valid one when applied to the protection of a party who had no knowledge that the facts making the business lawful did not exist. There being here no evidence that the bank which discounted the original note had knowledge that the borrower intended to use the proceeds in a business which in its circumstances was unlawful, that note was not invalid in its hands. It is very doubtful whether, assuming that the business was *malum prohibitum*, the mere knowledge that the proceeds of the note were intended to be used therein would render the note discounted void, if the bank did not co-operate in the use of the money. *Sortwell v. Hughes*, 1 Curt. 244; *Webster v. Munger*, 8 Gray, 587. But here the business connected with the giving of the first note and the use of the money realized thereon had transpired. The giving of the new note to raise money to pay off the earlier one did not promote the illegal business, assuming it to have been such, but was a transaction quite distinct from it. The new note, therefore, was not void by reason of any illegality in the first note. *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbes*, 17 How. 236; *Brooks v. Martin*, 2 Wall. 70; *Planters' Bank v. Union Bank*, 16 Wall. 483.

In *Brooks v. Martin* the parties had been engaged as partners in buying and dealing in bounty land warrants, in violation of a statute prohibiting such dealings, the policy of which was to prevent soldiers to whom the warrants were issued from becoming the victims of speculators. The defendant, who had become possessed of a large sum of money in the prosecution of the forbidden business, resisted the action of his partner for an accounting on the ground of illegality in the cause of action; but the court refused to sustain the defense, and held that as the illegal object had been already accomplished, and the recovery of his share by the plaintiff would not aid in accomplishing any object in violation of law, the defendant should be compelled to account to the plaintiff.

In *Planters' Bank v. Union Bank* the defendant had sold Confederate bonds which had been sent to it by the plaintiff for that purpose, and in accounts rendered had charged itself with the proceeds. In a suit brought to recover therefor the defendant set up the illegality of selling the bonds as a defense. The court held that the defense did not avail; that while it would have been a good defense to a purchaser of the bond in a suit for the price thereof, or perhaps to the defendants in a suit by the plaintiff to recover damages for a failure to sell as directed, yet that whatever mischief there was in the transaction had already been done, and there was nothing in public policy to be affected by the action of the court in granting or withholding redress on other grounds.

But, further, there being nothing to show that the *Drovers' National Bank* knew anything about the first note, or the use that was intended to be made of the proceeds of the new one, it would be contrary to elementary principles controlling the transaction in

which the bank was engaged to carry forward into it the consequences of a fault previously committed by the makers of the note, and visit them upon the bank, an entirely innocent party. It needs no extended reasoning to repel a result so manifestly unjust.

Then, as to the question arising upon the law in regard to the rate of interest, and its consequences. The plaintiffs in error contend that the note represents a Tennessee contract, and is therefore void, because in contravention of the usury law of that state. It was held in the court below to be an Illinois contract, and therefore good for the principal, though void as to interest, under the law of Illinois, which inflicts only that penalty upon a usurious contract. We have no doubt that the view taken by the circuit judge was correct.

It appears that when the note for \$25,000 was transmitted to Campbell at Chicago it was the expectation of the makers that it would be used there, either upon a taking by Campbell and an advance by him to them, or, through his indorsement to a third party, presumably a bank, upon a taking by such third party, and its advancement to them, by placing its proceeds to their credit. The latter was the course taken, and it sufficiently appears that that disposition of the note was confirmed by the makers. Without considering how the matter would stand if Campbell had himself taken the note as holder, and advanced the money, the discounting of the note by the bank there made it an Illinois contract. It first became a contract when discounted. The obligation of the makers was not until then imposed. No suit could have maintained upon it by Campbell. He was a mere agent for the makers in effecting a loan upon it, and delivering the notes as evidence of their obligation to the bank. *Orr v. Lacy*, 4 McLean, 243. The contract was therefore made in Chicago, and it was payable there. It follows that it was an Illinois contract. See authorities cited below upon the same question in reference to the note in suit.

This, however, is only important as it tends to show what the understanding of the parties presumably was in giving the new notes. That one of the new notes which is now in suit bears date at Franklin, Tenn. That circumstance, in the absence of all other indications, either in the note or in the extrinsic facts, would render it a Tennessee contract. But that is usually one of the least controlling circumstances to be attended to in ascertaining by what law a written contract is governed. In this case the makers intended the note should be used in Chicago for the purpose of satisfying their unpaid obligations in the hands of a bank there. Their transmission of it by mail to Chicago, to be employed for that purpose by one who was to act for them in accomplishing what they had in view,—that is, the meeting of their primary obligation on the original note,—was the equivalent of a manual taking by them of the note to that place, and there delivering it. *Pattison v. Mills*, 1 Dow & C. 363, per Lord Lyndhurst; *Milliken v. Pratt*, 125 Mass. 574. The obligation of this note, upon the facts disclosed by the record, was created when the Drovers' National Bank discounted it. The contract was then made, and in Illinois.

By its express terms it was made payable there. Thus the obligation was not only formed, but was also to be solved, in that state. These are two circumstances always very controlling. There is not, in our opinion, room for doubt that the law of Illinois applies to the solution of all questions pertaining to the nature and effect of the obligation. *Cook v. Moffat*, 5 How. 295; *Coghlan v. Railroad Co.*, 142 U. S. 101, 12 Sup. Ct. Rep. 150; *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. Rep. 154; *Story, Confl. Laws*, § 280 et seq.

In *Cook v. Moffat*, suit was brought on promissory notes which had been dated and signed at Baltimore, where the maker resided, and sent by mail to his agent in New York, and there delivered to the payee in payment for goods purchased in New York. The defendant claimed that the notes were Maryland contracts, and that he had been discharged from liability on the notes by a Maryland court under the insolvent laws of that state. The court, however, did not sustain the defendant's premises, but held, on the contrary, that the notes constituted New York contracts, and were therefore beyond the jurisdiction of the courts of Maryland; saying that, "although the notes purport to have been made at Baltimore, they were delivered at New York in payment of goods purchased there, and of course were payable there, and governed by the laws of that place."

In *Coghlan v. Railroad Co.*, bonds of a railroad company doing business in South Carolina had been issued, purporting to have been executed at Charleston, in that state, and made payable in London. A question arose upon the rate of interest the bonds would bear after their maturity. In order to determine this question it was necessary to ascertain by what law the nature and effect of the obligation of the bonds was to be fixed. It was held that the bonds were English contracts, and that the English law in regard to interest governed the rate. Mr. Justice Harlan, in delivering the opinion of the court, said: "It is contended that the principal sum agreed to be paid should bear interest at the rate of seven per cent., fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that state. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed."

The case of *Lennig v. Ralston*, 23 Pa. St. 137, falls within a recognized exception to the rule. It was there held that a purchaser for value, who in good faith had relied upon the appearances given to the paper, no fact being exhibited to show the contrary, was entitled to be protected in dealing with it upon the assumption that the law of the place was as indicated by those appearances.

It is hardly necessary to add that the fact that this case was tried in Tennessee in no wise changes the result. In whatever forum the case is tried, the rights of the parties must be adjudicated according to the *lex loci contractus*, which in this case covers as well the making, as the satisfaction, of the debt. Green-

wood v. Curtis, 6 Mass. 358; McIntyre v. Parks, 3 Metc. (Mass.) 207. Coghlan v. Railroad Co., *supra*, was like this in that respect. No error being found in the record, the judgment must be affirmed.

BROWN v. RENO ELECTRIC LIGHT & POWER CO.

(Circuit Court, D. Nevada. March 6, 1893.)

1. **FIXTURES—LANDLORD AND TENANT—ELECTRIC LIGHTING PLANT.**

Certain land, with water power, was leased for use in the operation of an electric lighting plant, and the lessee built on a solid stone foundation laid with mortar a substantial dynamo house, in which he placed two dynamos; also a boiler house of rough lumber upon sills laid on stone or blocks, and a shaft house or shed, constructed for the most part of old lumber from buildings on the premises. He also erected a shafting 29 feet long, resting upon trestles imbedded in the ground to the depth of two feet. *Held*, that the buildings as well as the machinery were accessory to the trade, and therefore trade fixtures subject to removal by the lessee on the termination of his lease.

2. **SAME—SUBLETTING.**

A covenant that the right of removal should not extend to the fixtures of sublessees, which was inserted at the lessee's request, with the intent and understanding that he might sublet to persons using the premises during the day for purposes other than those for which the lessee takes the land, did not affect the lessee's right to remove his own fixtures.

3. **SAME—COVENANT TO REPAIR.**

A covenant that the lessee should keep in good repair all buildings, erections, water wheels, flumes, dams, etc., and quit and surrender them at the expiration of his lease, except buildings erected by subtenants, should be construed to cover only buildings already on the land and those subsequently erected by the lessor, although the dam and other water-power appurtenances are to be built by the lessee for the lessor under a separate contract.

4. **SAME—LESSEE'S OPTION TO PURCHASE.**

A covenant that the lessee may within a certain time purchase the premises at a stated price does not affect his right to remove fixtures in case he does not purchase.

5. **SAME—PRIOR CONTRACT—WATER WHEEL AND SHAFTING.**

A contract between the parties, made the day before the lease was executed, providing that the lessee shall build a dam, flume, penstock, etc., and put in a water wheel "in full working order," should not be construed so as to include a shafting not specifically contracted for, and which the lessee thereafter connects with the water wheel, when such a construction would take away his right to remove it on the termination of the lease.

6. **SAME—RIGHT TO REMOVE AFTER LEASE EXPIRES.**

A tenant who remains in possession as tenant at will after the expiration of his lease may remove fixtures as if his lease were still running.

At Law. Action by Samuel Brown against the Reno Electric Light & Power Company for breach of the covenants of a lease. Tried by the court without a jury. Judgment for plaintiff.

Robert M. Clarke and Charles A. Jones, for plaintiff.
Baker, Wines & Dorsey, for defendant.

HAWLEY, District Judge. This action was brought to recover \$5,000 damages, alleged to have been sustained by plaintiff by the breach of certain covenants in a lease. On May 1, 1887, the plain-

tiff, being the owner of certain land bordering on the Truckee river, in Washoe county, contracted with one J. L. Stevenson to put a dam in the river, to construct a flume, ditch, and tail race, and to dig and construct at the end of said ditch a "penstock of the dimensions required for a 48-inch Leffel wheel," and to "put in place in full working order in said described penstock one Leffel water wheel, 48 inches in size, and sufficient to develop not less than 60 horse power." This work was, in due time, completed by Stevenson, and paid for by plaintiff. On May 2, 1887, plaintiff gave a lease to Stevenson of said land, including "the appurtenances which comprise the water power, ditch, flumes, dams, Leffel turbine wheel of 48 inches diameter, and tail-race ditch now about to be made and erected" by said Stevenson, for the term of five years, at a fixed monthly rental. It was, among other things, covenanted in said lease that if Stevenson at any time during the first three years of the lease should desire to purchase the leased premises for \$13,000, the plaintiff would convey the same to him, "together with all the appurtenances, inclusive of water-power ditch, flumes, dams, wheel, tail-race ditch, and all buildings and erections of what kind or nature soever in and upon the said demised premises, *excepting such buildings as may be erected by tenants of the lessee during the currency of this lease.*" It was further covenanted that said Stevenson would "keep all buildings, erections, water wheels, flumes, dams, ditches, tail-race ditches, etc., upon the demised premises in good substantial repair during the whole term of this lease, and that at the expiration of said term * * * will quit and surrender the said premises and all appurtenances [repeating here the words in italics above quoted] in as good state and condition as reasonable use and wear thereof will permit." When the lease was executed it was understood by the parties thereto that the leased premises were to be used in the nighttime for the purpose of producing or creating water power to be used in running and operating an electric light plant for the purpose of lighting lamps in the town of Reno. The clause in italics was not in the original draft of the lease, but was inserted at the request of Stevenson, so as to enable him to sublet the premises in the daytime for other purposes, and to enable such tenants to remove such buildings and erections as they might construct or put upon said premises for their own uses. The lease was assigned to defendant on the 20th day of October, 1888, and the leased premises were never used for any other purpose than that of operating an electric light plant. The defendant is entitled to the same rights and privileges, and is subject to the same conditions and liabilities, as the original lessee.

Prior to the assignment of the lease Stevenson erected upon the premises a substantial dynamo house, boarded up at the ends, and ceiled on the inside with dressed ceiling lumber. This building stood upon a solid stone wall foundation laid with mortar, and within the building were placed two dynamos. A boiler house was constructed of rough lumber, the sills being laid on stone and blocks, and an engine and boiler were placed therein. A shaft

house or shed was built mostly of old lumber taken from old buildings that were on the leased premises. Connecting the dynamos with the Leffel wheel was a line shaft 29 feet long and $4\frac{3}{4}$ inches in diameter, upon which wheels, pulleys, belts, etc., were placed so as to transmit the water power for the purpose of running the machinery and generating the electric light. This shaft rested upon five trestles, the bottom timbers of which were solidly imbedded in the earth about two feet deep. All of these buildings, with the machinery therein, were removed by the defendant. The work of tearing down the buildings and displacing the machinery commenced about the 25th of April, 1892, and continued daily until all the buildings were torn down and the machinery removed from its connections. The lease expired May 1st. There is considerable conflict in the evidence as to when the work of tearing down the buildings was completed. I think the evidence shows that the buildings were torn down, and the machinery loosened from its connections, and portions thereof removed from the premises, prior to the expiration of the lease. The main shaft and one of the driving wheels attached to it was not taken out until May 2d or 3d, and portions of the materials, lumber, etc., from the buildings, and portions of the machinery that had been taken out of the buildings, were not removed from the premises until the 4th or 5th of May.

The first, and most important, question is whether the defendant had the right to remove the buildings and machinery erected, constructed, and placed upon the leased premises by the lessee, as trade fixtures. There is more or less diversity of opinion in the various courts of the United States as to the rule which should be adopted in determining the question; as, for instance, whether the fixtures placed upon the premises by the tenant are so annexed to the soil as to become a part of the freehold, or whether the intention of the parties or the character of the fixtures should control independent of, or in connection with, the question of annexation to the soil. It is safe to say that no definite rule can be gleaned from the decisions of the supreme court of Nevada upon this subject. The cases, however, will here be noticed. In *Prescott v. Wells, Fargo & Co.*, 3 Nev. 82, it is stated that the term "fixtures" is used in a variety of senses, and might mean "something substantially affixed to the land, but which may afterwards be lawfully removed therefrom by the party affixing it, * * * without the consent of the owner of the freehold." In *Brown v. Lillie*, 6 Nev. 244, the court declined to determine what might be considered trade, ornamental, or removable fixtures, but based its decision upon the ground that nothing could become a fixture in any sense of the word which was neither attached to the realty nor placed upon the land with a view to making it permanent, nor essential to the full and complete enjoyment of the land, and that actual annexation to the soil is an essential requisite to constitute a fixture belonging to the realty. In applying these principles it was held that a sawmill built upon timbers lying upon the surface of the ground, and constructed with the object and purpose, after sawing

the timber within a convenient distance, to be removed to another locality, is a mere personal chattel, and will not pass by a conveyance or patent of the land. In *Treadway v. Sharon*, 7 Nev. 37, the court declared the general rule to be that when a chattel, such as a steam boiler, engine, and machinery, had been affixed to the soil, it passed with the soil, and could not be removed; but it was admitted in the course of the opinion that as "between landlord and tenant this rule was relaxed to relieve the tenant from the dilemma of submitting either to the inconvenience of conducting his business with articles capable of use without annexation, or to the injustice of surrendering to his landlord, at the expiration of the term, articles unfit for use unless so fastened and steadied as to become fixtures." In Michigan it is held that there is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract; that neither the mode of annexation nor the manner of use is in all cases conclusive, and that it must usually depend on the express or implied understanding of the parties concerned. *Wheeler v. Bedell*, 40 Mich. 693; *Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. Rep. 692.

Although every case must to a certain extent be governed by its own facts, and although no positive test can be applied that will be absolutely decisive of every given case, yet there are certain and well-defined principles which, if properly considered, will serve as a safe guide in arriving at a proper determination in all cases. In *Wood's Landlord & Tenant* (page 878, § 521) the following rule is stated as a result deducible from the authorities on this subject, viz.:

"In determining whether or not a chattel is so annexed to the freehold as to become a fixture, reference must be had to the nature of the chattel itself, the position of the party placing it where found, the probable intention in putting it there, the injury that would result from its removal, and the object of the party placing it on the premises with reference to trade, agriculture, or ornament."

Taylor, in his work on *Landlord & Tenant*, (8th Ed., pages 148, 149, § 544,) after stating the old rule as to fixtures at common law, to the effect that everything fixed to the land was considered as belonging to the proprietor, and adding that, as between landlord and tenant, the rigor of the old law had been gradually relaxed, said:

"Courts of law subsequently adopted the principle that it is for the benefit of the public to encourage tenants to make improvements in trade, and to do what is advantageous for the estate during the term, with the certainty of their being still benefited by it at the end of the term. And in modern times the rule is understood to be that, upon principles of general policy, a tenant, whether for life, for years, or at will, is permitted to carry away all such fixtures of a chattel nature as he has himself erected upon the demised premises for the purpose of ornament, domestic convenience, or to carry on trade, provided the removal can be effected without material injury to the freehold."

That the buildings and machinery removed by the defendant were what are known as "trade fixtures" seems to me very clear. They were part of the electric plant, separate from and independ-

ent of the penstock and Leffel wheel, which were placed upon the premises at the expense of the owner of the land. The dam, ditch, flume, penstock, Leffel wheel, and tail race were constructed and put in place under the contract for the purpose of creating a water power sufficient to run and operate an electric plant. Without that power it is fair to assume that neither Stevenson nor the defendant would have leased the premises. With it they were willing to rent the premises, and at their own expense they put in such machinery and erected such buildings as enabled them to run and operate the electric plant, and supply the town of Reno with electric lights. It is not reasonable to believe, in the absence of any express covenant to the contrary, that the lessee would have incurred the expense of erecting the buildings and procuring the necessary machinery to connect with the water power furnished by the lessor, unless he had the privilege of removing the same during the term or at the expiration of the lease. The right of removing trade fixtures should be liberally construed in favor of the tenant. There is no presumption that the tenant intended to make the buildings and machinery erected and put in place by him at his own expense a permanent accession to the freehold. On the other hand, if inferences and presumptions are to be indulged in, it is manifest that such was not the intention of the tenant. As was said by the supreme court of New York in *Watts-Campbell Co. v. Yuengling*, 3 N. Y. Supp. 869, affirmed in 125 N. Y. 1, 25 N. E. Rep. 1060, and quoted with approval in *Havens v. Electric Light Co.*, (Sup.) 17 N. Y. Supp. 580, where it was held that machinery placed by an electric light company in a building erected by it on leased land does not become part of the realty:

"It is largely a question of intention whether machinery placed in a building is to be considered as attached to the freehold or not. There are numerous cases where the controversy has arisen between landlord and tenant, in which the principle has been laid down that fixtures erected by a tenant, in a building for the convenience of his trade may be removed by him at any time during his term; and this conclusion is arrived at upon the principle that they were necessary for the carrying out of his trade, and that, as he was not the owner of the fee, there was no presumption that he intended to make them part thereof. So it was held as early as the case of *Holmes v. Tremper*, 20 Johns. 29, that a cider mill and press erected by a tenant at his own expense, and for his own use, though fixed to the soil, are his own property, and removable by him at the end of the term."

In *Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. Rep. 138, the court held that the engine, machinery, and appliances of an electric light plant do not pass with the real estate upon which it is operated to the purchaser at a sale under a mortgage judgment unless it was the intention to make the plant a part of the realty when it was erected.

The plaintiff admitted upon the oral argument that defendant had the right to remove the engine, boilers, and the dynamos, but denied the right to remove the buildings in which they were placed. The buildings were erected for the sole purpose of protecting the machinery. It would seem upon sound reason that if this portion of the machinery could be removed the right to remove the dynamo

house and the boiler house ought not to have been questioned unless there is some express covenant reaching them, for, as we have already stated, the right to claim the buildings as a part of the freehold on the ground that they were firmly affixed to the soil is not the only question to be considered. Regard is always to be had to the object, effect, and intent as well as to the mode of annexation. *Seeger v. Pettit*, 77 Pa. St. 437. An examination of the authorities will show that, as regards trade fixtures, it is now the well-settled rule that the tenant may take away whatever he erects, at his own expense, for the purpose of carrying on his trade or business, whether it be machinery or buildings, even though affixed to the soil or freehold, provided it can be done without material injury to the land. In *Conrad v. Mining Co.*, 54 Mich. 249, 20 N. W. Rep. 39, the court held that, as between landlord and tenant of a mining lease, engines and boilers erected by the tenant on brick and stone foundations, and bolted down solidly to the ground, and walled in with brick arches, and dwellings erected by the tenant for miners to live in, standing on posts or dry stone walls piled together, where such machinery and buildings were intended to be merely accessory to the mining operations under the lease, and when there was no intention in affixing them to the realty to make them accessory to the soil, and where they can be removed without material disturbance to the land, are regarded as trade fixtures, and may be removed at or before the termination of the lease. In *Van Ness v. Pacard*, 2 Pet. 137, decided in 1829, the supreme court held that a building erected by a tenant with a view to carry on his business as a dairyman, and for a residence for his family and servants engaged in that business, the residence of the family there being merely to enable them to carry on the trade more beneficially, may be removed by him during the term. Story, J., in delivering the opinion of the court, said:

"The question whether removable or not does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap boiler of one or two stories high, and on whatever foundations he may choose. In *Lawton v. Lawton*, 3 Atk. 13, Lord Hardwicke said * * * that it made no difference whether the shed of the engine be made of brick or stone. In *Penton v. Robart*, 2 East, 88, the building had a brick foundation, let into the ground, with a chimney belonging to it, upon which there was a superstructure of wood. Yet the court thought the building removable. In *Elwes v. Maw*, 3 East, 38, Lord Ellenborough expressly stated that there was no difference between the building covering any fixed engine, utensils, and the latter. The only point is whether it is accessory to carrying on the trade or not. If bona fide intended for this purpose, it falls within the exception in favor of trade. The case of the Dutch barns before Lord Kenyon (*Dean v. Allalley*, 3 Esp. 11; *Woodf. Landl. & T.* 219) is to the same effect."

Further on in the same opinion it is said:

"If the house were built principally for a dwelling house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise

of the trade, and with a view to superior accommodation in this particular, then it is within the exception."

This case is cited with approval in *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 12 Sup. Ct. Rep. 188. There are no covenants in the lease which, in my opinion, charge, or in any manner prevent, the application of the general principles of the law, as hereinbefore announced, to the facts of this case. The covenant giving the right to the lessee to sublet the premises to other parties for other uses did not affect, and evidently was not intended to affect, the legal rights of the lessee concerning the buildings, machinery, and appliances placed upon the premises by the lessee. The covenant in relation to repairs must be interpreted as having reference to the "buildings and erections" that were upon the premises when the lease was executed, or such other buildings or erections as might thereafter be placed thereon by the lessor. The covenant giving the privilege to the lessee to purchase the premises within a specified time certainly does not affect the question as to the right of the tenant to remove the buildings, machinery, and appliances which he put upon the property for the purpose of carrying on the business in which he was engaged. It is unreasonable to believe or presume that the plaintiff,—who is shown to have exercised great care in the preparation of the lease,—if it had been the understanding or intention of the parties at the time the lease was executed that all buildings, machinery, and appliances necessary to run and operate the electric plant should be left upon the premises and become the property of the lessor at the expiration of the lease, would have signed the lease without inserting a direct covenant to that effect.

Considerable stress was placed by the plaintiff's counsel in his oral argument upon the meaning of the words "full working order." These words, as used in the contract, referred to the construction of the penstock and the placing therein of the Leffel wheel. This wheel was minutely described, its exact size stated, and it was to be put in full working order, "sufficient to develop not less than sixty horse power." This power, as thus described, was to be, and was, developed by the plaintiff at his own expense, and the penstock and wheel were not removed, and have not been materially disturbed by the acts and conduct of defendant. The argument of plaintiff's counsel to the effect that the wheel could not be put in "full working order" without the appliances and machinery to connect it with the dynamos, and that such appliances must therefore be construed and treated as part of the wheel in full working order is certainly untenable, illogical, and unsound. If it was understood that these appliances were necessary to put the wheel in full working order, plaintiff should have sued Stevenson for a failure to comply with his contract. It is admitted that the contract was carried out, and that plaintiff paid the full price to be paid for the work, and there was no suggestion upon the completion of the contract that the Leffel wheel was not in full working order. The truth is, as we have before stated, that all the appliances, belts, wheels, etc., along the line shaft and connecting the Leffel wheel with the

dynamos were a part of the electric plant, put in at the expense of the lessee; were trade fixtures, which were removable by the lessee at the expiration of the lease. In *Holbrook v. Chamberlin*, 116 Mass. 155, the plaintiff leased to defendants for the term of five years "a certain factory building and water privilege, with all the appurtenances thereto belonging," and the defendants covenanted to quit and deliver up the premises and all future erections and additions thereto in as good order and condition as the same then were or might be put by them. The plaintiff agreed to sell to the defendants, at any time within two years, the property known as the "Sutton Woolen Manufacturing Establishment" for a specified sum. There was a second lease for a like term for all the land and buildings as they are upon the premises known as the "Sutton Mills Estate," with a like covenant upon the part of defendants to deliver the premises in good order and condition. The premises were used by defendants for about one year, and were then changed to a cotton mill, and afterwards used as such. The machinery used therein was operated by water power in the usual manner. The defendants placed in the mill additional machinery, consisting of countershafting, pulleys, hangers, and belts. The countershaft was belted from the main shaft, and, with the pulleys and hangers appertaining thereto, was fastened to the timbers or floors of the building by bolts and screws, and was connected to the machines by belts. This machinery was all purchased for and was adapted to the use of the mill as a cotton mill. The defendants also used appliances for heating the mill by steam by means of a portable boiler and steam piping passing through the floors of the factory, and supported by hooks screwed to the building, etc. Gray, C. J., in delivering the opinion of the court, said:

"It was admitted at the argument that at the beginning of the term there was no machinery on the premises except the main shaft. The countershafting, pulleys, hangers, and belts, the portable boiler and the steam pipes connected with it, were either trade fixtures, removable by the lessees during the term, or personal chattels. * * * The fact that the lease contained an agreement of the lessor to sell the premises to the lessees did not affect their right in this respect."

The buildings and machinery were not entirely removed from the premises before the expiration of the lease, and hence it is claimed that the removal was unlawful. In *Wood's Landlord & Tenant*, (page 908, § 532,) cited and relied upon by plaintiff, it is, among other things, said:

"It would rather seem that a tenant for years, who holds over on sufferance after the expiration of his term, may, during such holding over, remove such fixtures as he might have removed during the term; but if he quits possession pursuant to a notice and demand of possession, and leaves any fixtures on the premises, his right to them is gone."

As the testimony shows that defendant continued in possession of the premises until all the trade fixtures were removed, the text does not support the claim contended for by counsel. In *Lewis v. Pier Co.*, 125 N. Y. 341, 26 N. E. Rep. 301, the court held that a tenant having the right to remove fixtures placed by him upon the demised premises during the term, in case he holds over after its termi-

nation without a new lease, has the same right of removal so long as he remains in possession, and, on being evicted by summary proceedings on account of such holding over, if he claims and is refused the right to take such fixtures with him, he may maintain an action for their conversion, and in the course of the opinion, upon this subject, it is said:

"There is no reason why the right should be lost before he quits possession as tenant, even though he holds over. The rule is based upon a question of public policy, which suggests that the tenant shall remove during his term—i. e. while in possession as a tenant—whatever he has the right to remove at all, so that the landlord may be himself protected, and so that the tenant shall not be permitted, after his surrender of possession, to enter upon the possession of the landlord or his succeeding tenant, and remove what he might have taken before, but which, by leaving, he has tacitly abandoned, and which the landlord may already have let to his succeeding tenant. A regard for such succeeding interests requires the adoption of a rule necessitating the removal of fixtures during the time of possession, but not in all cases during the running of the term."

Under this rule, and upon the undisputed facts of this case, the removal of the fixtures was not unlawful, and plaintiff is not entitled to any damages therefor. It is proper to add that there was no material damage to the freehold by the act of removal.

This case was tried before the court without a jury, and, having disposed of all the legal questions, it only remains for me to assess the damages to which plaintiff is entitled by reason of the failure of the defendant to keep the premises in good, substantial repair during the term of the lease, and to "quit and surrender the premises and all appurtenances in as good state and condition as reasonable use and wear thereof will permit." The testimony upon this point is conflicting, and wholly irreconcilable. It would serve no useful purpose to review it at any length. Suffice it to say that the testimony upon the part of plaintiff estimated the damages to be about \$1,500, viz.: To repair the dam, about \$715; flume, \$555; ditch and tail race, \$200; stone wall, \$40. The testimony on the part of the defendant ranged from a mere nominal sum to about \$200 for the entire work; the highest estimate to repair the dam being placed at about \$100, and the highest estimate on the flume at \$50. One witness, a carpenter by trade, testified that he would take a contract and give a bond to furnish all the lumber, materials, and labor and put the flume in good repair for \$50. It was satisfactorily shown that with the dam, the ditch, and the tail race in perfect repair it was sometimes difficult to obtain the 60-horse water power necessary to run the electric plant, and that defendant had been compelled to repair the flume, and to frequently clean out the ditch, in order to get the required amount of water. It is shown that the plant was in full operation up to the time when the taking down of the buildings and removal of the fixtures was commenced, and that at that time there was as much water as usual running through the flume, etc. After due consideration of all the facts in this case, I assess the damages, under this covenant, in the sum of \$425. Judgment will be entered in favor of plaintiff for that amount.

ST. PAUL FIRE & MARINE INS. CO. v. KIDD et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

INSURANCE—CONSTRUCTION OF POLICY—SUBROGATION.

A policy of insurance on certain whiskies to be shipped was made "as per form attached," and by the attached form the insurer's liability was limited to the excess in value over \$20 per barrel, carriers to have the right to limit their liability for loss to \$20 per barrel, and the insured to have the right, on collecting that sum from the carrier, to give a release from all liability. The body of the policy, however, contained a provision that any claim against the carrier for loss should be assigned to the insurer. *Held*, that the provisions of the attached form must prevail over the inconsistent provisions contained in the body of the policy, and that it was no defense to an action on the policy that the shipper, by accepting a bill of lading providing that the carrier should have the benefit of all insurance on the goods, had destroyed the insurer's right of subrogation.

At Law. Action by George W. Kidd and others against the St. Paul Fire & Marine Insurance Company. From a judgment for plaintiffs, defendant brings error. Affirmed.

Joseph A. Shoudy, for plaintiff in error.

John G. Milburn, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the defendant in the court below. It was sued by the plaintiffs upon its policy of fire insurance issued to them. The action was tried before a jury, and the judge, upon a statement of facts agreed to by the parties, and which presented merely questions of law, directed a verdict for the plaintiffs. The defendant excepted, and has assigned error of that ruling.

An open policy was issued by the defendant, May 22, 1890, insuring the plaintiffs in the sum of \$3,000, on account of whom it may concern, loss, if any, payable to them, for the term of one year, on spirits, whiskies, etc., and packages containing the same, while in transportation in the state of Illinois and elsewhere, on railroads or on ferryboats, to destination in another state. It contains the following clauses, among others:

"This policy to be liable only for excess of value above \$20 per barrel, which will be deducted from all losses before presentation of claim." "It is understood that the transportation companies may limit their liability to the insured to \$20 per barrel on goods shipped under this policy, and the said insured may, in the case of loss, collect said sum from said companies, and release the same from all liability, without affecting the liability of the insurer."

These clauses were inserted in an ordinary cargo policy adapted to marine insurance, by attaching a form to the policy. The policy reads that the property is insured "as per form attached." The body of the policy contains the following condition:

"Should any loss or damage under this policy be occasioned by any other vessel, person, or persons, in such a manner that such other vessel, or the owners thereof, or such person or persons, should be liable therefor, then all claims for such losses and for damage shall be assigned over to this company, and shall inure to its benefit, in proportion to the amount of such loss sus-

tained by them; that is to say, the amount of such loss shall be satisfied and paid out of what shall be recovered by such claimants in the same proportion (according to such amount) as the losses sustained by other sufferers shall be paid out of said recovery."

October 13, 1890, the plaintiffs shipped at Peoria, Ill., for transportation to them at New York, over the railroad of the New York, Chicago & St. Louis Railroad Company and the railroad of the Delaware, Lackawanna & Western Railroad Company, certain spirits, of which 63 barrels, of the value of \$6,349.03, were destroyed by fire October 17, 1890, and became a total loss, while in the course of transportation on the railway of the New York, Chicago & St. Louis Railroad Company. The plaintiffs shipped the spirits pursuant to a bill of lading received by them from the railroad companies, which, among other things, contained the following condition:

"In case of loss or damage of any goods named in this bill of lading, for which these companies may be liable, it is agreed and understood that they may have the benefit of any insurance effected by or on account of the owner of said goods."

The fire occurred solely through the negligence of the New York, Chicago & St. Louis Railroad Company. Thereafter due notice of the loss was given to the defendant, and proofs of loss were made and presented to it, conformably to the provisions of the policy. The time for the payment of the loss had expired, and the defendant had not paid the same at the time of the commencement of the suit.

Upon these facts the defense interposed by the defendant was that, by agreeing with the railroad company that it should have the benefit of the insurance, the plaintiffs destroyed the right of subrogation reserved by the policy, and deprived defendant of any remedy against the transportation company for the loss, and consequently could not recover on the policy. In directing the jury to find a verdict for the plaintiffs the trial judge overruled this defense. We think there was no merit in the defense, because the special conditions of the form written into the policy are inconsistent with the retention of the insurer's ordinary right of subrogation, and are intended to give to the plaintiffs the sole and exclusive benefit, in the event of a loss, of any remedy against any transportation company responsible therefor. If there is any collision between these conditions and the subrogation clause in the body of the policy, the latter must give way. The instrument, having been prepared by the defendant, is to be construed most strongly against the defendant if its provisions conflict. *National Bank v. Insurance Co.*, 95 U. S. 673. The form is expressly referred to in the policy as embodying the terms of the insurance, and is obviously designed to cover a special class of risks to which many conditions in the policy do not attach. The terms supersede any inconsistent terms in the body of the policy. *Chadsey v. Guion*, 97 N. Y. 333; *Halpin v. Ins. Co.*, 120 N. Y. 73, 23 N. E. Rep. 988; *May, Ins.* (3d. Ed.) § 177.

By the first of the special clauses the risk is divided into two parts in case of a loss, so that the plaintiffs are to bear it to the extent

of \$20 per barrel, and the defendant is to bear it only as to the additional value; and by the second the plaintiffs are authorized to contract with every transportation company so as to release the carrier from liability for any loss applicable to the defendant's part of the risk. By the latter clause the plaintiffs are also authorized to release the carrier wholly upon collecting indemnity for the loss upon their own part of the risk. Obviously it was quite immaterial to the defendant whether the plaintiffs, in case of loss, should collect their part from the transportation company or not. If they were to do so, the defendant would get nothing by it, nor could the defendant lose anything by the omission of the plaintiffs to collect. It is the manifest purpose of the provisions to give to the plaintiffs any indemnity for their own part of the loss which they may choose to require of the carrier, and it would be absurd to construe the provision as intending to compel them to indemnify themselves.

The language of the second clause does not, in terms, permit the plaintiff to release the transportation companies wholly from liability in advance of a loss; on the contrary, fairly interpreted, it contemplates that they shall not do so. It is usual for underwriters to insure the property at risk at something less than its full value, in order that the insured shall have an interest in preventing loss, to guard against his carelessness or dishonesty. Ang. Ins. § 92. As the risk here, upon property while in transportation by carriers, was to be largely affected by the vigilance of the carriers, it was natural that the defendant should wish to compel the transportation companies, in the event of a loss, to bear some of the consequences. The clause contemplates that the transportation companies, as well as the plaintiffs, should bear the risk to the extent of \$20 per barrel. We are not called upon to determine whether a breach of this condition by the plaintiffs would afford a defense to the action, because no defense has been interposed based upon the theory that the plaintiffs violated their agreement not to release the transportation companies before a loss. If they had a right to release the railroad company after a loss, without accounting to the defendant, the defendant has not been injured in its right of recourse by subrogation. The judgment is affirmed.

SMITH v. SUN PRINTING & PUB. ASS'N.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

1. FEDERAL COURTS—JURISDICTION—PROOF OF CITIZENSHIP.

In an action by a married woman for libel, the testimony of the plaintiff's husband, that he has resided at Toronto, Can., all his life, and of the plaintiff, that she has been married nearly six years, during which time she has also resided there, is sufficient to establish an averment of the complaint that the plaintiff is a British subject, and resides at Toronto, Can., especially when no objection to the sufficiency of the evidence is interposed at the trial.

2. LIBEL—COMPETENCY OF EVIDENCE—HARMLESS ERROR.

In an action for libel, alleged error in allowing witnesses to answer question, "Did you know to whom the article related?" does not prejudice the

defendant, even if the testimony be incompetent, when there was practically no dispute as to the identity of the person referred to; when no evidence was introduced to show that the article could apply to any other person than the plaintiff; when the defendant permitted testimony as to facts conclusively identifying the plaintiff with the person referred to in the libel to be received without objection, and without contradicting it in any way; and when the defendant permitted the court to instruct the jury that the plaintiff was the person referred to, without excepting to the charge.

3. SAME—HEARSAY EVIDENCE—HARMLESS ERROR.

In an action for libel in publishing the statement that the plaintiff, a married woman, had eloped with a person not her husband, the reception of hearsay testimony of the plaintiff that her husband made an arrangement with her companion that he should accompany her on a journey is not ground for reversal, when it appears that the husband subsequently testified, of his own knowledge, without objection, to the same arrangement, and his testimony was not disputed or controverted by other proof.

4. SAME—EVIDENCE—SUITS AGAINST OTHER NEWSPAPERS.

In an action for publishing a libel in a newspaper, testimony that the plaintiff has also commenced suits against other newspapers for the publication of other similar libels is irrelevant and immaterial, and is properly excluded.

5. SAME—EVIDENCE—WRITER OF ARTICLE.

In an action against a newspaper for libel, in which it is conceded that the defendant did not write the libelous article, but received it in the regular course of business from a news agency on which it was in the habit of relying for accuracy, and published the article relying on the source whence it came, the exclusion of evidence as to who wrote the article does not prejudice the defendant, when the court instructs the jury that the source from which the defendant received the article may be considered in mitigation of the defendant's act, and that the plaintiff has not proved actual malice or personal ill will.

6. SAME—IMPLIED MALICE—INSTRUCTIONS TO JURY.

In an action for libel, even if there be no evidence of actual malice, it is not error to instruct the jury that the law implies malice, when the court also correctly states the distinction between actual and implied malice, and the rule of law to be applied in cases where actual malice or personal ill will is not shown, and also expressly charges that the plaintiff has not proved personal ill will.

7. SAME—INSTRUCTIONS—OPINION OF COURT ON THE FACTS.

A federal court may, in submitting a case to the jury, express its opinion on the facts, and it is not error, in an action by a married woman for libel, for the court to charge that the libel complained of is "a sensational statement of the plaintiff's disgrace," or that it charged "an act of the greatest dishonor to a wife," or that "it was calculated to cause great injury to her reputation," and was a "most damaging article," when the libelous article asserted, in a sensational manner, that the plaintiff had eloped with a person not her husband.

8. SAME—INSTRUCTIONS—SOURCE OF INFORMATION—PUNITIVE DAMAGES.

In an action against a newspaper for publishing a libelous article received by it from a news agency, the jury are properly instructed that if they think that the fact that the article was received, in the ordinary course of business, from a reliable and unusually correct news agency, is sufficient to excuse the defendant from inquiry and delay before publication, punitive damages should not be given, but that, if they think that the defendant was guilty of reprehensible negligence in publishing the article without verification of its truth, then punitive damages may be given. *Morning Journal Ass'n v. Rutherford*, 2 C. C. A. 354, 51 Fed. Rep. 513, followed.

9. SAME—MEASURE OF DAMAGE—INSTRUCTIONS.

In an action for libel the jury may properly be instructed that the amount of the plaintiff's damage cannot possibly be arrived at by arithmetical calculation, when further instructions are given that the plaintiff

is entitled to compensation for actual injury received, and that, while the amount is in their control, the amount given should be reasonable and just.

10. **SAME—INSTRUCTIONS—PLACE OF PUBLICATION.**

In an action against a newspaper for libel, the refusal of instructions that there is no proof of any publication of the libelous article in the city of the plaintiff's home, and that the fact should be considered in fixing the damages, is not reversible error, when the court has already instructed the jury that the article was not published in that city, and that, so far as it is known, there are no people there who habitually take the paper, and it is not displayed on the news stands.

11. **SAME—PUBLICATION—APPARENT FALSITY.**

In an action for libel, an instruction that, according to the testimony, the only persons who have read the libelous article are intimate friends of the plaintiff, who knew it to be untrue, is properly refused, when the testimony brought out on the cross-examination of a witness is inconsistent with the requested charge.

12. **SAME—ACTUAL DAMAGE—INSTRUCTIONS.**

Although no special damage be shown, the law presumes injury to reputation and feelings by the publication of an article which is libelous *per se*; and, when the publication and the falsity of the article have been proved, defendant is not entitled to have the jury instructed that there is no evidence tending to show actual damage to the plaintiff by the publication of the libel.

13. **SAME—INSTRUCTIONS—CONDUCT OF THE PRESS—CORPORATIONS.**

Although requested instructions that "the general conduct of the public press has nothing to do with this case," and that, "whether a newspaper is published by a corporation or an individual, it matters not," are correct as abstract propositions, yet the refusal to so charge is not reversible error, when there is nothing in the record to show that such instructions are material to a proper consideration of the case by the jury.

14. **NEW TRIAL—DAMAGES—EXCESSIVE VERDICT.**

When the proper rule for the computation of damages has been given to the jury, a verdict cannot be set aside as excessive, in the federal courts, upon a writ of error.

15. **SAME—APPEAL.**

A decision upon a motion for a new trial is not the subject of review in a federal appellate court.

In Error to the Circuit Court of the United States for the Southern District of New York.

At Law. Action by Juliette C. Smith against the Sun Printing & Publishing Association for libel. Verdict for plaintiff. Motion for a new trial denied. 50 Fed. Rep. 399. The defendant brings error. Affirmed.

Franklin Bartlett, for plaintiff in error.

J. D. Fessenden, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff is a married woman, residing with her husband at Toronto, Can. In the month of June her husband came to New York, and on the 8th of that month plaintiff left Toronto to join him there. By a prior arrangement between them, she was accompanied on her journey by a Mr. Edward Rutherford, of Toronto,—a friend of her husband and herself. When the train arrived, they were met at the station by her husband. On June 14, 1890, the following statement appeared in the

Evening Sun, a daily paper published in the city of New York by the defendant:

"Did She Go with a Handsomer Man?"

"Reported Sensational Elopement in Canadian High Life.

"Toronto, Ontario, June 13th. Society was excited last night about the elopement of Mrs. Smith, the wife of one of the biggest merchants in Toronto, and Edward Rutherford, who belongs to one of the first families. He is a bachelor of thirty. For some time past their intimacy was freely spoken of, and when both were missing, and no explanations were given, tongues wagged freely. A private dispatch from New York, received last night, said they were both seen in that city. Mr. Smith had paid no attention to the scandalous talk until the receipt of this message, when he at once started for New York. His friends say that he has not lost confidence in his wife, and that his object is to trace her actions in Montreal and Boston."

The article was forwarded to the defendant, in the regular course of business, by a news agency to which it was a subscriber, and was published without any effort at verification of its statements. Although it was admitted by the defendant that the charge therein contained—that plaintiff had eloped from her husband—was false, no retraction was ever published in defendant's paper.

Plaintiff brought her action for libel, and upon a trial before Judge Shipman and a jury recovered a verdict of \$7,500. A motion was thereupon made to the trial judge to set the verdict aside, which was denied. To review errors in the trial below, this writ of error was taken.

The general subject of the responsibility of proprietors of newspapers for libels such as this, and published in the same way, was discussed by this court in *Morning Journal Ass'n v. Rutherford*, 2 C. C. A. 354, 51 Fed. Ren. 513, where the same libel, except for the headlines, was before the court. It will only be necessary, therefore, to dispose of the several exceptions reserved in the case at bar, and argued by the plaintiff in error.

1. Defendant contends that the circuit court had no jurisdiction of the case, because the requisite citizenship of the plaintiff did not appear of record. It is averred in the first paragraph of the complaint that plaintiff "is, and always has been, an honest, moral, and loyal subject of her majesty, Victoria, queen of England, and as such has resided for a long time, and now resides, at Toronto, Can.," etc. The answer admits the residence at Toronto, but denies any knowledge or information sufficient to form a belief as to the other allegations set forth in said first paragraph. John C. Smith, the plaintiff's husband, testified that he had "lived in Toronto all his life." If so he must have been born there, and was therefore a British subject. The plaintiff testified on October 20, 1891, that she had been married to John C. Smith "nearly six years," during which time she also resided there. By her marriage, her nationality became that of her husband, and the evidence is quite sufficient to establish the averments of the complaint, especially as no objection to its sufficiency was interposed at the trial.

2. Defendant contends that the court erred in allowing one witness to answer the question, "Did you know to whom the article [the libel] related when you read it?" and another to answer the

question, "Did you know to whom it alluded?" Having answered these questions in the affirmative, the witnesses were both asked to "state the reasons why they knew." The defendant relies on the cases of *Van Vechten v. Hopkins*, 5 Johns. 211, *Maynard v. Beardsley*, 7 Wend. 560, and *Gibson v. Williams*, 4 Wend. 320, in which it is held that in an action for libel a witness should not be allowed to state his opinion as to whom he understood the defendant to mean, but must be strictly confined to a statement of facts, from which it is for the jury, under direction of the court, to draw such inferences as may be warranted. We do not deem it necessary in this case to enter into any extended discussion as to the authority of these cases, and to what extent, if at all, a witness who is not an expert may testify to his opinion or judgment, when said opinion is coupled with a statement in detail of the facts and circumstances upon which he founds it,—an exception from the general rule well recognized in certain cases. *Insurance Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. Rep. 533. In the case at bar, although the answer denied that the article complained of was published of or concerning the plaintiff, and averred that it referred "to some other Mrs. Smith," there was practically no dispute as to the identity of the person referred to. No evidence whatever was introduced to show that there was any other Mrs. Smith to whom the article could apply. It was testified by a witness well acquainted with the parties, and who had resided in Toronto for 29 years, that there was not in 1890 any person in Toronto, other than the Edward Rutherford above mentioned, to whom the article could relate, or who in any way answered the description contained in the article, and that there was not at the time mentioned in Toronto any Mrs. Smith, other than the plaintiff, who was known to be on terms of intimate acquaintance with the said Edward Rutherford. To this evidence defendant did not object. Irrespective entirely of all testimony as to the opinions of witnesses, there was evidence, wholly uncontradicted and unquestioned, of facts which abundantly established the identity of plaintiff with the Mrs. Smith named in the libel. In the absence of any evidence showing the existence of any other Mrs. Smith to whom the article might apply, the circumstance that plaintiff was the Mrs. Smith who early in June went from New York to Toronto with Edward Rutherford was quite sufficient to warrant the conclusion that she was the individual referred to as an eloping wife. In this view, defendant, upon the trial, seems to have concurred, for he took no exception to the charge of the court that there was "no room for doubt that the plaintiff was the Mrs. Smith to whom the defamatory publication referred, and concerning whom the libel was uttered by its original author," and "that the only question in real and actual dispute is the question of damages." If, then, the admission of the opinions of the two witnesses above referred to was error, it did not prejudice the defendant. Perfectly competent evidence, to which no objection was interposed, so abundantly established the affirmative of that issue against the defendant that the court was justified in taking it from the jury, as it practically

did, and the objectionable evidence, which was confined to this issue, could not have operated to the defendant's detriment upon their minds.

3. The exceptions argued in defendant's 5th, 8th, 9th, and 10th points may be disposed of in like manner. They all relate to the admission of testimony bearing on the question of identity. If every item of testimony thus objected to were thrown out, there would be sufficient left in the case, in the absence of a scintilla of evidence that the article was intended to apply to any one else, to warrant a court in instructing the jury that, upon the question of identity, the plaintiff had made out her case by undisputed testimony. Therefore, if all defendant's objections above enumerated were sound, the admission of the evidence they cover has worked no prejudice.

4. The defendant also excepted to the admission of testimony by the plaintiff as to an arrangement alleged to have been made between her husband and Mr. Rutherford prior to her starting for New York, the witness not being present when such arrangement was made. This was hearsay, and improperly admitted, but as the husband subsequently, of his own knowledge, testified, without objection, to the same arrangement, which is in no way disputed or controverted by other proof, we are at a loss to see wherein the defendant has been prejudiced by the error complained of.

5. Defendant further contends that the court erred in excluding testimony as to other suits having been brought against other newspapers. This objection is unsound. Such evidence was wholly irrelevant and immaterial. It was not even suggested that any other suit was ever brought against any one for the libel counted upon in the action at bar. That other newspapers, which published similar libels, had been prosecuted by the plaintiff for their acts, was a matter with which neither court nor jury had any concern.

6. Equally unsound is the exception to evidence as to who wrote the article complained of. Defendant insists that it was admissible to rebut any presumption of malice. It was conceded, however, that the article was not prepared by the defendant, but came to it regularly, in due course of business, from a reputable news agency, upon which it was in the habit of relying for accuracy, and that it published the article relying upon the source from whence it came; and the court charged that those were circumstances which were "fairly to be taken in mitigation of the act of the defendant," and that the plaintiff had not proved any actual malice or personal ill will on the part of the defendant. Under these circumstances it could have in no way prejudiced defendant that it was prevented from showing the identity of the original liar.

7. The exception as to the exclusion of evidence as to the previous life of the plaintiff was withdrawn upon the argument.

8. The defendant further contends that there was error in the charge to the jury. The law, as laid down by the court, is in substantial accord with the opinion of this court in *Morning Journal Ass'n v. Rutherford*, 2 C. C. A. 354, 51 Fed. Rep. 513. The particular portions of the charge excepted to are these:

(a) "The law, therefore, as it is frequently said, implies malice."

This was a perfectly correct statement of the law, and was followed by an equally correct statement of the distinction between actual and implied malice, and of the rule of law to be applied, in actions for libel, where no actual malice or personal ill will is shown; and the jury was charged, expressly, that plaintiff had produced no evidence to show any personal ill will. The exception is therefore unsound.

(b) "As in this case there was no evidence of actual pecuniary loss, she is entitled, unless the evidence in support of mitigation of damage is such as to satisfy you that a substantial amount ought not to be given, to such damages as she sustained in her feelings and her reputation by reason of the publication of the libelous article."

(c) "She, a married woman, was charged positively, in a sensational manner, and in a somewhat jeering manner, with having eloped with a man, her previous intimacy with whom, it was further said, had been freely spoken of in the city of her residence."

(d) "It was a bold, positive, and sensational statement of her disgrace, as a married woman."

(e) "It charged an act of the greatest dishonor to a wife, and one which, if true, is well-nigh remediless."

(f) "It was calculated to cause great injury to her reputation," and was a "most damaging article."

We do not understand that defendant contends that these excerpts from the charge contain any misstatement of the law. He objects to them as being comments on the facts, and calculated to prejudice defendant's case with the jury. It is well-settled law that a court of the United States, in submitting a case to the jury, may express its opinion on the facts. *Lovejoy v. U. S.*, 128 U. S. 171, 9 Sup. Ct. Rep. 57; *U. S. v. Philadelphia & R. R. Co.*, 123 U. S. 113, 8 Sup. Ct. Rep. 77; *Simmons v. U. S.*, 142 U. S. 148, 12 Sup. Ct. Rep. 171. That the comments in this particular case were harsh is manifestly due to the circumstance that the facts in the case were what they were. We do not see in the quotations above any misstatement as to the contents of the libel, any characterization of its terms which its own language did not fully warrant, any comment upon it which was at all unfair. The trial judge might, if he pleased, have refrained from any comment at all; but when, in his discretion, he decided to express an opinion as to the libel, it is not easy to perceive how he could have said much less.

(g) "If you think that the fact that the article was received, in the ordinary course of business, from a reliable and unusually correct news agency, is sufficient to excuse the defendant from the duty of investigation, of inquiry, of delay, for the sake of accuracy, before it published this most damaging article, then you will not give punitive damages."

(h) "If you think * * * that the defendant was guilty of reprehensible negligence in publishing the article without further attempts to verify its truth, then you are justified in giving such a reasonable sum in damages as shall be an example to deter against similar future negligence."

These were perfectly correct statements of the law, (*Morning Journal Ass'n v. Rutherford*, supra,) and the exceptions taken are unsound.

(1) "As was said in a similar case in this court, it is impossible to arrive, by any arithmetical calculation, at the amount of damages to which she is entitled on this account."

This also was a truthful statement, and the jury being further instructed that they were to compensate for the actual injury caused, and that, while the amount was in their control, the amount given "should be reasonable, and should be just," defendant's exception is clearly unsound.

9. It is further contended that the court erred in refusing to charge defendant's 2d, 3d, 4th, 5th, 8th, 10th, and 11th requests. These may be briefly disposed of:

"Second. There is no proof in this case of any publication of the article complained of in the city of Toronto, Can., the home of the plaintiff.

"Third. The fact that there is no proof of publication of the libel at the home and residence of the plaintiff should be taken into consideration in the fixing of damages."

The court did instruct the jury that "the article * * * was not published in Toronto, and, so far as it is known, there are no people in Toronto who habitually take the paper, and it is not displayed upon the news stands." Why, when the court charged upon the question of publication in Toronto more strongly in favor of defendant than the language of its request asked, counsel nevertheless excepted, and presents such exception here as a ground for reversal, is a mystery which his brief does not elucidate. The fact of nonpublication in Toronto was enumerated in the charge with the other facts which were laid before the jury as bearing upon the question of the measure of plaintiff's damages. That is all the defendant was entitled to.

"Fourth. The only persons who have read the article in question, according to the testimony of the plaintiff's witnesses, have been persons who are intimate friends of the plaintiff, and knew that the charge in said article contained was not true."

In view of the testimony brought out on the cross-examination of the witness Thwaite, it would have been error for the court to have charged in the language of this request.

"Fifth. There has been no evidence in this case tending to show any actual damage to the plaintiff by the publication of the alleged libel."

The court charged that there "was no evidence of actual pecuniary loss." The defendant was not entitled to a charge in the language of the request. When publication of an article libelous *per se* is proved, and the falsity of its statements shown, the law presumes an injury to reputation and feelings, which is actual damage, even though no special damage be shown. *Bergmann v. Jones*, 94 N. Y. 51.

"Eighth. It appears from the uncontradicted evidence that the article complained of was received by the Evening Sun from the United Press, a news agency in good standing, which supplies newspapers with items of news, and which regularly supplies the Evening Sun with such items, and that the Evening Sun published the article in question, relying on its authenticity, and the credit to which it was entitled, coming from such a source, and these circumstances should fairly be taken in mitigation."

The court substantially so charged.

"Tenth. The general conduct of the public press has nothing to do with this case.

"Eleventh. Whether a newspaper is published by a corporation or an individual, it matters not."

These abstract propositions are correctly stated, but there is nothing in the record to show that such instructions were so material to a proper consideration of the case by the jury as to make it error in the court to decline to charge them.

10. There is nothing to show that the verdict was, as defendant contends, the "result of passion and prejudice." When the proper rule for the computation of damages has been given to the jury, a verdict cannot be set aside as excessive, in the federal courts, upon a writ of error. *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. Rep. 356; *Hogg v. Emerson*, 11 How. 587. Nor is a decision upon a motion for a new trial the subject of review in a federal appellate court. *Laber v. Cooper*, 7 Wall. 565; *Railway Co. v. Heck*, 102 U. S. 120. The defendant's 18th, 19th, 21st, and 22d assignments of error are therefore unsound.

The judgment of the circuit court is affirmed.

HUDSON v. CHARLESTON, C. & C. R. CO.

(Circuit Court, W. D. North Carolina. March 4, 1893.)

1. MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES.

In an action by a railroad employe for injuries resulting from his being run over by defendant's engine, plaintiff is entitled to recover where it is shown that the valves of the engine were leaky, and allowed steam to accumulate in the cylinder and move the engine in spite of those in charge of it, which defect was known, or should have been known, to defendant.

2. SAME—FELLOW SERVANT.

But if such movement was caused by the fireman in charge of the engine not defective there can be no recovery, for he was the fellow servant of plaintiff, in any view of the evidence, which was conflicting as to whether plaintiff was a baggage man, car coupler, or switch tender.

3. SAME—VICE PRINCIPAL.

Where the conductor of the train that caused the accident had ordered plaintiff to open a switch, and cut off a flat car from the train and place it on a side track, he had a right to presume that his orders had been obeyed, and that plaintiff was in a position to uncouple the cars safely; and hence his subsequent order to the engineer to "ease up on the pin" by a forward motion of the engine, so that the car might be uncoupled, was not negligence, though such forward motion was what injured plaintiff.

4. SAME—CONTRIBUTORY NEGLIGENCE.

When plaintiff had long been accustomed, in the course of his employment, to couple and uncouple cars and tend switches without objection from his superior officers, it was not contributory negligence for him to undertake to uncouple the cars on this occasion, exchanging duties with his mate, who had been ordered by the conductor to uncouple the cars.

5. SAME.

Should the evidence show that plaintiff himself gave the signal that brought the train upon him, he was guilty of contributory negligence, and could not recover.

At Law. Action by H. T. Hudson against the Charleston, Cincinnati & Chicago Railroad Company for personal injuries. As to the nature and extent of plaintiff's employment the evidence was in conflict. Some evidence tended to show that he acted as baggage master, car coupler, switch tender, etc. The evidence was also in conflict as to whether the forward motion of the engine which injured plaintiff was due to the accumulation of the steam in its cylinder by reason of leaky valves, or whether it was made by those in charge of the engine, voluntarily, or in response to signals from the conductor or from plaintiff himself.

F. I. Osborne and Jones & Tillett, for plaintiff.

P. D. Walker and G. F. Bason, for defendant.

DICK, District Judge, (charging jury.) The cause of action in this case originated in the state of South Carolina. As the action is of a transitory character, it was rightfully brought by the plaintiff in a court of this state in the county of his residence. Under the provisions of the act of congress of March 3, 1887, corrected by the act of August 13, 1888, the defendant filed a petition to have the cause removed to this court on the ground of "local prejudice." This court, being of opinion that the sufficient allegations of the petition were sustained by the proofs offered, ordered a removal as prayed for.

I can well conceive that an individual nonresident defendant may have some grounds to apprehend the existence of local prejudices against him, in an action brought in a state court in a county where a plaintiff resides, who has, by reason of family, social, and business relations and connections, acquired considerable influence, but I know of no just or reasonable general cause for local prejudices against a railroad corporation doing business in the county where a suit is brought. Railroad corporations are in many respects public institutions, and confer almost inestimable benefits upon all sections of the country. They have their tracks and station houses in nearly every county and state in the nation. They are beneficent and powerful agents in the progress of civilization, advancing state and national power, prosperity, and greatness, and materially contributing to individual comfort, convenience, enjoyment, improvement, and wealth in all the departments of domestic, social, and business life. That such prejudices do exist is clearly manifested by the numerous cases in which such corporations have filed petitions in federal courts, making such allegations, for the purpose of obtaining judicial orders of removal from state courts.

I can easily understand how local prejudices may have concentration and power in the narrow limits of a county where local causes exist, and where jurors are neighbors, and frequently meet in social and business intercourse, but I am surprised that such prejudices seem to prevail in all communities. These railroad companies are not apprehensive that the judges in the state courts will do them wrong and injustice in the administration of the law, but they fear the action of local jurors, who are more accessible to the passions and prejudices excited and applied by immediate surround-

ing influences. These companies, therefore, anxiously desire their causes to be tried before jurors in the federal courts, who are summoned from a larger extent of territory; and who are usually the most intelligent and upright citizens and business men in their communities. Under these circumstances I feel that an imperative official obligation rests upon me to instruct you that it is your sworn, solemn, and legal duty to guard yourselves against any influences other than those legitimately produced by the testimony in this case, and to divest your minds of all kinds of prejudices, if any such are entertained by you. The defendant company is entitled in this court to the same rights as the plaintiff; no more and no less. It would be entitled to such equal rights in any court of justice. I am aware that sympathy for human injury and suffering is a natural sentiment, and usually commendable, but it should not improperly influence the action of a jury in the discharge of a solemn legal duty. You must patiently hear and consider the testimony, you must deliberately weigh its force and effect, and then determine the preponderance with the same impartiality that you would do if the controversy was between two of your fellow citizens.

I have the legal right to express to you my views of the evidence, but on this trial I will observe the laws of this state, and leave you to consider and determine all the matters of fact involved in the issues submitted to you for trial. On you alone rests the responsibility of determining the facts, and, if the facts found by you justify, you can assess just compensatory damages for the injuries sustained by the plaintiff; but I deem it proper to advise you that the court can set aside your verdict, and grant a new trial, if the damages are unreasonably excessive.

I will now proceed to perform my special duty in announcing the principles of law which I think are applicable to the issues of fact before you for trial. As I desire to be fully and clearly understood by you, and to have my views of the law expressed with certainty and accuracy, so that they may be reviewed and reversed in an appellate court, if erroneous, I have deemed it proper to reduce to writing and to read to you my instructions on this subject. Some of the issues submitted have been withdrawn, or the answers to be returned are agreed upon by counsel.

First and second issues. Before you can answer "Yes" to the first and second issues you must become satisfied by a preponderance of the evidence that the engine of the defendant that caused the injury complained of was seriously defective, and such defect was the active and moving cause of the injury; that is, that such defect produced the self movement by reason of force accumulated by the leakage of steam through the defective valves, or put it out of the power of the fireman in charge to control the engine to prevent the injury to the plaintiff. If the engine was in good order, and the injury was caused by the act of the fireman, who had charge of the engine, then the plaintiff cannot recover, as the injury resulted from the act of a fellow servant; but if you find that the defective engine was the active and proximate cause of the injury, and that the defendant had opportunity, through its superintending officers,

to obtain knowledge of such defect, then the plaintiff is entitled to recover such damages as you, from the evidence, see proper to assess.

Fourth issue. Before you can properly consider the question as to the negligence of the conductor of defendant's train of cars, you must be satisfied from the evidence that the manager of the engine saw and obeyed the signal of the conductor for the forward movement of the engine, to "ease up" on the pin that coupled the flat car of brick with the train. If you become satisfied from the evidence that the manager of the engine saw and obeyed said signal, then I charge you that there was no negligence on the part of the conductor in giving the signal,—if you believe his testimony,—for he had given his instructions to his subordinates, the plaintiff and Ramseur, to open the switch, and cut off the flat car of brick and place same on side track. The conductor in supervising his train saw that a forward movement of the engine was necessary to ease up on the pin, and he had a right to presume that his subordinates had obeyed his orders, and were in position to safely and properly uncouple the cars as directed.

Seventh issue. If you become satisfied from a preponderance of the evidence that the plaintiff was required, by the terms of his contract of employment, by the defendant, to couple and uncouple cars when necessary, or when ordered to do so by the conductor; that the plaintiff and witness Ramseur had often worked as fellow servants in the same general line of employment in opening switches and coupling and uncoupling cars, and no dissatisfaction had been expressed by superior officers,—then I charge you that the mere fact that plaintiff exchanged employment with Ramseur, and undertook to uncouple the car on this occasion when the injury was sustained, he was not guilty of contributory negligence, even though he disobeyed the express order of the conductor. He certainly was not guilty of contributory negligence if he was, according to his testimony, in the line of his duty, and was obeying the command of the conductor.

As to the manner and methods of coupling and uncoupling cars, the evidence tends to show that there is no certain and fixed manner and method of doing such work, but that persons discharging such imposed duties are usually governed by the circumstances of the occasion, and the place where the cars are stopped. Long experience has shown that attempts to get on a moving train, or to couple and uncouple such moving train, are very dangerous, and any person injured in such hazardous attempt negligently contributes to his own injury. It is well known that the management of moving railroad trains is hazardous, and all persons who engage in such employment assume the ordinary incidental risks arising from accident and the unskillful acts of their fellow servants.

Eighth issue. You assess the damages. The judge has nothing to do with this issue, except to see that excessive damages are not assessed.

In reply to an instruction requested by counsel of plaintiff at close of charge. If you believe the testimony of the witness Wright that

plaintiff gave the signal that brought the car upon him, then I charge you that plaintiff was guilty of contributory negligence, and cannot recover.

At the close of the charge the court asked counsel if they desired any further instructions or any modification of instructions given. Counsel of defendant replied that they had handed to the court, at the close of the evidence, written instructions which they wished to be given, and urged the same in their arguments, and had no other instructions to request. The jury then retired, and, after several hours deliberation, returned a verdict for \$4,333.33 $\frac{1}{3}$. The court supposed that the jury had rendered a compromise verdict, and on inquiry ascertained such to be the fact. The court then remarked to counsel of plaintiff that, unless they agreed to a verdict assessing damages at \$1,500, the verdict would be set aside, and a new trial granted. Upon the consent of counsel of plaintiff the jury returned a verdict for the damages indicated by the court.

HUDSON v. CHARLESTON, C. & C. R. CO.

(Circuit Court, W. D. North Carolina. March 7, 1893.)

1. BILL OF EXCEPTIONS—INCORPORATION OF TESTIMONY—WHEN ALLOWED.

In an action at law, in which a verdict has been rendered for plaintiff on evidence introduced by both parties, defendant cannot have the oral testimony incorporated in a bill of exceptions, when it was not reduced to writing at the time, under the direction of the court, and when there was no agreement about it by the parties.

2. SAME—REVIEW—WITNESSES.

A ruling by the court that plaintiff, by calling to the stand a witness who had been summoned, sworn, and tendered by defendant to plaintiff at the close of defendant's evidence, did not thereby make the witness his own witness, so as to preclude him from exercising the liberal privileges of cross-examination, or from impeaching the credibility of such witness, is subject to review; and defendant is entitled to have his exceptions thereto, duly noted at the time, incorporated in the bill of exceptions.

3. SAME—REQUESTED INSTRUCTIONS—WAIVER.

A party desiring to avail himself of alleged error in the refusal of a federal court to give a special charge, by having the same incorporated in a bill of exceptions, must distinctly call the attention of the court to the matter, and ask the charge; and if, after having given the general charge, the court asks counsel if they have any other instructions to be given, and counsel do not specifically call attention to the omission of certain special charges previously handed to the court, such special charges are waived, and cannot be incorporated in a bill of exceptions.

4. APPEAL—REVIEW—OBJECTIONS WAIVED.

Alleged error in the refusal of the court to give a peremptory instruction for defendant at the close of plaintiff's evidence is waived, if defendant thereafter offers evidence, and goes to the jury on the issues.

At Law. Action by H. T. Hudson against the Charleston, Cincinnati & Chicago Railroad Company to recover damages for personal injuries. The plaintiff obtained a verdict and judgment, and the defendant tendered a bill of exceptions to be signed. Opinion by the judge, giving reasons for refusing to sign the same.

P. D. Walker and G. F. Bason, for defendant.

DICK, District Judge. After carefully reading and considering the bill of exceptions tendered by P. D. Walker and G. F. Bason, counsel of defendant, I decline to sign the same. I deem it proper, and respectful to counsel, to reduce to writing my recollections of the occurrences of the trial and the rulings of the court.

In the course of the trial, when the plaintiff closed his case, at the request of the counsel of defendant, concurred in by counsel of plaintiff, the jury were directed to retire from the court room. After the retirement of the jury the counsel moved the court to instruct the jury, when they returned, "that there was no sufficient evidence to warrant a verdict for the plaintiff, and a verdict should be returned in favor of defendant." This motion was fully argued by counsel on both sides. The court said "that there was some evidence to sustain the claim of the plaintiff, and the jury must pass upon the weight and sufficiency of the evidence, and determine the question whether the plaintiff was entitled to a verdict, and, if he was so entitled, then they must assess the amount of damages sustained by him." This ruling was excepted to, and the court directed counsel to note their exception, and the same would be allowed in a bill of exceptions, or would be considered on a motion for a new trial.

At that time the court was clearly of opinion, which was not expressed, that the evidence of plaintiff so far tended to show gross negligence on the part of the conductor of the defendant's train of cars that caused the injury to the plaintiff, and also so far tended to show that the engine was seriously defective,—and such defects were, and for some time had been, known to the officers and agents of defendant,—as to warrant a verdict for the plaintiff upon the issues in which these questions were involved. No request was made to reduce the testimony of plaintiff to writing, so that the same might be put in a bill of exceptions, and there was no agreement of parties as to the ultimate facts to be deduced from the parol testimony. The jury then returned to the box, and the trial proceeded, and evidence was introduced on the part of the defendant which tended to contradict and to modify the evidence of plaintiff.

When the evidence on the part of the defendant was closed, several witnesses who had been summoned by defendant were called, sworn, and tendered by defendant to the plaintiff. The plaintiff called one of said witnesses upon the stand. The counsel of defendant insisted that by so doing the witness became the witness of the plaintiff, and, as such, the plaintiff ought not to be allowed in any way to discredit such witness, or have the liberal privileges usual in cross-examination. After hearing argument the court was of opinion that the witness should be regarded as the witness of defendant, as when the witness was thus summoned, sworn, and tendered, the defendant was entitled to have the fees of said witness taxed, as its witness, against the plaintiff, in costs, if judgment should be in favor of defendant, and the plaintiff, by

accepting the witness brought into court, sworn, and tendered by defendant, did not impliedly vouch as to good character and credibility. The court, being of opinion that questions as to the cross-examination of witnesses, as to all matters pertinent to the issues on trial, were largely within its legal discretion, and as the witness (employee) of the adverse party might well be presumed to be unfavorable to the party examining him, allowed the counsel of plaintiff the usual privileges of cross-examination. To this ruling the counsel excepted, and were directed by the court to note the exception.

The plaintiff examined a witness, named Wright, who had been summoned, sworn, and tendered by the defendant, and was fireman in charge of the engine at the time the injury to plaintiff occurred. Soon after such examination was concluded, the plaintiff called another witness to show, and did show, declarations made by said Wright that tended to contradict the testimony given by Wright when on examination by plaintiff; the court, still being of opinion that Wright was the witness of defendant, conceding error in the ruling, if the witness was, in law, the witness of the plaintiff. To the ruling of the court, admitting such contradictory testimony, the counsel excepted, and were directed by the court to note such exception.

The bill of exceptions tendered in this case correctly sets forth the facts,—that at the close of the evidence the counsel of defendant submitted, in writing, certain instructions, and prayed that they be given to the jury. These instructions are 29 in number, and accompany the bill of exceptions tendered. In my charge to the jury, I reduced to writing, and read to the jury, my views as to the questions of law and fact which I regarded as applicable to the issues on trial, and arising out of the testimony, stating at the time that I wished my views upon these questions to be expressed with certainty and accuracy. At the close of the charge I asked the counsel on both sides if they desired any other instructions, or any modification of instructions given. The counsel of plaintiff asked an instruction upon one question which I had failed to refer to in the charge. My answer was reduced to writing, and read to the jury. The counsel of defendant replied that they had submitted in writing, and urged in the argument, all the instructions that they desired to be given. None of these instructions were specifically called to the attention of the court, otherwise than as above stated, and I said nothing further on the subject. I did not expressly refuse to give such instructions, but I failed to respond *seriatim* to the numerous instructions, as I believed that my charge to the jury included all questions of law and fact involved in the issues submitted to the jury. I had in a previous part of the trial, as above stated, refused the motion of counsel of defendant, "that there was no sufficient evidence to warrant a verdict for the plaintiff, and a verdict should be returned in favor of defendant." In my charge to the jury, I did not repeat my reply to the motion, as heretofore stated. If such instruction had been specifically called to my attention by the counsel at the close of the charge, it would

have been promptly refused, as before; but I cannot perceive what wrong was done to defendant by my failure to give an instruction which was adverse to its views of the evidence. When the jury rendered what I regarded as a compromise verdict, assessing excessive damages, I at once remarked to counsel of plaintiff that, unless they would agree that the verdict might be reduced to reasonable damages, I would set aside the verdict and grant a new trial. The counsel accepted the proposition of the court, and the jury returned a verdict in accordance therewith.

I will now present some of my objections to the bill of exceptions tendered, and my reasons for declining to sign the same.

This bill of exceptions purports to set forth the parol evidence in the case, which is not usually allowable in appellate proceedings by writ of error; for, as to any error in relation to facts, a writ of error is not the proper remedy. An appellate court cannot properly be called to pass upon the credibility or sufficiency of parol evidence, when there is conflict, in an action at law. Parties to an action at law have a constitutional right to have issues of fact determined by a jury. Questions as to the credibility or sufficiency of parol evidence cannot be presented in an appellate court as they were presented to a jury in a trial court. These questions are not entirely dependent upon what a witness says, but his appearance and conduct upon the stand, his relations and connections with the parties, and other attendant circumstances, often properly and strongly influence a jury in determining the weight of his testimony. Under the act of March 3, 1865, parties to an action at law may, by consent in writing, waive a jury, and have issues of fact tried and found by a judge, and his general or special findings of fact have the force and effect of a verdict. Issues of fact, dependent on parol evidence, must be ascertained and made certain in the court of original jurisdiction before the judgment can be reviewed by a court of error. There is great difference, in an appellate court, between evidence of facts, and positive facts themselves, as agreed upon by the parties, or found by some method provided by law. When facts are legally found, or are agreed upon by the parties, an appellate court may in some cases determine the question of law, whether such ascertained facts are sufficient to warrant a judgment. When matters of fact, in an action at law, are dependent upon the credibility or sufficiency of parol evidence, they are only cognizable by a jury, unless the parties waive such constitutional right. Questions respecting the admission or exclusion of evidence on the ground of competency are entirely different from those which respect its credibility or sufficiency. The admission or exclusion of evidence is matter of law, and a statement of so much of the testimony as may be necessary to show the correctness or error of the rulings of the inferior court are properly allowable in a bill of exceptions. But bills of exceptions which recite the entire evidence in the trial court, with a view to have its credibility or sufficiency passed upon by an appellate court, are strongly condemned by the United States supreme court; and such court regards it as a duty of a judge of an inferior court to with-

hold his approval. *Lincoln v. Clafin*, 7 Wall. 132; *Generes v. Campbell*, 11 Wall. 193. In the case of *Herbert v. Butler*, 97 U. S. 319, the bill of exceptions setting forth the evidence was entertained, as it was "a case and exceptions" concurred in by both parties; and the evidence thus agreed upon was considered as to its sufficiency to warrant the finding of facts, and the action of the judge in not submitting the case to the jury. In my opinion the ruling of the supreme court would have been different if the judge had submitted the case to the jury, and they had found a verdict for plaintiff, and the defendant had moved to set aside the verdict upon the ground that the evidence was not sufficient to warrant the verdict. The bill of exceptions before me recites only a condensed abstract of the parol evidence, not made on the trial under the direction of the court, and its correctness is not conceded by the counsel of plaintiff. I kept no full and accurate notes of the testimony, and if I were now to sign such abstract, and order the same to be sent up to the appellate court, my action would not be approved, and such recital of evidence would be treated as a nullity. *Generes v. Bonnemer*, 7 Wall. 564.

The nature of bills of exceptions, and the extent and character of the evidence that may be put in the record, and as to how far an appellate court will entertain and pass upon evidence or facts legally found, are clearly pointed out in many decisions of the supreme court. *Graham v. Bayne*, 18 How. 60; *Guild v. Frontin*, 18 How. 135; *Suydam v. Williamson*, 20 How. 427; *Campbell v. Boyrean*, 21 How. 223; *Norris v. Jackson*, 9 Wall. 125; *Flanders v. Tweed*, 9 Wall. 425; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. Rep. 321. In a recent case (*Railway Co. v. Winter*, 143 U. S. 60-75, 12 Sup. Ct. Rep. 356) the court says in affirmance of a previous decision:

"It may be that if we were to usurp the functions of the jury, and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province, on a writ of error. In such a case we are confined to the consideration of exceptions taken at the trial, to the admission or rejection of evidence, and to the charge of the court, and its refusal to charge. We have no concern with questions of fact, or to the weight to be given to evidence which was properly admitted."

I readily concede the principle of law insisted upon by counsel of defendant, as it is well established in the courts of this state, of the United States, and in England,—that in the trial of civil cases at law there is a preliminary question of law for the judge, "not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Bowditch v. Boston*, 101 U. S. 16. A party has a right to call on a judge for an instruction to the jury which will show his opinion on such preliminary question of law, and if the instruction is refused he may note an exception, and have the matter reviewed in a court of error. In such case the question of law involved is dependent upon the evidence, and the entire evidence must be set out in the bill of exceptions that goes up with the record to the appellate court. If

the evidence is documentary, or the parties agree upon a statement, the appellate court will have no difficulty in reviewing the judgment of the court below. In this state there is no difficulty in presenting the evidence to the supreme court. Under the provision of the Code of North Carolina (section 550) an appeal on the trial and determination of the cause in the inferior court carries the whole case to the supreme court for review, and such court has plenary jurisdiction to reverse, affirm, or modify the judgment. The appellant makes out a concise statement of the case, and the instructions of the judge. It is handed to the appellee, and if he does not concur in the same the judge appoints a day, and notifies the parties of his readiness to hear them, and then he settles the case, and sends the same to the supreme court. The provisions of the Code must be strictly complied with in these proceedings, and the case thus sent up is regarded by the supreme court, as nearly as can be, in the light of a bill of exceptions for specified errors of law or fact, and no exceptions are considered unless they were made in the court below, and so appear of record.

In regard to motions for a new trial and bill of exceptions, the courts of the United States are independent of any statute or practice prevailing in the courts of the state in which the trial is had. There is a clear distinction, always observed, between a writ of error and an appeal, as methods of review in an appellate court. A writ of error is of common-law origin, and strictly removes nothing but questions of law apparent on the record. Where questions of law are dependent upon the ultimate facts of the case, they must be found and made certain in some legal way in the court below, from the evidence, and be entered on the record, as an appellate court has no concern about unascertained matters of fact, or the credibility or sufficiency of evidence properly admitted. When questions of law are peculiarly dependent upon the nature of the evidence, as in cases where evidence is admitted or rejected on the ground of relevancy or competency, or when the court is asked for instructions as to the sufficiency of evidence to warrant a verdict, the evidence must be included in the record under the sanction of the court; for the appellate court has no other means of determining the question of law presented, as to the correctness of the ruling in the court below. If the first instruction asked in this case by the defendant at the close of the evidence of the plaintiff, as to the sufficiency of such evidence to warrant a verdict for plaintiff, had been peremptory, and the defendant had closed its case, there would have been no difficulty in putting the evidence of the plaintiff in the record; and the question of law arising from the refusal of the court to give such instruction would have been fully and fairly presented in a bill of exceptions. The witnesses of the plaintiff were unimpeached and uncontradicted, and what they testified might have been regarded as conclusive on the points of failure or sufficiency of proof to warrant a verdict. The refusal of the court to give this instruction cannot now be assigned as error, because the defendant had not rested its case, but afterwards went on, and introduced evidence in its own behalf. *Insurance Co. v. Crandal*,

120 U. S. 527, 7 Sup. Ct. Rep. 685; *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. Rep. 279.

The motion for instructions when the plaintiff had closed his evidence embraced all the issues before the jury, including the one relating to the defective engine. The repetition of the instruction as to the alleged defective engine after the evidence of defendant had been introduced, showing much conflict with that of plaintiff, was, in effect, asking the court to pass upon the weight and preponderance of parol evidence, which is a matter properly cognizable only by a jury in an action at law. The failure or refusal of the court to give such instruction was, by implication, at least, an answer to the motion, as it tended to show that the court was of opinion that there was sufficient parol evidence to be submitted to the jury upon the issues of fact before them. Such implication is especially strong in a case in a federal court, where a judge has such clearly-defined power and duty in directing a jury as to the verdict which should be rendered on the evidence. In the case of *Pleasants v. Fant*, 22 Wall. 116-120, the court clearly intimates that the action of a judge in submitting a case to the jury would not be regarded as error, when the testimony was doubtful and conflicting, and the jury, by their verdict, had passed upon and determined the sufficiency of the evidence. The defendant did not rest its case solely upon the question of law arising upon the refusal of the court to give the instruction as to the insufficiency of the evidence to warrant a verdict for the plaintiff, but, in its long series of instructions, prayed the court for instructions upon other points upon which it relied for defense, and thereby seemingly waived the question of law as to its right to a verdict upon the primary instruction requested. *Insurance Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. Rep. 671; *Alexandria v. Stabler*, 50 Fed. Rep. 689. I am strongly inclined to the opinion that when a defendant, at the close of the evidence of the plaintiff, or at the close of the evidence on both sides of the case, asks the court to instruct the jury that there is not sufficient evidence to warrant a verdict for the plaintiff, his request should be single and peremptory, and he should rely confidently and solely upon this preliminary question of law as affording him entire defense; and, if the court should refuse to give such instruction, he should seek his remedy for the denial of such legal right in a court of error, where the entire evidence would appear of record, or could be brought up by writ of certiorari. If a defendant takes his chances before a jury upon evidence which he has introduced in defense, it may be that an appellate court would not long or favorably consider a bill of exceptions which included the entire evidence on both sides,—that required the court to weigh conflicting testimony, and determine the preponderance, before it could ascertain the matters of fact to which legal principles were to be applied.

The instructions of defendant consisted of a series, 29 in number, and the court failed to respond to all, *seriatim*; but the attention of the court was not, at the close of the charge, called to any one or more of such series, although the counsel of defendant were invited by the court to do so, if desired. I feel sure that under such circum-

stances the failure of the court in this respect would not be regarded in an appellate court as error, even if some of such instructions ought to have been given. *Anthony v. Railroad Co.*, 132 U. S. 172, 10 Sup. Ct. Rep. 53; *Insurance Co. v. Smith*, 124 U. S. 405-426, 8 Sup. Ct. Rep. 534; *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466. I candidly concede that the instructions were presented in apt time, in due form, and with very intelligible directness, and they were considered by the court during the argument with a view to the charge to be given to the jury; but I insist that, if I failed to respond to any one or more of the instructions which the counsel deemed as material and essential points in their case, they should have called my attention to the omission, and specially asked specific instructions. "It is too late, certainly after verdict, to raise the objection that the judge did not charge upon a particular aspect of the case." *Boon v. Murphy*, 108 N. C. 187, 12 S. E. Rep. 1032; *Posey v. Patton*, 109 N. C. 455, 14 S. E. Rep. 64.

After careful consideration of all the instructions requested, I am of opinion (1) that defendant is entitled to have included in a bill of exceptions its objections made during the progress of the trial, and duly noted, as to the rulings of the court in reference to the witnesses who were summoned, sworn, and tendered by defendant to plaintiff, and who, with leave of the court, were cross-examined by plaintiff, and were afterwards contradicted by other witnesses of the plaintiff; (2) that defendant is not entitled to have included in a bill of exceptions the parol evidence on the trial, as it was not reduced to writing at the time under the direction of the court, and there was no agreement of the parties about the matter; (3) that defendant is not entitled to have included in a bill of exceptions a general or special objection that the court failed to respond to any or all of its series of instructions, as at the close of the charge the attention of the court was not called to any omission as to any one or more of said series, and specific instructions requested.

I have, in open court, caused an order to be entered of record, allowing the defendant further time during the continuance of this term, which expires on the first Monday of April next, to prepare and tender such other bill of exceptions as will be approved by the court, as above indicated.

STOCKMEYER v. REED.

(Circuit Court, D. Indiana. April 17, 1893.)

No. 8,791.

FELLOW SERVANTS—VICE PRINCIPAL—LIABILITY OF EMPLOYER.

If an employe is injured by reason of the negligence of the foreman or superintendent in charge of the work, he can only recover against the employer when the foreman or superintendent was negligent in performing duties which the law imposes on the master personally, and cannot recover if the foreman or superintendent was merely negligent in the performance of such work as properly pertains to a servant; as, for instance, in pounding and prying upon a rock in a stone quarry.

At Law. Action by Lentwick Stockmeyer against David Reed for damages for personal injuries sustained by the plaintiff while in the defendant's employment. Heard on demurrer to the complaint. Sustained.

Keith & Taylor, for plaintiff.

Dunn & Alexander, for defendant.

BAKER, District Judge. The sole question in this case is raised by the defendant's demurrer, which alleges that the complaint does not state facts sufficient to constitute a cause of action. The material facts alleged in the complaint are that the defendant on and before, as well as after, May 6, 1892, was the owner of and actively operating a certain stone quarry and stone sawmill at and near Reed's station, in Lawrence county, Ind., for the purpose of quarrying, turning, cutting, sawing, and shipping limestone, and in the operation of said quarry and mill employed a large number of men. That defendant is likewise the owner of large quarries and mills in Monroe county, Ind. That he is a resident of Chicago, Ill., and is seldom present at his quarries and mills in Lawrence and Monroe counties, and intrusts the control and management of the same to one Robert Reed, and divers other superintendents and foremen. That at the date of the grievances, May 6, 1892, the defendant had in charge of the quarries at Reed's station, as superintendent and foreman, one Joseph Drehoble, and that Drehoble, in the absence of Robert Reed, was in full charge of the quarries, the works, men, employes, and machinery; and on the 6th day of May, 1892, Robert Reed was absent from the quarries and works at Reed's station, and was in Monroe county, and so absented himself, leaving Drehoble in full control and management of the quarries, their employes, machinery and business. That at and prior to said date plaintiff was employed by defendant, and was engaged as a quarryman or scabber in the quarries and yards of the defendant at Reed's station. That at said date Drehoble attempted to turn, and cause to be turned, a certain block of stone in said quarry. That, after the stone has been duly channeled, it is the customary and usual and only safe rule of quarrying to drill the same at the base of the cut on the outside before attempting to turn the stone; but in violation of this rule, which is the only safe one, the defendant, by his superintendent and foreman, negligently and carelessly attempted to turn and throw over said stone without so drilling, and, in so attempting, Drehoble had actual charge and management of the quarry and its employes. That Drehoble discovered that there were one or more dry seams running through the stone, thereby rendering it liable to break and come apart when moved or handled; and, notwithstanding the fact that Drehoble had full knowledge of the dangerous and unsafe condition of the stone, he directed and ordered the plaintiff, who was scabbling at another part of the quarry, to work at and immediately below the outside base of the rock so sought to be turned, and to clean away dirt and rubbish from the same, that the stone might be so turned or thrown over.

That plaintiff had no knowledge of the dangerous and unsafe condition of the stone and the work, and that Drehoble had full knowledge, and that, under said orders from him, plaintiff proceeded to work at the base of the rock; and while he was so at work, under defendant's orders, and without fault, Drehoble, superintendent and foreman as aforesaid, was carelessly and negligently pounding and prying on said rock above the plaintiff; and, as the result of such careless and negligent acts on the part of defendant and his superintendent and foreman, the rock, so seamed, as Drehoble well knew, parted and broke and slipped, and fell on the plaintiff, bruising and mangling him so as to require the amputation of his right leg.

The plaintiff contends that the foreman of the defendant represented him in the alleged wrongful acts resulting in his injury, in such sense that the negligence of the foreman was the negligence of the defendant. On the other hand, the contention of the defendant is that the foreman and the plaintiff were engaged at the time of the injury as fellow servants in performing the work of a common employer, and that the facts disclosed in the complaint bring the case within the principle that the employe assumes the risks incident to the service, and that among them are those arising from the negligence of a fellow servant. It is firmly established that the common master is not responsible to an employe for an injury caused by the negligence of a coemploye, in the absence of negligence, either in hiring or in retaining one who is careless or incompetent. *Hough v. Railroad Co.*, 100 U. S. 213; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Holden v. Railroad Co.*, 129 Mass. 268; *Flynn v. City of Salem*, 134 Mass. 351; *Crispin v. Babbitt*, 81 N. Y. 516; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. Rep. 556; *Taylor v. Railroad Co.*, 121 Ind. 124, 22 N. E. Rep. 876; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. Rep. 303. It is equally well established that the fact that one employe is the superior of another makes no difference. The question is not one of rank. Whether, at the time the negligent act causing injury occurs, they are fellow servants, is not to be determined by an inquiry into their relative grade or authority. The rule extends to every case where the two, deriving their authority and compensation from the same source, are engaged in the same business, although in different departments. *McGee v. Cordage Co.*, 139 Mass. 445; *Clifford v. Railroad Co.*, 141 Mass. 564, 6 N. E. Rep. 751; *McCosker v. Railroad Co.*, 84 N. Y. 77; *Car Co. v. Parker*, 100 Ind. 181; *Justice v. Pennsylvania Co.*, *supra*. If Drehoble was acting in the capacity of a fellow servant at the time his negligence caused the plaintiff's injury, the action cannot be maintained, although he was the plaintiff's superior, and had the right to retain or discharge him. The defendant exercised no personal supervision over the work, but devolved its whole control and management upon superintendents and foremen, who were authorized to employ and discharge workmen, to regulate and direct the manner of the work, to provide the appliances and means necessary to its prosecution, and to determine the time and place of its performance. The superintendents or foremen were employed by the defendant as his servants, but were

delegated with the discharge of all those duties which, in the conduct of the work at the quarries, rested upon the defendant as master to perform in respect to the persons there employed.

So far, therefore, as the sufficiency of the complaint in this case is concerned, Drehoble may be regarded as standing in the place of the master to the persons employed in the quarries. It is not, however, every act of such superintendent or foreman for which the master is liable. Notwithstanding his supervisory power, such superintendent or foreman is still a servant, and, in respect to such acts and work as properly belong to a servant to do, he is, while performing them, discharging the duties of a servant, for whose carelessness and negligence the master is not responsible to a co-employee. *Taylor v. Railroad Co.*, 121 Ind. 124, 22 N. E. Rep. 876; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. Rep. 303; *Crispin v. Babbitt*, 81 N. Y. 516; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. Rep. 556; *Holden v. Railroad Co.*, 129 Mass. 268; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326. It has been asserted that, in determining the responsibility of the master for the negligent acts of his servants, we must look solely at the position of such servant, and we must consider the duties devolved upon him, solely for the purpose of determining his position; and, if we find that he is the representative of the master, then the master must be held responsible for all his acts of negligence committed within the scope of the business intrusted to him, as well to coemployees as to strangers, whether the acts of negligence were such as pertained to the duties of the master or those of a servant. *Crispin v. Babbitt*, 81 N. Y. 516, dissenting opinion of Earl, J. In my opinion, however, there can be no middle ground. Either the master must be held responsible for all negligent acts of his superintendent or foreman within the scope of the business intrusted to him, or for those only which pertain to the duties of the master. Reason and the decided weight of authority support the doctrine that the employee, whatever his rank or authority may be, does not stand in the place of the master except in respect of the performance of those duties which, from motives of public policy, the law has imposed upon the master. There are duties incumbent on the master, with reference to the safety of his employees, whose performance the law devolves upon him personally; and whoever is authorized by him to perform them, without regard to his grade or authority, stands, while engaged in their performance, in the master's place, and his negligence in their performance is the negligence of the master. The supervision of the business, the employment of workmen, suitable in number and skill, the provision of suitable tools, machinery, and materials for the work, the providing and maintenance of reasonably safe and secure places for his employees in which to work, are some, but not all, of the duties devolved by the law on the master personally. The neglect of any of these duties, causing injury to employees or strangers, whether the negligent act be that of the master, or of a servant upon whom he has devolved these duties, gives a right of action against the master. But no reason is perceived why the servant, upon whom the master

has devolved these duties, the performance of which the law has imposed upon him personally, may not also perform for the master service which belongs properly to a servant to do; nor is there any reason why the same rules of law should not apply to such employe as to any other, in respect to such work as properly belongs to a servant to do. In my opinion the true rule is that the master should be held responsible for every act of negligence of a servant, whatever his rank, who is charged with the performance of those duties devolved by the law on the master, where the negligent act of such servant has relation to the performance of the master's duties; and that such servant, when performing such work as properly pertains to a servant to do, is the fellow servant of all others engaged in the common service. As was said in the case of *Crispin v. Babbitt*, supra:

"The liability of the master does not depend upon the grade or rank of the employe whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives. * * * The liability of the master is thus made to depend upon the character of the act, in the performance of which the injury arises, without regard to the rank of the employe performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows: If the act is one which pertains only to the duty of an operative, the employe performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow servant for its improper performance."

In that case, while the plaintiff was engaged in lifting the flywheel of an engine off its center, the superintendent carelessly let on the steam and started the wheels, throwing the plaintiff onto the gearing wheels, and thus occasioned the injuries complained of.

While the allegations of the complaint are inartificial and confused, it seems to me that the proximate cause of the injury was the careless and negligent acts of the foreman which pertained to the duties of a servant, and not to those of a master. In ordering the plaintiff to work below the stone which was being quarried, the foreman was performing an act pertaining to the duties of a master; but no injury arose from the plaintiff's obedience to this order. Nor was the dry seam in the stone the proximate cause of the injury. The proximate cause of the injury was the careless and negligent acts of the foreman in pounding and prying on the stone in attempting to remove it from its bed. The quarrying of the stone, and its removal from its bed, pertained to the duties of a servant, and not to those of a master. The injury was the proximate result of the careless and negligent acts of the foreman which pertained to his duties as a servant, and not to the improper performance of those duties which pertained to the defendant as master. For these reasons the demurrer must be sustained, and it is so ordered.

MCDONALD v. PRESS PUB. CO.

(Circuit Court, S. D. New York. April 24, 1893.)

LIBEL—WHAT CONSTITUTES—NEWSPAPER PUBLICATION.

A complaint for libel set out the following publication: "Missing Millionaire McDonald Located. Cincinnati, O., Aug. 17. McDonald, southern Ohio manager of the Standard Oil Company until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada." Held that, in view of the fact that many of our countrymen who expatriate themselves under such circumstances in Canada are frequently fugitives from justice, (a matter of common knowledge, which the court may judicially notice,) this publication is capable of a libelous interpretation, and, being properly pleaded, is good as against a demurrer.

At Law. Action by Alexander McDonald against the Press Publishing Company for libel. Demurrer to the complaint overruled.

Deming & Walradt, for plaintiff.

Platt & Bowers, for defendant.

WALLACE, Circuit Judge. This is a demurrer by the defendant to a complaint in an action for libel. The complaint shows that the defendant printed and published of and concerning the plaintiff, a citizen of the state of Ohio residing at the city of Cincinnati, the following alleged defamatory matter:

"Missing Millionaire McDonald Located.

"Cincinnati, O., Aug. 17. McDonald, southern Ohio manager of the Standard Oil Company until six months ago, when he strangely disappeared, has been located living in luxury at Bellmore, near Windsor, Canada."

The innuendo is stated as "meaning and intending to accuse the plaintiff of odious and disgraceful conduct, and to bring him into disrepute and disgrace, and meaning and intending that the plaintiff was obliged to secretly run away to Canada, and that he was there found living in luxury on his ill-gotten gains."

It is insisted by the demurrer that the complaint does not set forth a cause of action, because the publication is not libelous. The construction which is to be put by the court upon a publication which is alleged to be libelous is to be derived as well from the whole scope and apparent object of the publication as from the expressions used. It is not to be dissected and analyzed to see whether the several parts, standing alone, are innocuous, but is to be read as a whole, in order to ascertain what general impression it is calculated to convey to those who see it. *Spencer v. Southwick*, 11 Johns. 592; *Fidler v. Delavan*, 20 Wend. 57; *Cooper v. Greeley*, 1 Denio, 347; *Beardsley v. Tappan*, 1 Blatchf. 588. If, when thus read, the language is equivocal, and capable of being understood as conveying an injurious imputation, even though it is also capable of an innocent meaning, it is not for the court, but for a jury, to determine in what sense the language is used.

Applying these rules, the question here is whether a jury would be authorized to find that the publication, in any sense which can be legitimately put upon it, is calculated to injure the reputation

of the plaintiff in the common estimation of mankind, expose him to contumely, or make him contemptible or ridiculous. If it is, it is libelous, although it imputes no crime. Undoubtedly, a man may mysteriously disappear while holding a position of trust and prominence, secrete himself for several months, and then be found living lavishly in a foreign country, who has not offended the civil or criminal laws, or been guilty of any immoral or discreditable conduct. On the other hand, it is a matter of common knowledge that those of our countrymen who expatriate themselves under such circumstances in Canada are frequently fugitives from justice. So often is this the case that it is not too much to say that the first impression upon reading a paragraph like this would be that the person referred to in it had been guilty of some breach of trust, and joined the colony of American embezzlers and defaulters who have found a haven of refuge, safe under the extradition laws, among our Canadian neighbors. It was said by De Grey, C. J., in *King v. Horne*, Cowp. 672: "A man is not allowed to defame in one sense, and defend himself in another." Whether a libelous sense or an innocent sense is to be attributed to the present publication must be determined by a jury, under proper legal instructions. The court cannot undertake to say, as a matter of law, in which sense the words are to be understood.

Matters of common knowledge do not require proof, but the courts take judicial notice of them. If, in the light of such knowledge, the publication is capable of a libelous meaning upon its face, the complaint states a good cause of action, notwithstanding no extrinsic facts are set forth explanatory of the language used.

The demurrer is overruled, with costs.

AMERICAN EXCHANGE NAT. BANK v. OREGON POTTERY CO.

(Circuit Court, D. Oregon. June 10, 1892.)

No. 1,930.

1. NEGOTIABLE INSTRUMENTS—FRAUD—BONA FIDE PURCHASER—BURDEN OF PROOF.

Where a promissory note has its inception in fraud, the burden of proof is cast upon a subsequent indorsee to show that he is a bona fide holder for value.

2. SAME—CORPORATION—AUTHORITY OF OFFICERS.

The president and secretary of a corporation are presumed to have authority to execute a promissory note in the name of the corporation, and the holder of such note will not be affected by the fact that such authority did not exist unless he is shown to have had notice thereof.

At Law. Action by the American Exchange National Bank of New York against the Oregon Pottery Company on a promissory note. Heard on demurrer to the answer. Overruled in part and sustained in part.

Milton W. Smith, for plaintiff.

Albert H. Tanner, for defendant.

GILBERT, Circuit Judge. This action is brought to recover upon a promissory note made by the defendant, by its president and secretary, to the order of one C. C. Gilman, and by him indorsed to the plaintiff before maturity. The answer sets up two defenses, each of which is demurred to: First, that the note was procured by fraud, and was without consideration; second, that the president and secretary of the defendant had no authority from the defendant, either by by-law or resolution, to execute the note, and that the defendant received no benefit therefrom, and did not ratify the same.

It is admitted that the first defense contains allegations of fraud sufficient to defeat the note as between the original parties to the same, but it is contended that the demurrer should be sustained for the reason that the answer contains no averment that the plaintiff had notice of the fraud or acquired the note otherwise than as a bona fide indorsee for value. The doctrine seems well established that where a promissory note had its inception in fraud or duress, or is fraudulently put in circulation, an exception arises to the general rule, and the burden of proof falls upon a subsequent indorsee to show that he took the note before maturity, and for value, and without notice. *Kellogg v. Curtis*, 69 Me. 212; *Smith v. Livingston*, 111 Mass. 342; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. Rep. 801; *Stewart v. Lansing*, 104 U. S. 505. The reason generally assigned for this exception to the rule is that a presumption exists that a fraudulent payee will place the note out of his hands, to have suit brought in the name of another, and such presumption operates against the holder. The demurrer to the first defense is overruled.

The demurrer to the second defense, however, is well taken. The payee or indorsee of a negotiable promissory note, signed by the officers of a corporation as the note of the corporation, is not required to ascertain whether the officers have authority to make the note. A corporation formed under the general incorporation laws, for the purpose of conducting business, has, so far as the law is concerned, the same power that an individual has to contract debts whenever necessary or convenient in furtherance of its legitimate objects. It may borrow money to pay its debts. It may execute notes, bonds, and bills of exchange. The power to sign such paper may be conferred upon any officer. If the president and secretary sign, their authority is inferred from their official relation. All persons dealing with them have the right to assume that there is no restriction of that authority. They also have the right to assume, unless they have actual notice to the contrary, that a note so signed is made in the regular course of the business of the corporation. To hold otherwise would destroy the negotiability of all notes made by corporations. *Merchants' Bank v. State Bank*, 10 Wall. 644; *Crowley v. Mining Co.*, 55 Cal. 273; 1 Daniel, Neg. Inst. § 381. In the absence of an allegation that the president and secretary of this corporation were deprived of power to make this promissory note, and that that fact was known to the payee of the note and the plaintiff before they became holders of the paper, the demurrer to this defense must be sustained.

HYATT v. CHALLISS et al.

(Circuit Court, D. Kansas. April 11, 1893.)

No. 6,634.

EJECTMENT—SECOND TRIAL AS OF RIGHT—SUIT IN FEDERAL COURT.

An action of ejectment was brought in a state court, and, the trial having resulted in a judgment for the defendant, the plaintiff moved, pursuant to Gen. St. Kan. § 4702, for a second trial as of right. The judgment was vacated, and a new trial ordered. The cause was continued until the next term, and, when it was then called for trial, plaintiff dismissed the action. Thereafter he commenced a similar action in the federal court. *Held* that, electing to litigate his rights in the state court, having had one trial therein, and having demanded a new trial, and procured the judgment against him to be set aside without costs under the statute, plaintiff had thereby waived his right to bring suit in the federal court, and that the action must be dismissed.

At Law. Action of ejectment by Thaddeus Hyatt against George T. Challis and others. Dismissed.

L. F. Bird, for plaintiff.

Elliston & Heath, for defendants.

RINER, District Judge. This is an action of ejectment. The action was originally brought in the district court for the county of Atchison, and a trial upon the merits was had in that court. On the 28th day of January, 1888, a judgment was rendered in favor of the defendant Challiss. Thereupon the plaintiff and certain other defendants (under the statute of Kansas) caused a notice to be entered on the journal that they applied for an order setting aside and vacating the said judgment, and granting another trial of the case. The statute under which these proceedings were had is in the following language:

"In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term." Section 4702, Gen. St. Kan.

Section 4703 provides:

"No further trial shall be had in such action, unless for good cause shown a new trial be granted, or the judgment reversed, as in other actions."

After obtaining the new trial upon demand, as provided by the statute, the cause was continued until the next term of the court, and upon being called for trial at the next term, to wit, on the 9th day of September, 1889, the plaintiff declined to proceed to trial, but dismissed his action, and thereafter, on December 3, 1890, brought his action in this court. These proceedings were all made to appear by the answer of the defendant Challis in this action, a transcript of the proceedings in the state court being incorporated therein, and upon the pleadings he asks for judgment.

The state district court for Atchison county had jurisdiction of the cause. One trial was had in that court; a new trial granted, not for error, but as of right, under a statute giving a second trial

upon demand; and the question now to be settled is whether, after these proceedings had in the state court, the plaintiff can dismiss his action there when the case is called for trial a second time, and then bring his case in the federal court. This, I think, the plaintiff cannot do. If he wished to have his case tried in the federal court, he should have brought it there in the first instance. This he had the unquestioned right to do; but he selected his tribunal, and sought to litigate his rights in the state court, and had one trial in that court, which resulted in judgment against him. He then demanded a new trial in that court under the statute, which was granted, and procured the judgment entered against him on the first trial to be set aside. If the first judgment had not been set aside under the statute, it would have been final. By procuring that judgment to be set aside, without cost, under the statute, which was a part of the proceedings authorized, plaintiff waived his right to resort to this tribunal. As was well stated by the court in the case of *Fraser v. Weller*, 6 McLean, 12:

"It would be a fraud upon the law. For aught that appears, the first judgment could not have been set aside except under the provisions of the statute, and, this remedy having been claimed under the statute, the party is bound to go on with another trial. Having set aside the bar to another suit, he does so under an obligation to pursue the special remedy under the statute. He cannot claim the remedy in part to his advantage, and then abandon it, to the injury of the other party."

The first judgment was not only a judgment against him for the property, but for costs as well. This he procured to be set aside under the statute, thus relieving himself of the obligation to pay the costs, and he cannot, under such circumstances, be permitted to require the defendants to incur cost and expenses in another tribunal. The case will be dismissed, at the plaintiff's cost.

UNITED STATES v. SEARS.

(District Court, D. Kentucky. April 3, 1893.)

POST OFFICE—OBSTRUCTING MAILS—REFUSAL TO PAY TOLL.

On indictment for obstructing the passage of the mail, the defendant, a toll-gate keeper on a gravel road, cannot justify his act on the ground that the driver of the wagon conveying the mail refused to pay toll in advance, and that by statute (Gen. St. Ky. c. 110, § 3, subsec. 2) toll-gate keepers on gravel roads are authorized to stop persons who refuse to pay in advance from passing and using the road.

At Law. Indictment under section 3995, Rev. St. U. S., containing four counts. By the first count the defendant was charged with knowingly and willfully obstructing the passage of the mail of the United States then and there being carried from Paducah to Benton, Ky.; by the second, with unlawfully, knowingly, and willfully retarding the passage of the mail; by the third, with unlawfully, knowingly, and willfully obstructing the passage of the driver, one Andrew Melbur, who was then and there carrying the mail; and, by the fourth, with unlawfully, knowingly, and

willfully obstructing Melbur, who was then and there a driver of a wagon in which the mail was being conveyed, etc. The case was tried November 21, 1892, and the jury returned a general verdict of guilty. On November 23, 1892, the defendant made motion in arrest of judgment on the ground that he was a toll-gate keeper, and, as such, had the right under the laws of Kentucky (Gen. St. Ky. c. 110, § 3, subsec. 2) to demand and receive tolls in advance, and, the carrier having failed and refused to pay his toll in advance, defendant rightfully denied him passage over the pike, though he thereby obstructed and retarded the passage of the carrier and the mail.

George W. Jolly, U. S. Atty., and W. McD. Shaw, Asst. U. S. Atty. Bishop & Dishman and Gilbert & Kahn, for defendant.

BARR, District Judge. This indictment was under section 3995, which provides that—

“Any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying same, shall, for every such offense, be punishable by a fine of not more than one hundred dollars.”

There can be no doubt under the evidence that the defendant stopped the mail carrier while he was carrying the United States mail, and that the defendant did this because he did not pay his toll for the use of the gravel road in advance, and also for some toll past due, and that he did this knowing he was the mail carrier, and was at the time carrying the mail. The only questions which were considered by the jury under the instructions of the court were whether he could lawfully stop said mail carrier, and whether the stoppage under the circumstances was “willful,” within the meaning of this section.

The state statute authorized the defendant, who was a toll-gate keeper on a gravel road, to collect in advance the toll for the use of the road, and to stop persons from passing through the gate and using the road who did not pay their toll in advance. See chapter 110, § 3, subsec. 2, Gen. St. Ky.¹ But this statute did not and could not authorize a toll-gate keeper to stop a mail carrier while he was carrying the mail, because he did not pay in advance the toll for the use of the road. The authority of the United States was supreme in that matter, and if the defendant did knowingly and willfully obstruct or detain the mail of the United States he cannot defend by proving that he had the state of Kentucky's authority to thus obstruct and detain the mail. If the authority to obstruct or detain the passage of the United States mails be conceded to the states for a purpose like this, there can be

¹Gen. St. Ky. c. 110, § 3, subsec. 2, is as follows: “All tolls are to be paid at the several gates at the time they are passed, or in advance, unless, by agreement with the managers of the road, a special permit is obtained to pass for a month or other longer term, not exceeding a year. If not so paid, the gate keeper may stop any person, and prevent him or his property from passing until payment is made.”

no limitation to the power to prevent the passage of the mails in and through the states at all. It is not intended to indicate that a state may not grant any remedy it chooses in the enforcement or collection of tolls on bridges or roads which do not encroach upon the rights and powers of the United States, but we think whatever remedies may be granted are subordinate to the power and authority of the United States under the federal constitution. Nor is it intended to assert that the United States can take private property for this public use without just compensation. It is not the right of the company to the tolls under the state law which is doubted, but the right to stop the passage of the mails to enforce their collection which is denied. Congress had, under the constitution, the authority to enact this section, and the only question in this case is whether the defendant Sears did "knowingly and willfully" obstruct or retard the passage of the mail or the mail carrier while he was carrying the mail.

This question seems to be answered in the opinion of the supreme court. In *U. S. v. Kirby*, 7 Wall. 485, the court say:

"The statute of congress by its terms applies only to persons who 'knowingly and willfully' obstruct or retard the passage of the mail or its carrier,—that is, to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows. All persons in the public service are exempt, as a matter of public policy, from arrest upon civil process while thus engaged. Process of that kind can therefore furnish no justification for the arrest of a carrier of the mail. This is all that is decided by the case of *U. S. v. Harvey*, [8 Law Rep. 77, 1 Brunn. Col. Cas. 540,] to which we are referred by the counsel of the government. The rule is different when the process is issued upon a charge of felony."

In that case Farris had been arrested on a bench warrant issued on an indictment charging him with murder, and the court decided the sheriff, who had arrested him while carrying the mail, had not willfully obstructed or detained the mail or a mail carrier. But if, as the court declared, Farris had been arrested under a civil process by the sheriff, and thereby obstructed or detained the passage of the mail, the sheriff would have been within this section (3995) of the law, how can it be claimed that a toll-gate keeper who, to collect toll in advance, obstructs and detains the passage of the mail, is not within this section, and does not violate the law? In *U. S. v. Barney*, 3 Hughes, 545, 12 Myers, Fed. Dec. 244, decided in 1810, the court decided that the lien on horses for their keep cannot be enforced in a manner to stop the passage of United States mail in a stage coach drawn by the horses upon which the lien was claimed. In *U. S. v. McCracken*, 3 Hughes, 544, Judge Hughes dismissed an indictment under this section where the offense as proven was the refusal of the stable keeper to allow a horse in his stable to be taken out to be used for carrying the mail unless his lien claim was paid him for keeping the horse. This was because the section did not apply, as there was no obstruction or detention of

the mail while it was in transitu, but the court seemed to assume that the offense would have been made out had the obstruction been while the mail was being carried from one place to another. The cases of *U. S. v. De Mott*, 3 Fed. Rep. 478, and *U. S. v. Kane*, 19 Fed. Rep. 42, sustain the view herein indicated. In the case of *U. S. v. Harvey*, 1 Brunn. Col. Cas. 543, Chief Justice Taney says:

"We do not consider the warrant a justification to the officer. Yet the mere serving of the warrant would not render the party liable to an indictment under the law; but if, by serving the warrant, he detained the carrier, he would then be liable. We do not construe the term 'willfully' in the same sense as the traverser's counsel. If the traverser, by serving the warrant, detained the carrier, then he 'willfully' detained him in the sense that word is used in the act of congress."

In that case a constable had arrested a mail carrier while he was carrying the mail, by virtue of a warrant in an action of trespass *quare clausum fregit*, but the detention was only for a short time, and the carrier got to the next office at his usual hour.

Although the facts surrounding the case should be considered in the sentence, we cannot consider the state statute a justification for the stoppage of this mail carrier while he was transporting the mail, and I must therefore overrule the motion to arrest the judgment on the verdict of the jury, and it is so ordered.

In re FITTON.

(Circuit Court, D. Vermont. April 15, 1893.)

INTERSTATE RENDITION—INFRACTION OF DISCHARGE—HABEAS CORPUS.

Relator was extradited from New York for larceny. He furnished bail, and was at once rearrested on a prior charge of perjury, and was discharged by the federal circuit court on habeas corpus with protection for one day, in which to return to New York. He appealed on the ground that protection should have been extended during the pendency of the proceeding for larceny, which appeal was dismissed during his enlargement on bail and while he was confined in jail for contempt against a state court in an entirely different matter. He was then convicted in the state court of perjury, and sentenced to the penitentiary for ten years, from which he claimed a discharge on the ground that he was convicted of the perjury pending his bail in the larceny proceeding. *Held*, that having, by his contempt of court, placed himself in a position where he could not surrender himself in discharge of his bail, and the state having done nothing on the indictment for perjury to prevent such surrender, he was not entitled to a discharge.

At Law. Application by Robert Fitton for discharge on habeas corpus from a conviction of perjury in a state court. Application denied.

Robert Fitton, pro se.

William W. Stickney, for the State.

WHEELER, District Judge. The relator was extradited from the state of New York for larceny, was bound over, and furnished bail. He was at once rearrested on a prior charge of perjury, and was afterwards discharged by this court from that arrest on habeas

corpus, with protection for one day, in which to return to that state. *In re Fitton*, 45 Fed. Rep. 471. An appeal was taken by him because the protection was not during the proceedings for larceny, and he was enlarged on bail pending the appeal, which was dismissed for want of appearance April 22, 1891. The mandate was filed in this court April 28th. He was at that time confined in the jail of the county where the indictment for perjury was pending, for a contempt of the order of the state court in a divorce proceeding, committed after his discharge, and was on the 9th of May further committed for want of bail for an attempt to break open the said jail during that confinement. He was taken into court, tried and convicted on the indictment of perjury, June 4th and 5th, and pleaded guilty to an information for attempting to break jail. He was sentenced to the state prison for two years for the attempt to break jail, and for ten years thereafter for the perjury. The sentence for attempting to break jail has by allowances for good behavior now expired, and he seeks discharge on this writ from the sentence for perjury because of the judgment on the former writ, and of his being under bail in that proceeding when he was tried.

The dismissal of an appeal "is not an affirmance of the judgment of the court below. It remits the case to the court to have proceedings to carry the judgment into effect, if in the condition of the case there is nothing to prevent it." *U. S. v. Gomez*, 23 How. 326. When the mandate on the dismissal of the appeal was filed in this court, the judgment of discharge from the arrest on the indictment for perjury, with the protection for a day, was left in force, to be carried out. Nothing done by the state on the indictment for perjury prevented the relator from then surrendering himself to this court in discharge of his bail, and departing under the protection, nor from departing without surrender, if he would without relieving his sureties. Whether he would protect them by surrender if he could, and would keep himself free so that he could, was a risk they took by becoming his bail. *Taylor v. Taintor*, 16 Wall. 366. The entanglement for contempt, which at that time alone held him, had been voluntarily begun by him, and, although in form the proceeding was criminal, it was for the protection of a merely private right. He had his day for departure. The placing of him where he could not depart was done by himself.

Section 766, Rev. St. U. S., provides that pending the proceedings or appeal, "and until final judgment therein, and after final judgment of discharge, any proceeding against the person," "in any state court," "for any matter so heard and determined, or in process of being heard and determined," "shall be deemed null and void." The relator insists that his trial and sentence while he was under bail in this court were within this provision. Counsel for the state insists that, if so, the proceeding in the state court was a mere error, which should be corrected by a proceeding in error to the highest court of the state, and, if necessary, to the supreme court of the United States, and cannot be corrected or relieved from in this court on habeas corpus. If, however, the trial and sentence are made wholly void by a law of the United States, any custody under them

is a violation of that law, relief from which is expressly left on habeas corpus with the courts of the United States. Rev. St. U. S. § 753. Nothing was pending in the supreme court. The appeal had not only been dismissed, and the mandate sent down and filed, but the term had been adjourned without delay. In *re Jugiro*, 140 U. S. 291, 11 Sup. Ct. Rep. 770. The judgment of this court was complete; the mandate left it as it was before, and nothing remained here undetermined. There was a final judgment of discharge, not from the indictment, but only from that arrest.

If the relator had departed pursuant to the arrest, he would have done so subject to be reached again by extradition or to arrest again if he should come within the state. He was found within the state because he had so involved himself that he could not get out of it pursuant to the judgment, and was arrested anew. This new arrest was not anything included by the judgment of discharge. The enlargement on bail was an incident to the appeal, and not any part of the judgment appealed from. That a person is under bail in one jurisdiction does not prevent the person from being arrested and proceeded with for another purpose in another jurisdiction, although it might for the same purpose. *Taylor v. Taintor*, 16 Wall. 366. This court could not try the relator for the perjury. The state court could, as soon as everything had been determined here on the habeas corpus, and the trial did not interfere with the judgment of discharge. The former judgment was probably erroneous, (*Lascelles v. Georgia*, [April 3,] 13 Sup. Ct. Rep. 687;) but as it was not in any way reversed, and remained in full force, the relator is entitled to its full effect as well as if it had been founded upon the best of reasons. Giving it that effect does not entitle him to discharge here from his present confinement. Relator remanded.

ERHARDT v. HAHN.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

CUSTOMS DUTIES—"CUT" AGATE AND TIGER-EYE STONES—"PRECIOUS STONES."

Agate and tiger-eye stones, cut in parts, and ground into shapes of penholder handles and other articles, and known to the trade by the names of "agate penholder handles," "tiger-eye penholder handles," etc., are dutiable at 20 per cent. ad valorem, under the tariff act of 1883, as non-enumerated manufactured articles, and are not admissible duty free, as "agate unmanufactured," nor assessable at 10 per cent., under Schedule A of the same act, as nondutiable crude minerals which have been advanced in value by refining, grinding, or other processes, nor at 10 per cent., under Schedule N as "precious stones." 46 Fed. Rep. 519, reversed.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Rudolph C. Hahn against Joel B. Erhardt, collector of the port of New York, to recover duties illegally exacted. The circuit court directed a verdict for plaintiff, (46 Fed. Rep. 519,) and, from the judgment entered thereon, defendant brings error. Reversed.

Thos. Greenwood, Asst. U. S. Atty., for plaintiff in error.
Everit Brown, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. The plaintiff in error was defendant in the court below. The action was brought to recover duties illegally exacted by the defendant, as collector of the port of New York, upon certain importations of merchandise made by the plaintiffs in the year 1889. The merchandise was classified, and subjected to duties at the rate of 20 per centum ad valorem, as nonenumerated manufactured articles, under the provision for "all articles manufactured, in whole or in part, not herein enumerated or provided for," of section 2513 of the tariff act of March 3, 1883. The contention upon the trial was whether this classification was correct, or whether the merchandise was free of duty, under the provision of the same act for "agate manufactured," contained in the free list; or, if not free of duty, was dutiable at the rate of 10 per centum ad valorem under the provision of schedule A of the same act, for "all nondutiable crude materials, but which have been advanced in value or condition by refining or grinding, or by other processes of manufacture, not specially enumerated or provided for in this act;" or, if not free of duty, or not dutiable at 10 per centum ad valorem under the last-mentioned provision, was dutiable at 10 per centum ad valorem under the provision for "precious stones of all kinds," contained in Schedule N of the same act.

According to the record the following facts appear: The merchandise in suit consisted of various articles, composed with few exceptions of agate, and, in case of these exceptions, of tiger-eye. Those of agate were made from crude agate, and those of tiger-eye from crude tiger-eye, by a process called "cutting," or, in other words, by first sawing these crude stones into pieces of the required sizes, and then grinding such pieces on sandstones or otherwise, and afterwards polishing the same so ground, into the shapes of, and for the uses respectively as, penholder handles, glove-hook handles, shoe-hook handles, knife handles, paper weights, paper cutters, rollers for book binders, slabs for match boxes, and slabs for blotting papers. At and prior to March 3, 1883, the date of the passage of the tariff act in question, crude agate and tiger-eye were known in trade and commerce as "precious stones;" but all the stones known to commerce as precious stones were bought and sold under their respective descriptive names; and articles like the imported ones were bought and sold in trade and commerce, when made of agate, under the names of and as agate penholder handles, agate glove-hook handles, agate shoe-hook handles, agate knife handles, etc., and, when made of tiger-eye, under the names of and as tiger-eye penholder handles, tiger-eye glove-hook handles, etc. Agate like that of which the imported articles were composed was also made into cameos, ring stones, sleeve buttons, pieces for earrings, and other articles used for jewelry purposes.

At the close of the evidence the defendant requested the judge to instruct the jury to render a verdict in his favor on the ground that the plaintiff had not proven facts sufficient to entitle him to recover. The court refused, and the defendant duly excepted. Thereupon the plaintiff moved the court to instruct the jury to find a verdict in his favor. The judge granted the instruction, and ordered a verdict for the plaintiff. To these rulings the defendant duly excepted. Error has been assigned of these rulings.

It has been repeatedly decided, under the tariff acts, that where an article has been advanced through one or more processes into a completed commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material, and is put into a completed shape designed and adapted for a particular use, it is deemed to be a manufacture. It is sufficient to refer to *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. Rep. 1240; *Schrieffer v. Wood*, 5 Blatchf. 215; *Stockwell v. U. S.*, 3 Cliff. 284. The importations in question were therefore properly classified and subjected to duty by the collector as articles manufactured in whole or in part, if they were not otherwise enumerated or provided for by the tariff act of March 3, 1883. Clearly none of them were "agate manufactured." Nor were they "crude minerals advanced in value or condition," etc., because that term applies to minerals in a state of preparation for manufacturing uses before they have reached the condition of a manufactured article. We agree with the learned trial judge that the real question in the case is whether they were "precious stones," within the meaning of Schedule N of the act, and therefore enumerated otherwise than as manufactured articles. Undoubtedly, agate stones and tiger-eye stones are "precious stones," within the common acceptance of the term; certainly, some varieties of them are; and of course they were known in trade and commerce, as to the lexicographers, by that generic term. But it does not follow that agate penholder handles, agate shoe-hook handles, etc., are the precious stones of the statute. If it could be shown that these articles, at the date of the tariff act, were bought and sold as precious stones, or were commercially known as such, then no doubt they would have to fall under that classification for duty. Not only had these articles no such commercial designation, but the stones themselves, when imported in the form of stones, were bought and sold as were rubies, diamonds, and other precious stones, by their respective distinctive names. We think the term as used in Schedule N applies to all stones known as precious, whether in their original condition, or advanced beyond it by cutting, polishing, etc., so long as they remained "stones" in the commercial sense of the word.

As the importations fall aptly under the description of manufactured articles, and not under that of precious stones, they were properly classified for duty by the collector, and a verdict should have been ordered for the defendant. The judgment is reversed.

In re COLLECTOR OF CUSTOMS, (SHERMAN et al., Importers.)

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

CUSTOMS DUTIES—POWERS OF BOARD OF APPRAISERS.

The board of general appraisers cannot go outside of the protest of the importer against an assessment by the collector, and find that the imported goods are dutiable as a class other than that specified in the protest. 49 Fed. Rep. 224, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Sherman, Cecil & Co. protested against an assessment by the collector of the port of New York. The protest was sustained by the board of general appraisers. Their decision was reversed by the circuit court, (49 Fed. Rep. 224,) and the protestants appeal. Affirmed.

Wm. Forse Scott, for appellants.

Thos. Greenwood, Asst. U. S. Atty.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a judgment of the circuit court reversing a decision of the board of general appraisers. October 6, 1890, the appellants imported into the port of New York certain merchandise, which was classified for duty and duty exacted thereon by the collector of customs at the rate of 60 per centum ad valorem, as "textile fabrics, embroidered by hand or machinery," under paragraph 373 of the tariff act of October 1, 1890. The importers, being dissatisfied with the classification, within 10 days after the liquidation of duties protested, setting forth in their notice, as the reason for their objection to the decision of the collector, that the merchandise should have been classified "under Schedule I, paragraph 346, as cotton cloth, bleached, counting over one hundred threads, and under one hundred and fifty threads, to the square inch, valued at over 10 cents per square yard, and subjected to duty at 40 per centum ad valorem." The board of general appraisers, after hearing testimony, decided that the merchandise was not "textile fabrics, embroidered by hand or machinery," and had therefore been improperly classified for duty; that it was not "cotton cloth, bleached, counting over one hundred threads, and under one hundred and fifty threads, to the square inch, and valued at over 10 cents per square yard," as claimed by the importers; and that it was a "manufacture of cotton not specially provided for," dutiable, under paragraph 355 of the same tariff act, at 40 per centum ad valorem. They accordingly ordered a reliquidation of the entry. From that decision the collector appealed to the circuit court. At the hearing in the circuit court the importers moved for leave to amend their protest so that it might accord with the decision of the board of general appraisers, by stating as an additional objection to the decision of the collector that the merchandise should have been classified as a "man-

ufacture of cotton not specially provided for," under paragraph 355. The trial judge ruled that the circuit court was without authority to allow such an amendment of the protest, and held that, as the board of general appraisers had decided in favor of the importers upon an objection which had not been stated in the protest, the decision was erroneous. The circuit court accordingly reversed the decision of the board of general appraisers. The only question which has been argued upon this appeal is whether the circuit court erred in ruling that the protest was not amendable, and that the board of general appraisers should have decided against the importers because the protest did not set forth any sufficient objection to the decision of the collector.

Prior to the act of congress of June 10, 1890, commonly known as the "Customs Administrative Act," the importer whose merchandise had been subjected to the payment of illegal duties by the collector had his remedy to recover them by an action at law against the collector personally. According to the decision of the supreme court in *Cary v. Curtis*, 3 How. 236, he was deprived of this remedy by the act of March 3, 1839. To obviate this injustice congress restored the remedy by the act of February 26, 1845, but in doing so required, as a condition of the right of the importer to maintain the action, that a protest be made in writing, signed by the claimant, at or before the payment of the duties, "setting forth distinctly and specifically the grounds of objection to the payment thereof." The act of 1845 remained in force until the passage of the act of June 30, 1864, when, by section 14, the time for the making of a protest was enlarged, and it was made a condition of the remedy that the importer should, within 10 days after the ascertainment of liquidation of the duties, give notice in writing to the collector, if dissatisfied with his decision, setting forth distinctly and specifically the grounds of his objection. In the revision in 1874 of the statutes of congress, section 14 of the act of 1864 was reproduced, and remained in force until the passage of the customs administrative act. Under all of these acts, from that of 1845 until the customs administrative act was passed, the courts, in construing the provision, had uniformly decided that the importer could not recover duties which had been erroneously or illegally exacted, unless by his protest or notice he had stated a valid objection to the action of the collector so distinctly and specifically as to bring it to the knowledge of the collector at the time. It suffices to refer to *Warren v. Peaslee*, 2 Curt. 235; *Davies v. Arthur*, 96 U. S. 148; *Arthur v. Dodge*, 101 U. S. 34; *Arthur v. Morgan*, 112 U. S. 495, 5 Sup. Ct. Rep. 241.

The customs administrative act abrogated the remedy of the importer by action, and substituted therefor a proceeding in the nature of an appeal to the board of general appraisers in review of the collector's decision as to the classification and rate of duty. Section 14 of the act declares that the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise shall be final and conclusive against the importer, unless the importer, within 10 days after the ascertainment and liqui-

dation of the duties, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry, the reasons for his objection thereto. Section 15 of the act authorizes the importer to apply to the circuit court for a review of the questions of law and fact involved in the decision of the appraisers. Thus it will be observed that congress reproduced in the customs administrative act the identical language as to the terms of the protest used in the previous acts, and declared, as explicitly as could be done by language, that in the absence of such notice the decision of the collector should be final and conclusive. It must be presumed that this was done with the full understanding of the settled judicial construction of the provision under the previous acts of congress, and therefore that congress intended that the importer should be bound by his own statement of the objections to the collector's decision, and should not be permitted to depart from it by alleging subsequently any errors of fact or of law not substantially brought to the collector's attention by the terms of the notice. Congress might have relieved the importer of any such condition as a prerequisite to his recovery if it had seen fit; but it is plain that it intended only to change the nature of his remedy, without enlarging the previously existing conditions precedent to his right of recovery.

It has not been argued, nor could it be with any color of reason, that the protest was sufficient to justify a reversal of the decision of the collector. Neither the board of general appraisers nor the circuit court had any authority to allow the importer to make a new protest, and the circuit court properly so decided. In reversing the decision of the collector upon an objection not stated in their notice of dissatisfaction by the importers, the board of general appraisers erred, and their decision was properly reversed by the circuit court. The judgment of the circuit court is affirmed.

In re HIGGINS et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

1. CUSTOMS DUTIES—"SORTED" WOOLS—SEPARATION INTO COLORS.

The importation of wool separated as to colors by entire fleeces, the colors being of different values, and entered for duty as washed wool of the third class, is not within paragraph 383 of the tariff act of 1890, which imposes double duties upon wool "which shall be imported in any other than ordinary condition, or which shall be changed in its character or condition for the purpose of evading the duty, * * * or which has been sorted or increased in value by the rejection of any part of the original fleece." 50 Fed. Rep. 910, affirmed.

2. SAME—EXCEPTION FROM "DOUBLE DUTY"—CONSTRUCTION OF ACT.

The proviso excepting "wools on which duty is assessed amounting to three times or more than that which would be assessed if said wool was imported unwashed" from the double duty imposed by paragraph 383 of the tariff act of 1890 on wools sorted in quality for the purpose of evading duty, cannot be restricted to those classes of wool upon which the act assesses duty by the express term "unwashed." 50 Fed. Rep. 910, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

E. S. Higgins & Co. protested against an assessment of washed wools by the collector of the port of New York, and the board of appraisers sustained the protest. The collector appealed to the circuit court, which sustained the decision of the board, (50 Fed. Rep. 911,) and the collector appeals. Affirmed.

Thos. Greenwood, Asst. U. S. Atty., for appellant.

W. Wickham Smith, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The tariff act of October, 1890, (26 St. U. S. p. 594,) divides wool for duty purposes into three classes. The firm of E. S. Higgins & Co., on April 2, 1891, made entry of an invoice of washed wool of the third class; some of it being gray, some yellow, and the rest white. The value of the gray and of the yellow was less than 13 cents per pound, of the white in excess of 13 cents per pound. The tariff act contains the following paragraphs:

"385. On wools of the third class, and on camel's hair of the third class, the value whereof shall be thirteen cents or less per pound, including charges, the duty shall be thirty-two per centum ad valorem.

"386. On wools of the third class, and on camel's hair of the third class, the value whereof shall exceed thirteen cents per pound, including charges, the duty shall be fifty per cent. ad valorem."

The importers contended that their importations were dutiable, the gray and yellow at 32 per cent., the white at 50 per cent. The collector exacted 64 per cent. and 100 per cent., respectively, against which the importers duly protested, and the board of appraisers sustained their claim. The collector exacted the additional duty under the supposed authority of paragraph 383:

"The duty upon wool of the sheep, or hair of the camel, goat, alpaca, and other like animals, which shall be imported in any other than ordinary condition, or which shall be changed in its character or condition for the purpose of evading the duty, or which shall be reduced in value by the admixture of dirt or any other foreign substance, or which has been sorted or increased in value by the rejection of any part of the original fleece, shall be twice the duty to which it would be otherwise subject: provided, that skirted wools, as now imported, are hereby excepted. Wools on which a duty is assessed amounting to three times or more than that which would be assessed if said wool was imported unwashed, such duty shall not be doubled on account of its being sorted."

The board of general appraisers found as facts that the gray and yellow wool was worth less than 13 cents per pound; that it had not been changed in its character or condition for the purpose of evading the duty, nor reduced in value by the admixture of dirt or any other foreign substance; that there had been a separation as to color, (according to a common practice of long standing in the case of East India wools,) which had depreciated the gray and yellow below the average value of the lot before such separation, but that there had been no separation as to quality of these wools. So far as the evidence shows, the separation was in whole fleeces, and none of the wool was "skirted,"—a process which consists in the

removal of the stained and inferior locks taken from the belly or legs, and sometimes from the neck.

Upon the argument we expressed the opinion that the board of appraisers and the circuit court were correct in their conclusion that the gray and yellow wool was not "sorted," within the meaning of paragraph 383. This word is aptly defined in the return of the board of general appraisers:

" 'Sorting,' as usually defined, means that process preliminary to wool manufacturing necessary to fit the article for textile purposes, which consists in classifying by separation the fibers of the fleece as clipped from the sheep's body 'according to length, fineness, elasticity, and soundness of staple.' The wool varies in quality in different parts of the animal, as many as twelve or fourteen 'sorts' being sometimes obtained from a single fleece, but frequently not more than from five to seven qualities."

This definition is sustained by expert evidence before the board, and by technical works on manufactures, which they cite. It is in accord with the definition contained in the report on wool and manufactures of wool, published by the treasury department September 6, 1889, and which was presumably known to the framers of the tariff act of 1890. The word is therein thus defined: "'Sorts:' The fleeces, broken into narrower and more accurate subdivisions as to fineness; there being several qualities or sorts of wool in the same fleece." The phrase, "which has been sorted or increased in value by the rejection of any part of the original fleece," in paragraph 383 is coupled with the phrases, "imported in any other than ordinary conditions," "changed in its character or condition for the purpose of evading the duty," and "reduced in value by the admixture of dirt or other foreign substance;" and the provisions for payment of double duty is in the nature of a penalty. In view of the fact that East India wool of this class, as the evidence shows, has always been packed abroad, separated as to color, and so imported, and of the further fact that, before the act of 1890 was passed, complaint had been made by the wool growers of this country of a practice that had grown up of taking third-class wool, separating the very finest parts of the fleece, bringing them over here, and getting them through the customhouse as carpet wool, and then using them for the purpose of making clothing, there is additional warrant for the conclusion that congress used the phrase "sorted wool" with the meaning understood by wool dealers, viz. a breaking up of the fleeces to obtain a subdivision into grades, and not a mere separation by whole fleeces into colors, each fleece still containing the separate sorts of wool of which it was composed when sheared from the sheep's back.

There was no warrant, therefore, for classifying the gray and yellow wools here imported as "sorted," and therefore the double duty upon them was improperly exacted.

It is conceded that the white wool was not only separated by color, but also sorted in quality. As such, it would be liable to the double duty imposed by paragraph 383, except for the proviso which excepts "wools on which a duty is assessed amounting to three times or more than that which would be assessed if said wool was im-

ported unwashed." The board of appraisers found as a fact that the duty already assessed at 50 per cent. ad valorem on the white wool amounted to more than three times the amount to which it would have been subject if imported unwashed. We find nothing in the record to call for a review of this finding of fact, and, it being a fact, there was no warrant for the imposition of the double duty. In the argument *ab inconvenienti* advanced by the district attorney we do not find sufficient ground for restricting the proviso to those classes of wools (first and second class) upon which the statute assesses duty by the express term "unwashed." If third-class unwashed wool were imported, it would pay a duty easily ascertainable by multiplying the valuation by the ad valorem rate. When the statute also provides that, if the duty on the same wool washed is three times what it would be were the wool unwashed, there shall be no doubling on account of its being sorted, the language is plain and comprehensive of all wools, and there is no reason why it should be construed to have a different meaning from that which is expressed upon its face simply because it may not be convenient to ascertain the value of unwashed wool of the same class and grade as washed wool. The board of appraisers did not find the task impossible, and presumably the collector would have found it no more difficult. *Arthur v. Pastor*, 109 U. S. 139, 3 Sup. Ct. Rep. 96. The decision of the circuit court is affirmed.

In re WERTHEIMER et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

CUSTOMS DUTIES—CUMULATIVE DUTIES—MEN'S PRICK-SEAM GLOVES.

The tariff act of October 1, 1890, par. 458, imposes a duty of 50 per cent. ad valorem on men's leather gloves, and then provides that, "in addition to the above rates, there shall be paid on all men's gloves, \$1.00 per dozen; on all lined gloves, \$1.00 per dozen; on all pique or prick-seam gloves, \$.50 per dozen," etc. *Held*, that these additional rates were alternative, and not cumulative, and that, if the same article was included in two or more classes, it need only pay the rate applicable to the highest of those classes. 50 Fed. Rep. 67, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal by Wertheimer & Co. from a decision of the collector of the port of New York, ascertaining the duty on men's leather gloves imported by them. The circuit court reversed the decision of the appraisers, (50 Fed. Rep. 67,) and the United States appealed from that decision. Affirmed.

Henry C. Platt, Asst. U. S. Dist. Atty.

W. Wickham Smith, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Wertheimer & Co., on October 15, 1890, imported into the port of New York an invoice of men's leather pique or prick-seam gloves. The collector, deeming them to be also

embroidered, assessed a duty thereon of 50 per cent. ad valorem, and \$2 per dozen pairs, under the provisions of paragraph 458 of schedule N of the tariff act of October 1, 1890. The importers protested upon the ground that, by the proper construction of said paragraph, they were dutiable at 50 per cent. ad valorem and 50 cents per dozen pairs. The board of general appraisers found that the gloves were not embroidered, and held that the statutory duty upon men's pique gloves, under the paragraph, was 50 per cent. ad valorem, and \$1.50 per dozen pairs. From this decision the importers appealed to the circuit court, which reversed the decision of the board of general appraisers, and held that the proper rate of duty was \$1 per dozen pairs, in addition to 50 per cent. ad valorem. From this decision the United States has appealed.

Paragraph 458 is as follows:

"Gloves of all descriptions, composed wholly or in part of kid or other leather, and whether wholly or partly manufactured, shall pay duty at the rates fixed in connection with the following specified kinds thereof, fourteen inches in extreme length, when stretched to the full extent, being in each case hereby fixed as the standard, and one dozen pairs as the basis, namely: Ladies' and children's schmaschen of said length or under, one dollar and seventy-five cents per dozen; ladies' and children's lamb of said length or under, two dollars and twenty-five cents per dozen; ladies' and children's kid of said length or under, three dollars and twenty-five cents per dozen; ladies' and children's suedes of said length or under, fifty per centum ad valorem; all other ladies' and children's leather gloves, and all men's leather gloves, of said length or under, fifty per centum ad valorem; all leather gloves over fourteen inches in length, fifty per centum ad valorem; and in addition to the above rates there shall be paid on all men's gloves one dollar per dozen; on all lined gloves, one dollar per dozen; on all pique or prick-seam gloves, fifty cents per dozen; on all embroidered gloves, with more than three single strands or cords, fifty cents per dozen pairs."

The question in this case relates entirely to the proper construction of this paragraph, and is, are the additional duties imposed upon men's gloves, lined, prick-seamed, and embroidered gloves, cumulative, so that gloves having all the peculiarities named are liable to pay an additional rate of \$3 per dozen? The board of general appraisers decided this question in the affirmative. The circuit court was of opinion that the latter portion of the paragraph imposed alternative rates, and that, if the same article was included in two or more classes, it should pay, under section 5 of the act of June 10, 1890, the rate applicable to the highest class within which it was included. The theory of the government is that it was the legislative intent to impose an increased duty upon each class of gloves upon which additional labor and expense had been placed, and that the paragraph, after placing a rate upon the standard article, placed cumulative rates upon each class as it increased in value. The paragraph does not declare such an intent. It must be inferred, for nothing in the language directs a cumulative series of duties. The language is in harmony with the theory that additional specific rates were imposed upon four separate classes of gloves, and that each class should pay a duty in addition to the rates which had been imposed in the first part of the paragraph, but not additional to the rates which were im-

posed by the latter part of the paragraph. The result which would happen if a certain style of gloves should be included in more than one class was not the subject of this paragraph. Although gloves might be included in two or more classes, the language of the paragraph does not imply that they were to pay two or more rates, but the question of the dutiable rate under such circumstances is solvable by reference to section 5, which provides that, if two or more rates of duty are applicable to an imported article, it shall pay duty at the highest of such rates. The construction which imposes cumulative duties is one which seems strained and unnatural, in the absence of a more clearly expressed intention on the part of the legislature to assess duties upon a cumulative system. The judgment of the circuit court is affirmed.

In re CROWLEY et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

1. CUSTOMS DUTIES—EFFECT OF PROTEST.

When an importer protests that his invoices are dutiable under a certain paragraph of the tariff act, he is not thereby concluded, so as to prevent the board of appraisers from adjudging that a part of the invoices is dutiable under that paragraph, and a part under the classification adopted by the collector. *Davies v. Arthur*, 96 U. S. 148, distinguished.

2. SAME—ARTICLES IN SEPARATE PARTS—INVOICE.

The fact that articles in separate parts are invoiced as *entireties* is not controlling, and will not prevent a separate classification, when such classification is otherwise proper. 50 Fed. Rep. 465, affirmed.

3. SAME—CLASSIFICATION—EMBROIDERED DRESS PATTERNS.

Woolen dress patterns, embroidered with silk, or silk and metal, are not dutiable as woolen "embroideries," under paragraph 398 of the tariff act of 1890, but at 44 cents per pound and 50 per cent. *ad valorem*, under paragraph 395, as woolen dress goods. *In re Schefer*, 53 Fed. Rep. 1011, followed. 50 Fed. Rep. 465, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a proceeding by H. C. Crowley & Co. for a review of the decision of the board of general appraisers in relation to the classification of certain imported dress goods. The circuit court affirmed the action of the board, and the United States appeal. Affirmed.

James T. Van Rensselaer, Asst. U. S. Dist. Atty.

W. Wickham Smith, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In May, 1891, H. C. Crowley & Co. imported into the port of New York four invoices of woolen dress patterns, each pattern consisting of two pieces of woolen goods; one being plain, and the other embroidered with silk, or silk and metal. The whole pattern consisted of ten meters, the embroidered part not exceeding two meters. The patterns were invoiced as *entireties*, and the pieces were not intended to be sold separately. The collector assessed duties on the importations at the rate

of 60 cents per pound, and 60 per cent. ad valorem, as woolen embroideries, under the provisions of paragraph 398 of Schedule K of the tariff act of October 1, 1890. The importers protested that they were dutiable under paragraph 395 of the same schedule, as woolen dress goods, at 44 cents per pound and 50 per cent. ad valorem. The board of appraisers sustained the decision of the collector, under paragraph 398, and the proviso in paragraph 373 of the same act, so far as the embroidered part of the patterns was concerned, and sustained the protest of the importers upon the plain parts. The importers thus succeeded before the general appraisers as to four fifths of the imported articles, and took no appeal. The collector appealed to the circuit court for the southern district of New York, and alleged that the general appraisers erred in three particulars: (1) In "going outside the protest of the importers," who protested that all the importations should be assessed under paragraph 395; (2) in segregating the value of the plain and embroidered parts, because the patterns were invoiced as entireties, and were valued for duty accordingly; (3) in holding that the embroidered parts are dutiable at 60 per cent. ad valorem and 60 cents per pound, under paragraph 398 of said act, and the plain parts at 44 cents per pound and 50 per cent. ad valorem, as manufactures of wool, under paragraph 392 of the same, instead of applying the rates imposed by said paragraph 398 to the entire article, as embroidery made of wool, or as embroidered robes of wool. The circuit court affirmed the decision of the board of appraisers, and declined to go into the question whether they correctly determined that the silk embroidery made the article upon which it was placed dutiable as if it had been embroidered in wool, because there had been no appeal, and no application for review, in that particular. The United States have appealed to this court from said judgment.

This court has already decided (*In re Schefer*, 53 Fed. Rep. 1011) that the ground of objection stated by the importers in their protest was well founded, and consequently that the entire importations should have been assessed for duty under the provisions of paragraph 395; but this appeal relates simply to the correctness of the decision of the circuit court upon the points which were specified in the collector's appeal from the decision of the board of general appraisers.

The collector's first point was that, inasmuch as the importer protested that all the articles contained in the invoices were dutiable under paragraph 395, it was not competent for the board of general appraisers to adjudge that a part of the articles was dutiable under that paragraph, and that the residue had been assessed for duty at the proper rate. This contention carries the principle that the importer is concluded by his protest to an unjust extreme. The importer claimed that all his articles should have been assessed under a certain paragraph, and the board find that his protest was well founded, as to a part of his articles. This has been the invariable practice when, in the opinion of the triors, the facts warranted such a finding. The case is not that

of *Davies v. Arthur*, 96 U. S. 148, in which it is held that the importer, having in his protest placed his objections to the payment of duties at the required rate upon one ground, cannot recover the amount upon another ground than the one so stated.

The second point is that because the articles were invoiced as entireties, and valued for duty accordingly, the board had no power to assess duty upon separate parts of the articles, although in their opinion separate rates were properly assessable. Each article was an entirety, and constituted one dress pattern, and should have been assessed for duty accordingly, by the board of general appraisers, at the rate named in the protest; but the alleged error which the circuit court was called to consider was not that the article was in fact an entirety; the assignment of error was confined to the impropriety of imposing separate rates upon separate parts of an article, if it was invoiced as an entirety, and was valued as such. The mere fact that it is called an entirety in the invoice is not controlling. The article may nevertheless not be an entirety, and may have been improperly, though honestly, invoiced. The theory of the collector makes the assessment of duties upon a certain class of articles to depend entirely upon the manner in which they are entered and valued in the invoice,—a theory which might result in placing the rate of duties at the will of the importer.

The third point was that the dress patterns should have been assessed at the rates imposed by paragraph 398 as embroideries. This position was declared unsound in *Re Schefer*, *supra*,—a decision which we have no occasion to alter.

The judgment of the circuit court is affirmed.

In re SALOMON et al.

(Circuit Court, S. D. New York. March 14, 1893.)

1. CUSTOMS DUTIES—RATE OF DUTY—GLASS BOTTLES.

Under paragraph 104 of the tariff act of October 1, 1890, which provides that glass bottles filled with an article that pays an *ad valorem* duty shall pay the same duty as the contents, the dutiable value being ascertained by adding the value of the contents to the value of the bottles, "provided that no article manufactured from glass described in the preceding paragraph shall pay a less rate of duty than forty per centum *ad valorem*," glass bottles filled with blacking, dutiable at 25 per cent. *ad valorem*, under paragraph 11, are liable to duty at the rate of 40 per centum *ad valorem*.

2. SAME—CONSTRUCTION OF LAWS.

The words "preceding paragraph," as used in such proviso, do not refer exclusively to paragraph 103; and, whether or not they include 103, they do apply to 104. *Marine v. Packham*, 52 Fed. Rep. 579, distinguished.

Appeal by Importers from the Decision of the United States Board of General Appraisers affirming a decision of the collector of the Port of New York. Affirmed.

W. Wickham Smith, for appellants.

Thomas Greenwood, Asst. U. S. Atty., for collector.

COXE, District Judge. In March, 1892, the appellants imported a quantity of merchandise consisting of green or colored, molded or pressed, flint or lime glass bottles filled with blacking. Duty was assessed upon the blacking at the rate of 25 per centum ad valorem (paragraph 11 of the act of October 1, 1890) and on the bottles at the rate of 40 per centum ad valorem under the proviso of paragraph 104 of the same act, which is as follows:

"All articles enumerated in the preceding paragraph, [among the articles so enumerated are glass bottles similar to those imported by the appellants,] if filled, and not otherwise provided for in this act, and the contents are subject to an ad valorem duty, or to a rate of duty based upon the value of the value of such bottles, vials, or other vessels shall be added to the value of the contents for the ascertainment of the dutiable value of the latter; but if filled, and not otherwise provided for in this act, and the contents are not subject to an ad valorem rate of duty, or to a rate of duty based upon the value, or are free of duty, such bottles, vials, or other vessels shall pay, in addition to the duty, if any, on their contents the rates of duty prescribed in the preceding paragraph: provided, that no article manufactured from glass described in the preceding paragraph shall pay a less rate of duty than forty per centum ad valorem."

Paraphrased to fit the facts of this case, paragraph 104 would read as follows:

"Green, etc., glass bottles, when filled with something that pays an ad valorem duty, shall pay the same duty as the contents, the dutiable value being ascertained by adding the value of the contents to the value of the bottles: provided, that no glass bottle shall pay less than forty per centum ad valorem."

The appellants insist that their bottles should pay but 25 per centum because their blacking pays only at that rate. I do not so understand the law. Paragraph 103 describes well-known articles of glassware, and, when they are empty, imposes a specific duty upon them. Paragraph 104 deals with the same articles when filled. It is manifest that if filled with some substance paying a low rate of duty ad valorem the bottles described in 103 would come in under the same low rate. Designing men could thus evade the provisions of the law. To guard against this contingency congress inserted the proviso, intended to prevent importers from avoiding the payment of duties which should approximate those of 103 by filling the bottles and importing them under 104. It is as if the proviso read:

"Provided that no article described in paragraph 103 shall, under the provisions of 104, avoid the payment of adequate duties, for all such articles when assessed with an ad valorem duty shall pay at least forty per centum."

It is argued that the proviso applies exclusively to paragraph 103. What possible reason can be suggested for placing a proviso at the end of paragraph 104 which was only intended to apply to 103? Why was it not placed at the end of 103? I have examined *Marine v. Packham*, 52 Fed. Rep. 579. The precise question there was whether the proviso applies to 103. The majority of the court held that it does. Whether it does or not is a question not involved in this controversy. The sole question here is, does the proviso apply to paragraph 104, a question not involved in *Marine v. Packham*. I am clearly of the opinion that the proviso does apply to 104.

The decision of the board was right, and should be affirmed.

ADRIANCE, PLATT & CO. v. M'CORMICK HARVESTING MACH. CO.

(Circuit Court, N. D. New York. October 13, 1892.)

1. PATENTS FOR INVENTIONS — SUITS FOR INFRINGEMENT — SUITS FOUNDED ON CONTRACT.

The owners of certain patents granted to complainant the exclusive right to make, use, and vend the patented machines in specified territory of the United States, and also, "so far as they could control the same, the exclusive right to make the patented machines for sale in Europe, Australia, and South America." Thereafter the owners conveyed all their right in the patents to defendant, subject to the rights of the complainant, from which time complainant paid to defendant the royalties under its license. Subsequently complainant sued defendant to restrain it from manufacturing machines under the patent, for sale in Europe, Australia, and South America. *Held*, that under the conveyance to it defendant assumed no contract relation with complainant, and thereafter the suit was not founded upon the contract, but was an ordinary suit for infringement of a patent.

2. SAME—JURISDICTION OF FEDERAL COURTS—DISTRICTS.

In a suit in which the jurisdiction of the circuit court is founded wholly or partly upon the patent laws of the United States, a corporation organized under the laws of another state cannot be sued in a state where it does business by a citizen of a third state. *Shaw v. Mining Co.*, 12 Sup. Ct. Rep. 935, 145 U. S. 444, followed.

In Equity. Bill by Adriance, Platt & Co. against the McCormick Harvesting Machine Company for infringement of certain patents. On motion for preliminary injunction. Denied.

Geo. B. Selden, (Chambers & Boughton, of counsel,) for complainant.

John E. Brandeger, (R. L. Parkinson, of counsel,) for defendant.

WALLACE, Circuit Judge. The motion for a preliminary injunction must be denied, because, irrespective of any other considerations, the jurisdictional objection raised by the defendant is fatal to the suit. The bill alleges that certain letters patent of the United States for inventions in harvester and grain binding machines were granted to one Severance, the inventor; that Severance thereafter conveyed a two-thirds interest therein to Adsit and Baldwin; that thereafter Severance, Adsit, and Baldwin, being then the owners of all the patents, granted to the complainant, upon the condition of the payment of a royalty of five dollars on each machine, the exclusive right to make, use, and vend the patented machines in certain specified territory of the United States, and also, so far as they could control the same, the exclusive right to build the patented machines for sale in Europe, Australia, and South America; that thereafter the said Severance, Adsit, and Baldwin, being still the owners of the patents, transferred all their right, title, and interest therein to McCormick, subject to the rights of complainant under the license; that thereafter McCormick, being then the owner of the patents, granted and conveyed to the defendant the exclusive right to make, use, and vend the patented inventions throughout the United States, subject to the rights of the complainant; that since McCormick became the owner of the

patents the complainant has always paid him the royalties secured by the license agreement with the original owners, among them the royalties on all machines made by complainant and sold in foreign countries; and that the defendant, in violation of the complainant's exclusive rights, has made and sold machines containing the patented inventions in England, France, and Germany, and threatens to continue so to do. The prayer for relief is for an injunction and an accounting.

Upon the hearing of the motion there seemed to be reason to doubt whether the suit was not founded on the breach of contract between complainant and the original owners of the patents set forth, to which McCormick and his licensee, the defendant, had subsequently become parties. But an examination of the bill shows that neither McCormick nor the defendant has assumed any contract obligation to the complainant, and, notwithstanding what has taken place between the original owners and McCormick, and between McCormick and the complainant, and between McCormick and the defendant, upon the facts set forth the cause of action is the ordinary one for infringement of a patent, in which the complainant must establish his right in the usual way, and to which the defendant is at liberty to interpose all the defenses which exist in an infringement suit. It is in no sense a suit to enforce a contract, either specifically or by enjoining a breach. It follows that the jurisdiction of this court is not founded "only on the fact that the suit is between citizens of different states," within the terms of section 1 of the act of congress of March 3, 1887. Jurisdiction is also founded on the fact that the suit arises under the laws of the United States. The defendant, as a corporation of the state of Illinois, is not amenable in such a suit to the process of this court. *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. Rep. 935.

Injunction refused.

ADRIANCE, PLATT & CO. v. McCORMICK HARVESTING MACH.
CO. et al.

(Circuit Court, N. D. Illinois. March 24, 1893.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT SUITS—PARTIES.

A licensee may prosecute in his own name suit for infringement of a patent where the defendant is the owner of the legal title to the patent; citing *Littlefield v. Perry*, 21 Wall. 205.

2. CONTRACT—CONSTRUCTION OF—AMBIGUITY.

It is only a latent ambiguity, which may be explained by evidence aliunde. Doubts apparent upon the face of an instrument must be resolved by the court, resorting, if necessary, to the rule that a grant expressed in doubtful words shall be construed most strongly against the grantor.

3. PATENTS FOR INVENTIONS—LICENSE FOR SALE IN FOREIGN COUNTRIES.

In addition to the grant of an exclusive license to manufacture and sell in certain specified parts of the United States, the license in this case contained the following clause: "And, so far as we can control the same, the exclusive right to build harvesters and binders, under the rights herein granted, for sale in Europe, Australia, and South America." *Held* that, fairly and reasonably construed, this language conferred upon the licensee

an exclusive right to manufacture within the United States, for sale in the foreign countries named, and hence that an injunction should issue against the parties manufacturing in the United States outside the territorial limits covered by the license to restrain them from manufacturing for such foreign trade.

4. INJUNCTIONS ORDERED.

In this case the court finds that complainant is entitled to a preliminary injunction to restrain infringement of 16 patents issued to James R. Severance for improvements in harvesters and binders.

In Equity. Bill by Adriance, Platt & Co. against the McCormick Harvesting Machine Company and others for infringement of certain patents. On motion for preliminary injunction. Granted.

Banning, Banning & Payson, for complainant.
Robert H. Parkinson, for defendants.

WOODS, Circuit Judge. The bill shows that 16 letters patent of the United States for improvements on harvesters and binders had been issued to one Severance, the inventor; that Severance had conveyed a two-thirds interest to Adsit and Baldwin; that they three, being owners of all the patents, granted to the complainant, an incorporated company, upon condition of the payment of a royalty of five dollars upon each machine made and sold, the exclusive right to make, use, and vend the inventions in specified parts of the United States, and also, so far as they could control the same, the exclusive right to build the patented machines for sale in Europe, Australia, and South America; that thereafter Severance, Adsit, and Baldwin transferred all their right, title, and interest in the patents to the defendant McCormick, subject to the rights of the complainant; that McCormick, being the president of the defendant company, granted and conveyed the rights and interest so acquired by him to that company, subject to the rights of the complainant; that, since McCormick became owner of the patents and assignee of the contract between the complainant and Severance, Adsit, and Baldwin, the complainant has duly paid to him the royalties in that contract stipulated to be paid upon all machines sold, including machines sold in Europe; but that the defendants, in violation of the complainant's exclusive right, have made and sold machines containing the patented improvement in England, France, and Germany, and threaten to continue to do so.

There are two instruments, alleged to have been executed by Severance, Adsit, and Baldwin, under which the complainant asserts its claims; but the first of them, dated August 29, 1887, was signed only by Baldwin, and his authority to bind Adsit and Severance is questioned. Whether or not he had authority need not be considered, because that writing, it seems clear, was intended to be only a preliminary agreement, which for present purposes should be deemed to be merged in the more formal deed of November 18, 1887, which was executed by all parties concerned, and was duly recorded in the patent office at Washington. By that deed, after reciting the various patents and transfers thereof which

had been made, the owners grant to the complainant the exclusive right to make, use, and vend the inventions covered by the patents and by renewals thereof in specified parts of the United States, "and also, as far as we [the owners] can control the same, the exclusive right to build harvesters and binders under the rights here-in granted for sale in Europe, Australia, and South America."

Upon a similar bill brought by the complainant against the defendant company in the United States circuit court for the northern district of New York, and which was dismissed because the defendant was not amenable to process in that state, Judge Wallace held that neither McCormick nor the defendant had "assumed any contract obligation to the complainant," and that upon the facts set forth "the cause of action is the ordinary one for infringement," to be prosecuted and defended in the usual way. 55 Fed. Rep. 287. There is here, however, no question of jurisdiction; and it is not necessary to consider whether or not the defendants, by taking title to the patents subject to complainant's rights, and by taking an assignment of complainant's obligation to pay royalties, and by receiving payment thereof from the complainant, notwithstanding they have assumed no contract obligation, are estopped to deny the validity of the patents, or complainant's rights thereunder. Familiar analogies may be found in the sales of property, real or personal, subject to the rights of third parties. But here the defendants have made no question of the validity of the patents or of complainant's right, except disputing the scope of the grant under which they are asserted, and do not deny having made in the United States, for sale in Europe, machines covered by some of the patents, and avow their purpose to continue so to do. They concede to the complainant, in connection with its exclusive right to manufacture and sell within the territorial limits of its grant in the United States, the right within those limits, exclusive therein, to manufacture for sale in the foreign countries named; but claim for themselves, in connection with their exclusive right to manufacture and sell in other parts of the United States, a corresponding right therein to manufacture for sale in the same foreign countries. The complainant, on the other hand, insists that the right given it to build machines under the patents for sale abroad is exclusive, not in respect to the territory in this country in which it may build machines for foreign sale, but in respect to the countries in which the sales may be made.

One of the defendants being the owner of the patents sued on, the complainant, though only a licensee, may prosecute the suit in its own name. *Littlefield v. Perry*, 21 Wall. 205.

Affidavits have been presented on either side, to aid or control the interpretation of the grant in question, but they are not deemed admissible. It is a latent ambiguity, which may be explained by evidence aliunde. Doubts apparent upon the face of an instrument must be resolved by the court, resorting, if necessary, to the rule that a grant expressed in doubtful words shall be construed most strongly against the grantor, whose words they are. Fairly

and reasonably construed, the terms used in this grant must be held to have conferred upon the complainant the exclusive right which it contends for in respect to sales abroad. The owners of the patents first give the complainant an entire and exclusive right under the patents to make, use, and sell the invention in designated parts of the United States, and then add the clause the meaning of which is in dispute: "And also, so far as we can control the same, the exclusive right to build harvesters and binders under the rights herein granted for sale in Europe, Australia, and South America."

It is insisted on behalf of the respondent that the phrase, "under the rights herein granted," expresses a territorial limitation, which confines "the exclusive right" to build machines for sale abroad to those parts of the United States to which the preceding grant was restricted; making it the meaning of the entire clause that in those parts of the United States, to the exclusion of all others, the complainant should have the right to build machines for sale abroad in the countries mentioned. This, as it seems to me, is a forced and inadequate construction. It requires that the word "herein" be read as if it were "hereinbefore," makes the word "exclusive" meaningless, and leaves to the phrase, "as far as we can control the same," little or no significance.

The exclusive right of the complainant in this country had been defined in unequivocal terms by the first clause of the grant. Nothing further was necessary to exclude the grantors or third persons from making or selling the invention within the designated states and territories, (*Brush Electric Co. v. California Electric Light Co.*, 52 Fed. Rep. 945, 959;) and if the purpose was simply to give the complainant the further, but not exclusive, right to sell in the countries abroad, it would have been enough to add, "And also the right to build, within the states and territories named, harvesters and binders, containing the inventions, for sale in Europe, Australia, and South America," with a proviso that the right should be protected and continued under any foreign patents which should be obtained. But the purpose having been, as I conclude it was, to give the complainant the exclusive right to manufacture in this country, (within the limits of its grant,) for sale in the foreign countries named, the use of the word "exclusive," or its equivalent, which otherwise would have been meaningless, was apt and necessary; and it was also important to say, "as far as we can control the same," because, in respect to such exclusive right to sell abroad, the owners could exercise a control much more effective than in respect to a right which was not exclusive by refraining on their own part from competitive sale abroad of machines made either in this country or elsewhere, by binding subsequent grantees or licensees to respect complainant's right, and by making or attempting to make no grant to others, either under these patents or any obtained abroad, inconsistent with the grant to the complainant.

The word "herein," as used in the sentence under consideration, includes the whole instrument,—the clause in which it is found

as well as the preceding clause; and the phrase, "under the rights herein granted," has, as it seems to me, the same force as if the words were, "by right of this grant," or "under this grant." With such change there could be no question of the meaning. And without any change of words, the meaning of the clause may be demonstrated by transposition in this way: "And also, under the rights herein granted, the exclusive right, as far as we can control the same, to build harvesters and binders for sale in Europe," etc. Read in this way, the entire expression is harmonious, and just force is given to each word and phrase. After the grant to the complainant, the owners of the patents, and their subsequent grantees, who took right or title with knowledge of or subject to the first grant, had no right within the United States to build machines to be sold at home or abroad in the states or countries wherein the complainant had been given the exclusive right to sell, and such manufacture and sale would be an infringement of the rights of the complainant under the patent. *Blatchford, J., in Ketchum Harvester Co. v. Johnson Harvester Co., 8 Fed. Rep. 586.*

It follows that the machines containing the inventions, which the defendants have made in this country, and have sold in England, France, and Germany, have been made in infringement of the rights of the complainant under the patents; and that, since the fact that the defendants propose to continue such manufacture and sale is admitted, the complainant is entitled to the temporary injunction prayed, and it is so ordered.

Since the foregoing was written the complainant has presented a second motion, asking a temporary order restraining the defendants against interference with and threatened infringement of complainant's rights within its territory in the United States, but the defendants deny that they have interfered as charged, and that they have any purpose to infringe, and the proof offered by the complainant is insufficient. The motion is therefore overruled.

LALANCE & GROSJEAN MANUF'G CO. v. HABERMAN MANUF'G CO.

SAME v. MOSHEIM.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

1. PATENTS FOR INVENTIONS—VALIDITY—INDEFINITENESS—ENAMELING.

In letters patent No. 279,094, issued June 5, 1883, to Emile Kegreisz, claim 1 covers an improved process of giving a variegated appearance to enameled ironware, by recoating it with a colored glaze after it has been enameled in the usual way. The specification described the process as follows: "After the ordinary process of enameling has been completed, I prepare a thin glaze, composed of any coloring matter that can be made to remain mechanically suspended a short time in water, and apply it to the article. * * * The glaze should be made sufficiently thin to avoid being pasty, so that it will freely spread or run over the surface. * * * The glaze will be found to separate and coagulate in irregular spots." *Held*, that the patent is not invalid for insufficiency of description, in that

It does not state that the coloring matter must be coarse ground, so as to remain but a short time mechanically suspended, for one skilled in the art would know that this result could only be obtained by the use of coarse-ground material. 53 Fed. Rep. 375, 380, affirmed.

2. SAME—ANTICIPATION—EVIDENCE.

Anticipation of the patent was alleged on the ground that one Vollrath had long ago used a similar process, but the evidence showed that, as used by him, the second coat of coloring matter was uniform and of the same consistency as the original coating of enamel, and that a mottled appearance was produced by agitation of the vessel or by striking upon it. Moreover, Vollrath had applied for a patent in which three coats were used. *Held*, that an anticipation was not shown. 53 Fed. Rep. 375, 380, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

In Equity. These were two suits by the Lalance & Grosjean Manufacturing Company against the Haberman Manufacturing Company and Julius E. Mosheim, respectively, for the infringement of a patent. There were decrees for complainant in each case, and defendants appeal. See 53 Fed. Rep. 375, 380. Affirmed.

R. D. Kenyon and E. Cowen, for appellant.

A. v. Briesen and Jos. H. Choate, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. These two appeals are from decrees of the circuit court for the northern district of New York upon two bills in equity which were founded upon the alleged infringement of letters patent No. 279,094, dated June 5, 1883, to Emile Kegreisz, assignor to the complainant, for an improved process of enameling ironware, and for the product of such process. The first claim of the patent is for the process, the second claim is for the product. The Haberman Company is a manufacturer, which is charged with infringement of each claim. Mosheim is a merchant, and is charged with infringing the second claim only. The circuit court granted decrees for an injunction and an accounting in each case.

The ordinary process of enameling hollow ironware is to clean the surface from rust or scale, to mix the enameling materials, melt them, cool and then grind the molten mass, and, after mixing with water, apply the enamel in liquid form to the iron vessel by pouring or dipping. The vessel is then dried in an oven and burned in a muffle. The burning fuses the enamel, and creates a new smooth, glassy surface, which is, as a rule, of a uniform color, liable to have spots or defects from one cause or another, and not attractive in appearance. The object of the patented process was to decorate or beautify the surface, and cause vessels of mere utility to be pleasing to the eye. The patentee described in his specification the object of the invention and his process, as follows:

"It consists in an improved method of giving a variegated appearance to the ware after the same has been coated or enameled by the usual process. In the manufacture of white-enameled ironware by the usual process it frequent-

ly happens that dark spots appear upon the surface of the enameled article, which practically destroy its beauty, and render it unfit for commercial purposes, although it is in no wise injured for actual use. For the purpose of restoring the commercial value of the imperfect article by beautifying its surface, I have devised a process of recoating the same with a colored liquid in such a manner as to give an irregularly mottled appearance to the article, which conceals the spots appearing upon the previously white surface, and produces a new article of manufacture of greatly enhanced beauty and value. The article, having been formed of iron or other metallic substance by casting or otherwise, is subjected to the well-known process of enameling for producing a white or other plain-colored surface. After the ordinary process of enameling has been completed, I prepare a thin glaze, composed of any coloring matter that can be made to remain mechanically suspended a short time in water, and apply it to the article, preferably either by immersing the latter in a tank containing said glaze, or by pouring the glaze upon the article. The glaze should be made sufficiently thin to avoid being pasty, so that it will freely spread or run over the surface. After the article has been submitted to the second bath of thin glaze, the latter will be found to separate and coagulate in irregular spots upon the smooth surface formed by the first coating of glaze. These spots are composed of varying thicknesses, causing each spot to present various shades of the coloring matter used. By varying the thickness of the second coating of glaze its density in shade, when applied to the vessel, will be correspondingly varied. I have produced very fine effects with a blue glaze upon a white-enameled surface; but other colors may be used, either upon a white ground or the other plain colors obtained by the ordinary process of enameling. Two or more colors may be used for the glaze, and thus a great variety of irregularly colored surfaces be produced, according to the taste or fancy of the designer. After the application of the glaze, the article is placed in a drying oven, heated to a temperature of about 130 deg. Fahrenheit, and is kept there until the glaze is approximately dry, when it is removed to the oven or muffle employed in the well-known enameling process, where it is a second time fired, as in the usual process of enameling."

The commonly received method of preparing the enamel was to grind it as fine as might be, so that it should not sink in the water, but the particles should remain suspended, and should approximately resemble impalpable powder. The invention consisted in coarsely grinding the second coat of enamel, so that the particles were capable of suspension in water but a short time, and in mixing the enamel freely with water, so as to make a thin glaze. When the iron article is dipped in this second coating, the heavy particles rapidly form the freely flowing enamel into drops which have a wave-like motion, and which separate and coagulate in what the patent terms "irregular spots." The second coating, being thus made up of somewhat larger particles, flows over the surface with an irregular thickness, and the particles lodge upon the surface of the first coat, so as to give the appearance of having moved forward with a wave-like motion. The appearance of the surface is described by the complainant's expert as follows:

"The surface is covered with an irregular series of waves or of wave-like appearances, in which can nevertheless be traced a certain parallelism or uniformity of line flow. The lower edge of each wave is more opaque than the other portion, and shades off gradually until it is nearly or quite the tint of the ground upon which it is superposed."

The appearance of iron cooking utensils, bowls, platters, and other articles of ordinary household service, when ornamented in this way, is exceedingly agreeable to the eye, and this class of ware has therefore a utility of its own.

The two claims of the patent are as follows:

"(1) The hereinbefore described process of enameling and ornamenting metal ware, which consists in first covering the body of the article with a glaze of any suitable plain color, firing the same, then applying to the surface an additional coating or partial coating of glaze of a different color from the first, the glaze constituting the second coating or partial coating being of such a consistency as to coagulate in irregular spots upon the surface, and again firing, as set forth. (2) As a new article of manufacture, an enameled vessel, presenting a mottled or variegated surface of two or more colors, produced by the coagulating in irregular spots of one or more of the coatings of glaze, substantially as set forth."

The two questions in the cases which are earnestly contested, and which are not easily answered, are those which relate to the novelty of the process and the vagueness of the patent.

It is undeniable that Jacob J. Vollrath, an ironware manufacturer of Sheboygan, Wis., made from 1875 to 1883 and before the date of the invention large quantities of enameled ware, which was known by the name of "gray-enameled ware," and which he sold by the car load. He generally used two coats of enamel. The first was whitish in color, which, when burned became dark and smooth. The second coat, also of the same whitish color, was turned into the inside of the vessel by means of a dipper, the enamel was rapidly whirled around the inside so as to cover the surface, the superfluous enamel was poured back, the article was then hung upon a hook and struck with a wooden hammer apparently to expedite the flow, the rim of the vessel was wiped off, and the vessel was quickly "jerked" or shaken. The entire surface of the enamel, after a second burning, was flecked with small spots, not regular in shape, which the German mechanics who testified called "checky," and which gave the inside of the vessel a spotted or checked appearance of different shades of color. The object was to make the surface more attractive. No person who made the enamel, or who knew its composition, was examined as a witness, and therefore its character is defined only in general terms by persons who are not accustomed to exactness in the use of language. An accurate idea of the peculiarities of the second coat cannot be obtained merely from the general description which is given by these witnesses. It was thin enough so that by pouring it with a dipper and twirling the vessel around it was made to spread freely over the surface of the vessel, and was not so pasty but that it would run with freedom. Upon the question of the coarseness of the second coat, which is the peculiar and distinguishing feature of the patented process, at least three witnesses testify that it felt rough, or "sand-like," or coarse, and at least three more testify that it had to be stirred frequently to be kept from settling in a mass. Other witnesses testify in such a manner that the coarse character of the second coat may be inferred. While the intentionally vague oral testimony of Vollrath, which was designed to help the complainant, does not carry conviction to our minds, the fact of importance which is connected with Vollrath is that in 1881 he applied for and obtained a patent for a process of enameling by a three-fold coating, thus indicating that he did not regard his two-coat process, which was practiced from and after 1875, as a novelty

worthy of a patent. In this state of the testimony, the appearance and character of the specimens of ware which were made by the Vollrath process of 1875, and which are the defendants' exhibits, become of great importance. They show variegated or checkered spots, made intentionally, for the purpose of ornamentation, but they do not show the wave-like motion of the drops before coagulation, and in that respect they differ from the appearance of the patented ware, and the difference indicates, if it does not effectually prove, that the second coating was not, as a rule, coarsely ground. The Vollrath process was a two-coat process; there being little substantial or uniform difference between the coats. The second coat was universally spread over the surface of the vessel, which was hammered or pounded, so as to compel the coating to be generally thinly distributed, and to cause any excess to flow away. The vessel was then sharply shaken, so that the second coat should be broken up, or divided into spots. The whole evidence does not satisfy the mind that the patented process was used by Vollrath before he became the complainant's licensee.

The next question relates to the vagueness of the patent, and it is insisted with much force that the distinctive feature of the process is nowhere described, and that, so far as appears from either specification or claims, it was a repetition of the Vollrath method of enameling. As has been said, the customary mode of preparing enamel had been to reduce it to a fine powder. The patentee did not instruct the public in words that the enamel was to be coarsely ground. The instructions were that the second or thin glaze was to be composed of any coloring matter that can be made to remain mechanically suspended a short time in water. He evidently intended to distinguish between "a short time" and the usual long time which enamelers aimed at. His object could not have been to say that it must remain at least a short time, and might remain much longer, but he wanted to point out that all that was requisite was a short time of suspension. He did not say that a short time of suspension, i. e. coarse grinding, was indispensable, and therein consists the vagueness of the patent; but, inasmuch as coarse grinding was known by the enameler to result in suspension for a short time only in the water, it is insisted by the complainant that he was necessarily instructed by the language to grind coarsely.

It cannot be denied that the language is vague, and does not inform a person who is not instructed in the enameling art. Whether it sufficiently informs the members of the craft, whom the language was meant to instruct, no testimony has been given, except by the defendants' expert, who was not a practical enameler, who considered that the instructions were very indefinite. On the other hand, it is said by the complainant's expert, who was not a practical enameler, that the only way known to him of making coloring matter to remain suspended a short time in water was to grind it coarsely. It is noticeable that no testimony was produced by the defendant from any skilled enameler that he would not have been able to understand the patent and be correctly instructed by it. Silence upon this point in a case so carefully prepared as this was is significant,

and, inasmuch as the testimony furnished by the defendants, upon whom rests the burden of proof, is very slender, and it gives no light in regard to the information which the mechanic gained from the patent, our conclusion is that the defense has not been established.

That the invention, if novel, was patentable, is not susceptible of earnest denial. The attackable defects in the patent are those which have already been examined.

No testimony was introduced to disprove the *prima facie* case which the complainant made of infringement by the Haberman Manufacturing Company, which manufactured by the process and sold the product, and by the defendant Mosheim, who only sold the new article of manufacture which was made by the process, and therefore infringed the second claim. This claim is for the new article, produced by the process of the first claim. *Glue Co. v. Upton*, 4 Cliff. 237.

The decrees of the circuit court are affirmed.

RUSSELL v. NEWARK MACHINE CO. et al.
(District Court, S. D. Ohio, E. D. March 13, 1893.)

No. 29.

1. PATENTS FOR INVENTIONS—VIOLATION OF LAWS—WRONGFUL MARKING.

A person who marks as patented, under letters patent of a certain date and number, a machine which does not in fact contain the invention covered by such patent, is not guilty of violating either clause 1 or 2 of Rev. St. § 4901, relating to the wrongful marking of articles as patented.

2. SAME.

In order to render defendant liable under clause 3 of said section, the burden is upon the plaintiff to show that the article marked "Patented" was not covered by any patent; and this burden is not met by showing that the machine did not contain the invention covered by one patent which was marked upon the same, there being other patents also marked thereon.

3. SAME—PLEADING.

In a petition to recover penalties under Rev. St. § 4901, an allegation "that said straw-stacking machine so manufactured, marked, and advertised by the defendant was not covered by the letters patent granted to Henry S. Stone and James M. F. Shepler, February 6, 1883, and numbered 271,943, or any other letters patent of the United States of that date or number," is specific and limited, and cannot be expanded into a general allegation that the machines were unpatented, so as to bring the case within the third clause of that section.

At Law. Action by Allen Russell against the Newark Machine Company and others to recover the penalties prescribed by Rev. St. § 4901, forbidding the wrongful marking of articles as patented. Judgment for defendants.

Rev. St. § 4901, reads as follows:

"Every person who in any manner marks upon anything made, used, or sold by him, for which he has not obtained a patent, the name, or any imitation of the name, of any person who has obtained a patent therefor, without the consent of such patentee, or his assigns or legal representatives; or

"Who in any manner marks upon or affixes to any such patented article the word 'patent' or 'patentee,' or the words 'letters patent,' or any word of like import, with intent to imitate or counterfeit the mark or device of the patentee, without having the license or consent of such patentee, or his assigns or legal representatives; or

"Who in any manner marks upon or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public,—shall be liable for every such offense, to a penalty of not less than one hundred dollars, with costs, one half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any district court of the United States within whose jurisdiction such offense may have been committed."

Charles R. Miller, for plaintiff.

Staley & Shepherd, for defendants.

SAGE, District Judge. This is an action for penalties under section 4901 of the Revised Statutes of the United States. The plaintiff alleges that Henry F. Stone and James M. F. Shepler are the inventors of a new and useful straw-stacking machine, and on the 6th of February, 1883, letters patent of the United States numbered 271,943 were issued to them therefor. He further alleges that subsequently—

"To wit, between the first day of January, 1890, and the first day of January, 1891, the exact date of which the plaintiff is unable to learn, the defendants the Newark Machine Company and J. P. McCune, president, at the city of Columbus, in the state of Ohio, in the southern district, and the eastern division thereof, did manufacture, and cause to be manufactured, a certain other straw-stacking machine, in addition to the ones heretofore complained of, and did mark, or cause the same to be marked, 'Letters Patent No. 271,943, February 6, 1883,' and advertised, in circulars, and otherwise, that the same was covered by and made in accordance with said letters patent."

"That said straw-stacking machine so manufactured, marked, and advertised by the defendants was not covered by the letters patent granted to Henry S. Stone and James M. F. Shepler, February 6, 1883, and numbered 271,943, or any other letters patent of the United States of that date or number, of all which said defendants had full knowledge, but the said defendants the Newark Machine Company and J. P. McCune, president, caused the same to be marked, and did so mark the said straw-stacking machine, with the intent and for the purpose of deceiving the public."

The admitted facts in the case are:

(1) That letters patent of the United States were on February 6, 1883, issued to Henry S. Stone and James M. F. Shepler, and numbered 271,943, and that Allen Russell is now the owner of an undivided one fourth.

(2) That the defendants, without authority or right derived from the patentees or their assignee, branded upon the stackers made by them within the southern district of Ohio the date and number of this patent.

(3) That the stackers so branded by the defendants did not contain the improvements set forth and claimed in said letters patent.

(4) That the defendants had advertised in their circulars that said patented improvement was embodied in their "Imperial" stacker, and warned the public against using straw stackers containing the same unless manufactured by them.

(5) That in December, 1885, the defendants obtained from W. H. Johnson a license to use certain letters patent, but not the one involved in this suit.

(6) That Johnson acquired title to the patents for which he issued the license to the defendants from C. E. Merrifield, and that in circulars previously issued by Merrifield & Co. they claimed to own, not only the patents for which Johnson issued a license to the defendants, but also the patent involved in this suit.

The case does not come within the first or the second clause of section 4901, because it is admitted that the machines made and sold by the defendants did not contain the improvements set forth and claimed in said letters patent.

The plaintiff relies upon the third clause of the section, contending that the evidence establishes that the machines manufactured by the defendants, and marked "Patented February 6, 1883, No. 271,943," were not patented of that date and number, and that there is no evidence to show that they were patented under, or made in compliance with, any of the other patents branded thereon. But there is no allegation in the petition that the defendants' machines were unpatented. The only allegation is that they were not covered by the patent granted to Stone and Shepler, February 6, 1883, and numbered 271,943, or any other patent of that date, which is a specific and limited allegation, and cannot be expanded by construction into a general allegation that they were unpatented, so as to bring the case within the provisions of the third clause of section 4901. Besides, there is no proof that they were not patented, and the burden is upon the plaintiff. It is stipulated that they were marked as patented under seven patents, of which No. 271,943 was one. The evidence is that the defendants manufactured the Imperial straw stacker under a license obtained indirectly from C. E. Merrifield & Co., who by a printed circular, which is in evidence, described the same as manufactured under seven patents, including No. 271,943, and cautioned all persons from buying or using machines infringing any claims of the same. It is also in evidence that defendants acquired 80 Imperial stackers manufactured by Merrifield & Co. or their licensees, and that those stackers were marked exactly as defendants marked the stackers of their own manufacture. The testimony of defendant John McCune, president of the defendant company, is that he always believed that the company had a right to use the marks of patent No. 271,943; always supposed that that patent was included in their license until the latter part of 1891, when, examining the license for the first time, he discovered that it was not included, and that after that time they never used the mark of that patent. Certain letters written by the plaintiff and by his attorneys to the defendants and their attorneys are in evidence, which, it is claimed, raise a presumption of the guilty knowledge of defendants sufficient to overcome the direct evidence of Mr. McCune. The first letter was written by plaintiff. It is dated "Indianapolis, 26th of March, 1888." He notifies the defendant company that he claims to own at least a half interest in the patents under which it was building

the Imperial straw stacker, and, forbidding it to continue the manufacture, advises that he shall hold it liable for damages. In the second letter, dated 24th of February, 1891, his attorney requests the attorney for the defendant company to inform him from whom that company received license or authority to use patent No. 271,943. In the third letter, dated "Canton, Ohio, September 30, 1891," plaintiff's attorney, then recently employed, refers to the defendant company's marking its machines as manufactured under patent No. 271,943, issued February 6, 1883, and, stating that he had not had opportunity to examine the machines to ascertain whether they were covered by that patent, requests, on behalf of the plaintiff, that if they are doing so they will discontinue its use, and arrange for payment therefor. Not receiving any answer, he calls attention to that letter by a letter dated October 12, 1891, to which, on October 13th, the defendant company answered that it was not using the patent referred to in the letter of September 30th. Then came a letter under date of October 15, 1891, from the plaintiff's attorney, acknowledging the defendant's disclaimer of present use, but inquiring whether it had used the patented device at any time since the date of the patent, to which, on the 17th of October, the defendant company answered in the negative. There is nothing in any of these letters that suggests that the defendant company was marking an unpatented article, contrary to the provisions of section 4901. All the letters indicate that the plaintiff claimed to own certain rights under patent No. 271,943, and that he intended to hold the defendants liable for infringement. Granting that the fact of marking upon or affixing to an unpatented article the word "patent" casts upon the person so doing the burden of proving that he was not guilty of any intent to defraud, the rule does not apply in this case; and, if it did, there is nothing in the evidence tending to overcome the testimony of Mr. McCune that there was no such intent on the part of the defendants. This case is not affected by the rule in *Deverall v. Banker*, 45 O. G. 591, cited for the plaintiff, that where a manufactured article contains, in addition to what is described and claimed in patents owned by the manufacturer, something new, substantial, and valuable in the market, he has no right, simply because the new article embodies the invention covered by those patents, to mark it, as a whole, "Patented." In that case it appeared affirmatively that the article marked "Patented" was something more than was claimed in the patent offered as covering it, and that it "accomplished, and was designed to accomplish, a further purpose." In this case it appears from the evidence that the article was marked with the number and date of each of the seven patents named in the license under which the defendant company claimed that it was manufactured and sold, and, although it is stipulated that it did not contain the improvements set forth in patent No. 271,943,—one of the seven,—the stipulation does not include the other six, and there is no evidence even tending to show that it was not covered by them, nor is there any showing that it was in fact in any part unpatented. No case for the plaintiff is made out. The judgment will be for the defendants.

PITTSBURGH REDUCTION CO. v. COWLES ELECTRIC SMELTING
& ALUMINUM CO.

(Circuit Court, N. D. Ohio, E. D. January 20, 1893.)

No. 4,869.

1. PATENTS FOR INVENTIONS—ANTICIPATION—ALUMINUM BY ELECTROLYSIS.

Letters patent No. 400,766, granted April 2, 1889, to Charles M. Hall, for an improved process of reducing aluminum by electrolysis, which process consists in dissolving alumina in a fused bath of the fluorides of aluminum and of some metal more electro-positive than aluminum, and then passing an electric current through the fused mass, whereby the aluminum of the alumina is precipitated at the cathode and its oxygen liberated at the anode; the bath meanwhile being unaffected as to its chemical composition. One De Ville, in a work on aluminum, published in 1859, described a process of coating copper with aluminum, in which the bath is the double chloride of aluminum and sodium, the cathode a bar of copper, and the anode a bar of aluminum. When the current is passed through the bath the chloride of aluminum is decomposed, the aluminum is deposited on the copper, and the chlorine gas, freed at the anode, attacks the bar of aluminum, and forms the chloride again, thus keeping the bath constant. *Held*, this was clearly no anticipation of Hall's patent.

2. SAME.

De Ville described a modification of this process, in which the bath is cryolite,—a double fluoride of aluminum and sodium,—and the anode a compact mixture of carbon and alumina, which, upon the passage of the current, gives the following reaction: The fluoride of aluminum is decomposed, its aluminum precipitated at the cathode and the fluorine at the anode, where it combines with the aluminum of the alumina, to form again the fluoride, and sets free its oxygen, which combines with the carbon to form carbonic oxide. *Held*, that this is not an anticipation of the Hall patent, inasmuch as the electrolyte is not dissolved alumina, as in the patent, but is the fluoride of aluminum,—one component of the bath itself; and the bath does not remain constant, but requires continuous renewal by the electro-chemical solution of the alumina of the anode.

3. SAME.

Even though the alumina from the anode in the De Ville process was dissolved in the bath and electrolyzed, he made no note of the fact, and it must be deemed an accident, which he failed to observe, and therefore it would not constitute any anticipation of the patented process.

4. SAME.

In order to show that the Hall process was identical with that of De Ville, the theory was advanced that in the former the electrolyte is not the dissolved alumina, but the fluoride of aluminum of the bath; and that, when this fluoride is decomposed, the fluorine attacks the dissolved alumina, drives off the oxygen to the anode, and unites with the aluminum remaining, thus restoring the bath. *Held* that, even if this were true, the Hall process would still be patentable for the regeneration of the bath accomplished by it is complete, and free from the escape of the corrosive fluorine gas, which renders the De Ville process a failure for commercial purposes.

5. SAME.

This theory of the reactions in the Hall process is, however, shown to be invalid by the facts that the alumina dissolves without any evidence of chemical action; that the action of the current gives no evidence of other products of decomposition than aluminum and oxygen; and that, as soon as the alumina is exhausted, the resistance to the current is doubled, indicating that the electrolyte has been changed; and, moreover, the theory contains a contradiction, in assuming, on the one hand, that the dissolved alumina will be decomposed by the fluoride of aluminum, and,

on the other, that the alumina is a more stable compound when electrolysis ensues so that the fluoride becomes the electrolyte.

6. SAME—"OXYFLUORIDE OF ALUMINUM."

The theory that when the alumina is dissolved in the bath in Hall's process there is found "an oxyfluoride of aluminum," which becomes the electrolyte, cannot avail to affect the validity of the patent, for it does not appear that any chemist has ever isolated any such compound, or known that it exists.

7. SAME.

Hall's claim to be the discoverer of the fact that cryolite will freely dissolve alumina to the extent of 10 to 25 per cent. of its own weight is not prejudiced by the fact that it had been used to wash off the film of alumina adhering to the globules of aluminum produced by De Ville's chemical process, for it appears that it was so used only as a substitute for fluoride of sodium or fluoride of calcium, either of which will dissolve no more than 1 per cent. of its own weight of alumina.

8. SAME.

Knowledge of this solubility of alumina in cryolite is not shown by the fact that in several English patents issued for the De Ville electrolytic process the anode of carbon and alumina is described as "soluble," for the anode of pure aluminum is likewise called "soluble," and the term is indicative only of the action of the fluorine gas in attacking the aluminum of the anode and forming the fluoride.

9. SAME.

A French patent was granted to one Fuerst August 8, 1884, for an electrolytic process of producing aluminum from alkaline aluminates in solution or fusion, alumina being added to regenerate the bath. The process, as described by him, was admitted to be inoperative; but he mentioned as one of the "indifferent or auxiliary bodies" that might be present in his hypothetical electrolyte, hydrofluoric acid; and it was shown by experiment that, if there be added to aluminate of soda eight times its weight of hydrofluoric acid, there would result a double fluoride of aluminum and sodium, which, upon the addition of alumina, and the passage of the current, would give the Hall process exactly. *Held*, that this experiment cannot avail to show an anticipation by Fuerst, for his mention of hydrofluoric acid as an "indifferent or auxiliary body" will not cover its use in excess, as herein; and, moreover, the experiment violates his express injunction that these foreign bodies, whatever they may be, shall not produce decomposition of the aluminates employed.

10. SAME—PROCESS—IMPROVEMENTS IN METHOD.

The means described in Hall's patent for effecting the process covered by it included the fusion of the bath by external heat before the current was passed through it to decompose the alumina, and a plant was constructed and successfully operated upon this method. It was subsequently discovered that the resistance of the components of the bath to a current sufficiently strong to accomplish electrolysis produced heat enough to maintain the fusion without the aid of external heat, a possibility suggested by Hall in his first specifications. *Held* that, even though the use of internal heat as a means of fusing the bath and carrying out the process might be such an improvement on the use of external heat as to render business competition between the two methods impossible, nevertheless the process was the same, and, as the method with external heat did accomplish a useful result, Hall, as the patentee, was entitled to the exclusive right of his process, whatever were the subsequent improvements on his method or apparatus for carrying it out.

11. SAME—ELEMENT OF CLAIM—ABANDONMENT.

Hall used a carbon anode in his experiments before applying for a patent, but in his application he stated that there were certain disadvantages incident to its use, and it was not embodied in his amended claims until more than two years thereafter, when it had been included in the claims of a pending application for a patent for the same process, which was refused upon an interference with Hall's patent. *Held*, that

this did not amount to an abandonment to the public of the carbon anode.

12. SAME—SPECIFICATION—DISCLAIMER.

The Hall patent claimed a bath "composed of the fluorides of aluminum and a metal more electro-positive than aluminum." In his specification he described a bath composed of fluorides of aluminum and sodium, "these salts being preferably mingled together in the proportions of 84 parts of sodium fluoride and 169 parts of aluminum fluoride. A convenient method of forming the bath consists in adding to the mineral cryolite 338-421 of its weight of aluminum fluoride to secure in the bath the proper relative proportions of the fluorides. Such proportions may be varied within certain limits without materially affecting the operation or function of the bath, as, in fact, any proportions which may be found suitable may be employed." *Held*, that this could not be construed as a disclaimer of the use of cryolite alone (which is a double fluoride of aluminum and sodium) for the bath, and that the patent covers every double fluoride of aluminum and sodium which can be made to produce aluminum when used as a bath in the Hall process.

13. SAME—LIMITING CLAIMS.

The facts that Hall in his specifications describes an apparatus for fusing the bath by external heat, and that the claim speaks of dissolving alumina in the fused bath, "and then passing an electric current," do not limit him to the use of external heat as against the heat developed by the current itself, for the claims contain nothing as to the production of the heat, and the patent states that the apparatus described therein forms no part of the invention. Following *Tilghman v. Proctor*, 102 U. S. 707.

14. SAME—CONSTRUCTION OF CLAIM.

The claim in the Hall patent of a "carbonaceous anode" covers both anodes made partly of carbon and those composed wholly of that substance.

In Equity. Bill to restrain infringement of patent. Decree for complainant.

George H. Christy and W. Bakewell & Sons, for complainant.

Henry S. Sherman, Leggett & Leggett, and Frederick S. Betts, for defendant.

Before TAFT, Circuit Judge, and RICKS, District Judge.

TAFT, Circuit Judge. This is a suit in equity by the Pittsburgh Reduction Company against the Cowles Electric Smelting & Aluminum Company, to restrain the infringement of a patent process for reducing aluminum by electrolysis, (letters patent No. 400,766,) owned by the complainant under an assignment from the original patentee, Charles M. Hall. The patent was applied for July 9, 1886, and was granted April 2, 1889. The defenses to the suit are: First, that the patent is invalid for want of novelty; and, second, that the defendant does not infringe.

Electrolysis is a process for separating a chemical compound into its elements by passing through it an electric current. The current is effective for this purpose only when the compound is reduced to a liquid state, either by solution or fusion. The compound which is decomposed by the current is called the "electrolyte."

Aluminum is a metal which was first isolated by Wohler in 1827. There is great difficulty in obtaining the pure metal from its compounds because of the tenacity with which it unites with other

substances. The compounds of aluminum are very abundant in nature. The most common, perhaps, is the oxide of aluminum, called alumina, one molecule of which is composed of three atoms of oxygen and two atoms of aluminum. Alumina is insoluble in water, and practically infusible.

Fluorine unites with the metals to form fluorides. The fluoride of sodium and the fluoride of aluminum united form what is known as the "double fluoride of aluminum and sodium." There are several minerals found in nature which are double fluorides of aluminum and sodium, of which cryolite is much more common than the others, and is found in large quantities in Greenland. Its uses are so extensive that it has become a well-known article of commerce.

More than 50 metals are known to chemists. When one of these is united with nonmetallic substances, and the compound is reduced to a liquid state by solution or fusion, and subjected to an electric current, which decomposes it, the nonmetallic element of the compound will be drawn by the current to that point in the bath where the current enters it from the positive pole, called the "anode," and the metal will move in the direction of the point where the current leaves the bath for the negative pole, called the "cathode." Metals differ, however, in the ease with which the current can draw them to the cathode; and when one is more sluggish than another in yielding to this influence the one is said to be more electro-positive than the other. Scientists have arranged all known metals accordingly. The only metals more electro-positive than aluminum are magnesium, calcium, strontium, barium, lithium, sodium, potassium, rubidium, and caesium. All other metals yield more readily to the current. When several compounds in solution or fusion are electrolyzed, the current will attack and decompose that compound whose parts are least firmly united, or, as the phrase is, "which is least stable." As might be supposed from the foregoing, the more electro-positive a metal is, the more stable its compounds are likely to be. Alumina is so common in nature that every one, in a desire to get pure aluminum, would naturally turn to that as one of the simplest of its compounds; but the fact that the oxygen has proved to be so firmly united to aluminum as to resist the action of the highest heat has been very discouraging to chemists.

Hall, the original patentee of the patent in suit, was a resident of Oberlin, Ohio, and a graduate of the college at that place. He had a strong taste for chemistry, and after leaving college in 1884 gave his attention, among other things, to the aluminum problem, which had baffled so many before him. He conceived the idea of obtaining aluminum from alumina by electrolysis, and concluded that if he could find a bath made up of compounds more electrically stable than alumina, which would freely dissolve alumina, the application of the current to the mixture would precipitate the aluminum upon the cathode, and would free the oxygen at the anode. He discovered that the fluoride of aluminum, when united with the fluoride of any metal more electro-positive than aluminum, to form a double fluoride, would, when heated to fusion, dissolve alumina as freely as

sugar will dissolve in water, and that an electric current passed through the fused mixture would deposit pure aluminum at the poles. Hall took out one patent for the process, in which he used a double fluoride of sodium and aluminum, and in this patent he also claimed the general process broadly, as we have stated it above. This is the patent in suit. He also took out other patents, as permitted by the practice of the patent office, covering the process when the fluorides of other metals more electro-positive than aluminum are used. The two claims of the patent in suit which are here involved are as follows:

"(1) As an improvement in the art of manufacturing aluminum, the herein described process, which consists in dissolving alumina in a fused bath composed of the fluorides of aluminum, and a metal more electro-positive than aluminum, and then passing an electric current through the fused mass, substantially as set forth.

"(2) As an improvement in the art of manufacturing aluminum, the herein-described process, which consists in dissolving alumina in a fused bath composed of the fluorides of aluminum and sodium, and then passing an electric current, by means of a carbonaceous anode, through the fused mass, substantially as set forth."

The defendant is said to infringe both these claims. The validity of the first, so far as it covers defendant's process, and of the second, is attacked by the defendant.

We shall first consider the validity of the claims, and in that connection must refer to the history of the art. It is said on behalf of the defendant that as far back as 1859, De Ville, a famous French chemist, published to the world the process which Hall has included in his patent. De Ville gave a great deal of time to aluminum and its production from its compounds. He was the discoverer of the purely chemical process by which, without the aid of electricity, pure aluminum has been manufactured since his day down to the present time. He also gave some attention to the manufacture of aluminum by the process of electrolysis. In the publication by De Ville on aluminum, its properties, its manufacture, and its uses, in the year 1859, we find this statement:

"Aluminum by the Current. The same bath of the double chloride of aluminum and sodium can be used for coating with aluminum, especially copper, on which Captain Caron and myself have worked. In order to succeed well, one must employ a bath of the double chloride, which has been carefully purified from all metallic substances by the action of the current itself. When the aluminum which deposits at the negative pole appears pure, one attaches to this pole the piece of copper to be aluminized, and to the negative pole a bar of aluminum."

("Footnote. A compact mixture of carbon and alumina, which is transferred into chloride of aluminum gradually and in measure as the deposit of aluminum takes place, keeps the composition of the bath constant for an indefinite period of time.")

"The temperature must be kept somewhat below the melting point of aluminum. The deposit takes place with great facility. It is very adhering; but it is difficult to prevent the metal from getting impregnated with double chloride, which attacks it the moment one washes the piece, while, with some precaution, one succeeds. The washing of the piece must be done with much water, and for a long time. Cryolite, in the same way can be used in this operation, but it must be made more fusible by mixing it with a little double chloride of sodium and aluminum, and with potassium chloride."

The process here described is not for producing pure aluminum, but for plating aluminum on copper. It will be seen that the bath which is first and chiefly recommended by De Ville is not a fluoride of aluminum and sodium, but a double chloride of aluminum and sodium, i. e. a double compound of chlorine with each of these metals. Alumina will not dissolve in a double chloride of aluminum and sodium, heated to a fused state. The operation of the process first described by De Ville is this: The double chloride of aluminum and sodium is heated to a state of fusion. The piece of copper is made the cathode, and a bar of aluminum is made the anode. When the current is passed through the bath, the chloride of aluminum, being the less stable compound, is dissolved into its elements. The aluminum is deposited on the copper, and the chlorine gas is freed at the positive pole, where it attacks the anode of aluminum, and its atoms unite chemically with atoms of the aluminum, to reform again molecules of aluminum chloride, which, when formed, take their place in the bath. The bath, which was partially destroyed by the disruption of the chloride of aluminum, is thus restored, to be again electrolyzed. Instead of the anode of aluminum, the footnote suggests that the compact mixture of carbon and alumina may be substituted for the bar of aluminum as an anode, and that the escaping chlorine gas, being presented to the compact mixture of carbon and alumina, would unite with the aluminum of the alumina, while the oxygen of the alumina would unite with the carbon, and pass off as carbonic oxide gas. The chlorine gas and aluminum would make chloride of aluminum, and, being reintroduced into the bath, would keep it constant.

Finally, it will be observed that De Ville suggests that instead of the double chlorides of aluminum and sodium, cryolite may be used, but that it must be made more fusible by mixing it with a little double chloride of sodium and aluminum and with potassium chloride; and it is the proposition of De Ville to use cryolite in this way as the main part of the bath, and an anode of carbon and alumina in accordance with the footnote, which the defendant's counsel and experts contend is substantially the same process as that on which Hall claims a patent.

Cryolite, as we have seen, is a double fluoride of aluminum and sodium. The theory of the process of De Ville is that the electric current disrupts the fluoride of aluminum which is a less stable compound than the fluoride of sodium. Fluorine gas is liberated at the anode, and, being presented to the mixture of carbon and alumina, unites with the aluminum, and leaves the oxygen with the carbon to make carbonic oxide gas. The fluoride of aluminum thus constituted at the anode renews the bath, and is supposed to keep it constant; while the aluminum of the original fluoride of aluminum, which was in the bath, is deposited at the negative pole.

We are very clear in our opinion that this is not an anticipation of Hall's patent. The primary and most important step of Hall's patent is the dissolving of the alumina in the fused bath of the double fluoride of aluminum and sodium. This happens before any electrolysis occurs at all. When the electric current is ap-

plied, it disrupts the alumina, sending the aluminum to the cathode and the oxygen to the anode, where it unites with the carbon anode, and becomes carbonic oxide gas. The bath material in which the alumina was dissolved—that is, the double fluoride of aluminum and sodium—is not affected by the electric current, and the process is made continuous by the simple addition of alumina to the bath. In the De Ville process, however, alumina is not dissolved in the bath. The fused mass subjected to the current is composed of a double fluoride of aluminum and sodium with no alumina in it. No effect comes from the presence of the alumina in the anode until after the electric current is passed through, and the fluoride of aluminum has been disrupted, and fluorine gas has been produced at the anode; then the gas unites with the aluminum of the alumina, and restores the bath, in a manner, to its former state, to be again disrupted by the application of the current. In the one case there is a simple solution of the alumina in a bath and its disruption by the current, the bath remaining constant; while in the De Ville process the bath itself is disrupted, and restored again by the union of one of the disrupted elements with an element of the alumina in the compact anode. In the Hall process there is simply solution of the alumina and electrolysis; in the De Ville process there was electrolysis, followed by what is called an “electrochemical solution of the alumina.”

Defendant's counsel and experts, in their effort to make the two processes the same, rely upon the supposition that when the compact anode of carbon and alumina was inserted by De Ville into the bath of cryolite some of the alumina was necessarily dissolved in the cryolite, and so the current electrolyzed that alumina as in the Hall process. In the first place, the experiments made on behalf of complainant demonstrate that a compact mixture of carbon and alumina (which can only be made by the use of some binding material) may be kept in a bath of cryolite for many hours without dissolving the alumina at all. Some counter experiments by defendant are by no means so satisfactory, because the results may be attributed to the presence of other causes than the solution of the compact anode.

But suppose it to be a fact that in De Ville's process alumina was dissolved in the bath from the anode, and that thereupon it was electrolyzed as in the Hall process, it was a mere accident, of which De Ville made no note, and which, therefore, we may reasonably infer, he did not observe. Accidents of this character cannot be relied on as anticipations of a patented process (*Tilghman v. Proctor*, 102 U. S. 707, 711) when the operator does not recognize the means by which the accidental result is accomplished, and does not thereafter consciously and purposely adopt such means as a process for reaching the result. De Ville did not intend that the alumina should be dissolved in the bath. If he did, why did he unite it with carbon by means of pressure and a binding material? If he had intended to dissolve the alumina, he could not have done anything which would have so interfered with his purpose. Just as Prof. Langley says, such a course would have been as reasonable

as it would be for a man, wishing to dissolve a lump of sugar in his coffee, to varnish it or grease it. De Ville did not intend to dissolve the alumina in the bath—First, because, as we shall see hereafter, he had no knowledge that it would dissolve therein; and, second, because, until the fluoride of aluminum had been decomposed in the bath by the current, he did not need anything with which to restore that fluoride to the bath. He felt that it was necessary to have the alumina in a solid form, in close connection with the carbon, because, without the strong attraction that the carbon would have for the oxygen of the alumina, the fluorine gas could not get at the aluminum of the oxide.

De Ville was seeking to electrolyze the fluoride of aluminum, while Hall was seeking to electrolyze alumina. It was a condition precedent to Hall's success that his alumina should be in a liquid state. As we have seen, it was essential to De Ville's process that his alumina should be where it was, i. e. mixed in solid form with the carbon.

This brings us to a theory of the Hall process which has been advanced by one or more of the defendant's experts to show that the Hall and De Ville processes are alike. Hall says in effect, in the specifications for his patent, that the electrolyte in his process is the alumina held in solution, and that in the decomposition the aluminum of the alumina goes to the cathode and the oxygen of the alumina goes to the anode, the fused double fluoride constituting the bath remaining unaffected. The theory, or, we would better say, the alternative theory, of the defendant's experts (for they venture more than one) is that the fluoride of aluminum is the electrolyte, and that when it is decomposed the fluorine attacks the dissolved alumina, drives off the oxygen to the anode, and unites with the aluminum remaining, thus restoring or regenerating the bath. This theory is advanced for the purpose of showing that the Hall bath does not remain constant, as he claims, but has to be regenerated as in the De Ville process, the only difference being that in the former the alumina is held in the bath in solution, while in the latter it is held in a compact mixture of carbon and alumina. If this were the only difference between the two processes, we should hold that the Hall process was a patentable discovery, because the regeneration of the bath from the dissolved alumina, if such were the chemical action which took place, would be a successful process, because regeneration is so complete as not even to betray itself, while in the practical operation of the De Ville process the regeneration of the bath is very incomplete. The fluorine gas escapes into the air, and is so corrosive as to injure both workmen and apparatus, and the process is a failure for commercial purposes. The compact mixture of carbon and alumina is hard to make, and obstructs regeneration; and the substitution for it of dissolved alumina, even if their functions in the process are exactly the same, is the step from failure to success.

But there is no satisfactory evidence at all that the dissolved alumina is not the electrolyte, and the burden is on the defendant to show it. *Coffin v. Ogden*, 18 Wall. 120, 124. Prof. Chandler,

of the Columbia School of Mines, called as an expert witness for the complainant, demonstrates, so far as chemical actions and reactions are capable of demonstration, that it is the alumina which is decomposed by the current. He says that the alumina dissolves in the fused bath of cryolite, as sugar does in water, quietly, without any of the usual evidences of chemical action, such as the production of heat, or the reduction of fusibility or thickening of the liquid. This seems to show that the alumina in solution remains chemically unchanged. He refers to the fact, admitted on all hands, that when the current is applied, aluminum goes to the cathode and oxygen to the anode without any indication of any other product of decomposition. This result is fully satisfied by the explanation that the alumina alone is decomposed. He refers to another fact, also admitted, that, as soon as the alumina in the bath is exhausted, the resistance to the current and the voltage of the current to overcome it become doubled, and are not reduced until alumina is added to the bath. This would seem to show that the electrolyte has been changed by the exhaustion of the alumina, and therefore that, when present, alumina is the electrolyte. The professor further shows from the observations of the most reliable chemists that the heats of formation of the three compounds in the bath are such that it would require 4.8 volts to decompose sodium fluoride, 4 volts to decompose aluminum fluoride, and 2.8 volts to decompose alumina, which proves that the alumina would first yield to the action of the current, and in the presence of the other two compounds would be the electrolyte. More than this, Prof. Chandler points out a fatal contradiction in the theory that the fluoride of aluminum is the electrolyte in the Hall bath. That theory assumes on the one hand that the dissolved alumina will be decomposed by the fluoride of aluminum, and on the other that the alumina is a more stable compound than the fluoride when electrolysis ensues, so that the fluoride, and not the alumina, becomes the electrolyte. Finally, the theory is shown to be unfounded by the total absence at the anode of fluorine gas, which would certainly be there present in perceptible quantities if fluoride of aluminum is the electrolyte and fluorine is released by the current. No facts of any kind are advanced by the defendant's experts to meet this demonstration of Prof. Chandler, which is fully concurred in by Prof. Langley of the Case School of Applied Sciences, and Dr. Raymond. The arguments, such as they are, depend on analogies drawn from the electrolysis of entirely different compounds, as, for instance, water. With the burden on the defendant on this issue, we are very clear that it has not been sustained.

An alternative theory, advanced by some of defendant's experts, is that when alumina is dissolved in the bath, a compound of oxygen, fluorine, and aluminum, called "oxyfluoride of aluminum," is formed, which is the electrolyte. It is sufficient to say of this theory that no chemist, and certainly none of defendant's experts, ever isolated such a compound, and no one knows that it exists. The reason for its theoretical existence is that such a compound is formed with the chlorides. Analogies between the fluorides

and the chlorides constantly fail. In this very case we find that the former will dissolve alumina, and the latter will not. The oxyfluoride of aluminum theory is mere speculation, and not worthy of consideration in a case involving property rights.

The defendant company instituted a number of experiments to show that the De Ville process would work as well and in much the same way as the Hall process. The evidence concerning these experiments, although it all comes from the defendant's witnesses, leaves no doubt in our minds that they were not conducted in a fair spirit, but rather with an intense desire to force a demonstration of the identity of the De Ville and the Hall processes. Nothing else can explain the palpable disobedience to De Ville's express directions for carrying out his process. According to De Ville's directions, the bath must not be heated up to the melting point of aluminum. This is evident, because his main process contemplates an aluminum anode, and heat beyond its melting point would destroy it as an anode, and it is for this reason that he directs that the fusibility of cryolite be reduced by mixing it with chlorides. In the experiments of the defendant the bath was heated far beyond the melting point of aluminum. It was so hot that the carbon of the carbon-alumina anode, a large part of which was not sunk in the bath, but was exposed to the air, united with the oxygen of the air, and was burned out. This left on the exterior of the anode nothing but a ring of pure alumina, which, dropping into the bath, was of course dissolved as in the Hall process, and from it aluminum was deposited at the cathode. Then, too, stubs of the partly used carbon-alumina anodes were ground up and thrown into the bath of cryolite, and of course the particles of alumina, separated by the grinding process from the carbon, became dissolved in the bath, and the Hall process was again reproduced. De Ville did not contemplate the presence of alumina in the bath except in a compact mixture with carbon, and yet the experiments of defendant presented alumina to the bath wholly free from carbon. Even with these approaches to the Hall process, the cost of producing the aluminum which was produced exceeded that of the Hall process some sixfold. Nothing could more clearly demonstrate the difference between the De Ville and the Hall processes.

We have considered the Hall process as a whole, and thus compared it with the De Ville bath-regenerating process. A comparison of his process with De Ville's and the difference would not be complete, however, without some reference to Hall's claim that he was the first discoverer of the fact that alumina would freely dissolve in the fused double fluoride of aluminum and sodium. The fact is that such a bath will dissolve from 10 to 25 per cent. of its weight as completely as water will sugar. Defendant claims that this was well known in the art long before Hall's application. The first publication relied on to establish the claim is found in one of De Ville's works, as follows:

"Cryolite is a double fluoride of aluminum and sodium, which one may produce artificially or imitate by mixing hydrofluoric acid in excess in pure and

calcined alumina and carbonate of sodium in quantities such that the sodium and aluminum will be present in the proportions in which they exist in cryolite. After drying and fusing the mixture one has a limpid and homogeneous substance which possesses all the exterior characteristics of fused cryolite. I have not yet made an analysis of it, but the weight of the substance produced is such that one must suppose that the alumina and soda have lost all their oxygen by transformation into fluoride. This cryolite, like the natural cryolite, gives aluminum when reduced by soda. It also yields aluminum under the influence of an electric current, which a mixture of alumina and fluoride of sodium fused together will not do. When this experiment is made, one perceives that the alumina dissolves in the fluoride, but in small quantity, and remains in the condition of alumina, because an electric current, which passes through the well-fused substance, yields sodium and fluorine. These experiments, which succeed very well when one employs a mixture of fluoride of sodium and fluoride of potassium, prove further that alumina at red heat is decomposed neither by sodium nor by potassium."

There is no statement here at all that cryolite will dissolve alumina. The words, "when this experiment is made," etc., clearly refer to the experiment last spoken of; that is, to passing an electric current through a mixture of alumina and fluoride of sodium fused together. In such an experiment De Ville says that the alumina dissolves in the fluoride, i. e. the fluoride of sodium, in small quantity. There was no cryolite in this experiment.

All the other publications relied on relate to a feature of the purely chemical process which De Ville discovered for the reduction of pure aluminum by the use of sodium. In that process the aluminum appears in tiny granules or globules of the pure metal, which De Ville found much difficulty in running together to make a button. He attributed this difficulty to the presence of a thin film of alumina surrounding each globule, formed by a union of the aluminum with the oxygen of the moisture developed in the experiment. He found that this film could be removed by washing the globules with fluoride of sodium. De Ville says:

"The facility with which aluminum gathers together in the fluorides is due without doubt to the property which they possess of dissolving the alumina which the moisture adhering to the chloride of aluminum deposits on the surface of the globules on the instant of their formation, and which the sodium is unable to reduce."

De Ville does not here refer to the power which double fluorides have of dissolving alumina, but to the power which the fluorides singly have of doing so. For, as we shall see from a subsequent publication, he used in his experiments the fluoride of sodium. Speaking of the same process, Charles and Alexander Tissier, in a work on aluminum, say:

"This salt [i. e. fluor spar] is without action on aluminum, of which it constitutes one of the best fluxes, especially so because of the property which it has of dissolving the alumina with which the metal may be contaminated, and thus facilitating the reunion of the metallic particles."

In speaking of the chloride of sodium, the same authors say:

"This is the salt which we employ habitually in recasting aluminum. However, it does not possess, like the fluoride, the property of dissolving the alumina."

The fluoride here referred to is, of course, the fluoride of sodium. Again, the same authors say:

"Such was the state of aluminum manufacture, when, towards the close of 1855, De Ville, surprised by the facility with which the aluminum gathered together when it was reduced from its fluoride instead of reducing it from its chloride, conceived the idea of trying how the fluoride would act under these circumstances. He perceived that the success of the operation was due to the fact that the alumina interposed between the small globules (that is, the small globules of metallic aluminum) was dissolved by the fluoride of sodium which was formed, and thus imparted to the metallic particles a much greater facility of reunion."

Referring to the same operation, Pelouze and Fremy, in a work published in 1865, say:

"It is probable that the salty, pasty state of this slag (i. e. the film about the globules) is due to the alumina which the fluorides dissolve well, but thereby lose their fluidity. This slag is composed principally of common salt and fluoride of aluminum in the following proportions: Common salt, 60 parts; fluoride of aluminum, 40 parts. When this slag is washed, the salt is dissolved, and there is left fluoride of aluminum, and a little cryolite and alumina. This is the alumina which has been dissolved or retained by the fluoride bath."

Again, in a German work by Hoffman, published in 1875, there is this reference to De Ville's process of making aluminum by his purely chemical process:

"Instead of the pure chloride of aluminum, De Ville soon after employed the double fluoride of aluminum and sodium, which he reduced in a reverberatory furnace with sodium. However, the chloride of aluminum and its double salt eagerly attract moisture, and then yield, on heating, hydrochloric acid and alumina, (aluminum oxide.) This last coats over the separately reduced globules of aluminum with a thin skin of oxide, which makes it difficult to get the globules to unite in a mass. This oxide, as Rosseau and Morin found, is dissolved by fluorides. For this reason fluor spar, or, as Pelouze and Fremy recommended, cryolite, is added to the double salt."

Payen, another chemist, in a work published in 1878, refers to the same process, and says:

"Cryolite may always be used with advantage in the place of fluor spar. It acts both as a solvent for alumina, like fluor spar, and also increases the yield by furnishing more aluminum."

We have given all the references relied on by defendant. It is perfectly apparent to us that it was only known that cryolite would wash off the film of what was supposed to be alumina from the tiny globules of aluminum in the De Ville chemical process exactly as fluoride of sodium or fluoride of calcium would, and that cryolite was proposed merely as a substitute for those compounds in this process. But fluoride of calcium will dissolve only 1 per cent. of its own weight in alumina, and fluoride of sodium even less. This does not show that any chemist knew, until Hall discovered it, that cryolite would dissolve alumina as water does sugar. Indeed, it will be noticed that Pelouze and Fremy, who recommended cryolite as a substitute for fluor spar in washing off the alumina film, say that by such dissolving the cryolite will lose its fluidity. Considering the slight amount of alumina to be washed off, this would show conclusively that they did not know or realize that cryolite would freely dissolve alumina, and not lose its fluidity at all. It will not do to say that the difference is only one of degree. If cryolite only dissolved one per cent. of its weight in alumina, Hall's process would

never have been heard of. The difference between what Hall discovered and what was known before him in this regard is the difference between complete knowledge on a subject and so little as to be wholly useless and not to suggest further inquiry. It is impossible, if De Ville had any knowledge that alumina could be dissolved in cryolite, as Hall found, that he should not have made a note of it, for all the experts agree that he observed most carefully, and noted exactly all that he observed.

Another claim in this connection perhaps deserves some notice. In several patents which were taken out in England for the making of aluminum by what is the De Ville process without any variation, the anode, made of a compact mixture of carbon and alumina, is referred to as a "soluble" anode. This is said to show that the patentees knew that alumina would dissolve in the cryolite bath. The expression is used merely to indicate the action of the fluorine gas, released at the anode by the current, in uniting with the aluminum of the alumina in the anode, and regenerating the bath, which of course destroys the anode. It is an electro-chemical solution of the anode, and wholly different from a free solution of alumina in the bath without any aid from electricity. That the term "soluble" has no other meaning in this connection is evident, because an anode of pure aluminum is also called "soluble."

We have read with care every part of this voluminous record of over 1,500 pages, and, while we are not chemists, we have obtained a sufficient understanding of the principles applied in the Hall and De Ville processes to be entirely confident that they are wholly different, and that no skilled chemist and electrician could have developed the Hall process from the De Ville process without a real discovery.

The Bell patent of 1861, the Johnson provisional specifications of 1879, the Johnson specification of 1883, and the Graetzel patent of 1884, which are all recorded in the English patent office, and are produced here by the defendant and relied on as anticipations of Hall's patent, are mere reproductions of the De Ville bath-regenerating process, with various attempts to avoid the difficulties which the process presents in its practical operation. The Graetzel patent—the latest of them—was a failure. This is admitted by the patentee himself, who was a witness in the case. The Johnson specifications were never even proceeded with to the procuring of a patent, and the Bell patent has never been used at all to make aluminum commercially. It is said that one reason why these electrolytic processes, including De Ville's, were not brought into actual use, was that, until within a very few years, there were no dynamos capable of furnishing sufficient electric volume and force to make them practicable for commercial purposes. That the improvements in the machines for producing electricity have greatly facilitated the use of electrolysis as an agent in commercial processes is not to be denied, but the failure of the De Ville process for making aluminum by electrolysis finds a far better reason in the inherent difficulties of the process itself than in the mere expense of electricity. If the De Ville process is operative with the present modes of producing electricity, why does not the defendant adopt it? It is free to any one. The

various futile attempts to relieve the De Ville process of its defects is strong proof that it was and is a failure without regard to the development in the making of electricity.

There are other patents introduced to show anticipation than those which involve the De Ville process, but of these there is only one which, it is seriously contended, discloses the Hall process. This is a French patent of Fuerst, dated August 8, 1884. In this patent the patentee says:

"The process of which I claim the industrial property consists in making the electrolysis of alkaline aluminates, or alkaline earthy aluminates, in the condition of solution or of fusion. For this I take an alkaline aluminate, or earthy alkaline aluminate; that is to say, one of the aluminates of potassium, of sodium, or of barium, etc. Into this body, in solution or fusion, according to the circumstances, I introduce the two poles of an electric current of suitable tension. There is nothing further to do than to receive the aluminum upon the cathodes employed, (negative poles,) where I collect it in order to melt or utilize it alone or in different alloys for all the industrial uses to which it can lend itself. As to the anodes, (positive poles,) these anodes can be, according to my desire, soluble or insoluble, and I reserve to myself the industrial property of each of these two cases. While I employ anodes which are insoluble, or are considered such industrially, I reserve to myself to maintain a constant composition in these electrolytic baths by adding to them, as is needed, oxide of aluminum."

"The electrolytic decomposition produced by the electric current in an alkaline aluminate, or in an alkaline earthy aluminate, can also be produced equally well whether this salt be in a state of purity or whether several aluminates be mixed together, or whether they be mixed with other salts or foreign materials giving rise to double salts or any secondary combinations whatever, provided, let it be understood, that these salts or foreign materials, whatever they may be, will not produce decomposition of the aluminates employed. It is thus that I reserve to myself to introduce into these baths salts of ammonia, alkaline sulphites, alkaline phosphates, alkaline cyanides, alkaline chlorides, etc., the presence of which seems to have the power of improving the practice of this electrolysis."

Later on, Fuerst deposited an addition to his patent, in which he says:

"In this certificate of addition I claim as my industrial property my process for the industrial production of aluminum by electrolysis of alkaline aluminates or alkaline earthy aluminates in solution or igneous fusion. And by 'alkaline aluminates,' I mean every compound into which alumina and alkaline base enter, even if there should enter into that compound one or more of the following bodies, which I shall call 'useful' or 'indifferent' auxiliary bodies: Hydro-cyanic acid, cyanides, cyanates, phosphoric acid, (pyro and meta,) boric acid, silicic acid, hydrofluoric acid,—in the state of acids or salts. For me there is aluminate of alkali as soon as there is in a body alumina and an alkaline base, even in the presence of the auxiliary bodies above mentioned, whatever otherwise be the hypotheses that might be established respecting the numerous molecular groupings which might exist or be supposed to exist."

An alkaline aluminate is either an aluminate of potassa or an aluminate of soda. Aluminate of soda is a compound of alumina and soda, i. e. of the oxides of aluminum and sodium. It is a triple compound of oxygen, aluminum, and sodium. An alkaline earthy aluminate is an aluminate of baryta, strontia, lime, or magnesia, i. e. a compound of alumina with baryta or strontia or the other substances. The three elements of such a compound are oxygen, aluminum, and barytum, or strontium, or the other substances.

The theory of the patent—and it is only a theory, as we shall see—is that if these triple compounds of oxygen, aluminum, and some other metal can only be reduced to a liquid form either by aqueous solution or igneous fusion, the current will decompose the compound by depositing the aluminum at the cathode, and will leave the compound of oxygen and the other metal in the bath. By adding alumina to the bath he proposed to restore the aluminate in the bath. Now, the electrolysis of an aqueous solution of the aluminates to produce aluminum is impossible. This is not denied. One half of Fuerst's patent is demonstrably inoperative. Secondly, so far as the patent calls for the igneous solution of the aluminate of soda, it is also inoperative, because that compound is infusible; and even if it were fusible, the current would precipitate the sodium, and not the aluminum. This is conceded by defendant's experts. Such facts are strong evidence that Fuerst wrote out a theory for the production of aluminum by the current without knowing by experiment whether it would work or not. All the experts in the case agree that he was a very poor chemist. In order, however, to catch future inventors in the toils of his dragnet, he mentions a great many chemical compounds which could be added to his bath of aluminates, and not interfere with its working, and might even aid the electrolysis. It is perfectly obvious that he never tried any of them, and it has not been shown at the bar that one of the innumerable baths proposed by him would, when electrolyzed, produce aluminum. It does appear, however, that if hydrofluoric acid, which is one of the indifferent auxiliary bodies mentioned by Fuerst, be mixed with aluminate of soda so that the mixture shall contain eight times as much acid as aluminate, the acid will entirely decompose and destroy the aluminate, and, after evaporation and fusion, we shall have a bath, not of the aluminate at all, but of the fluorides of aluminum and sodium. If, then, alumina be added, and the current applied, we shall have the Hall process exactly. An experiment of this kind was tried on behalf of defendant, and an account of it is produced in evidence as demonstrating the identity of the Fuerst and Hall processes. It is perfectly evident that no one without a knowledge of the Hall process, and without the deliberate intention of producing Hall's bath, would ever have derived from the Fuerst patent any information leading to such a treatment of the aluminate of soda with the hydrofluoric acid. In the first place, according to Fuerst's specifications, the acid is to be only indifferent or auxiliary. Who would think, therefore, of using eight times as much acid as aluminate in preparing an aluminate bath? Again, one imperative injunction which Fuerst imposes in his specifications was flatly disobeyed in defendant's experiment. He says he has no objection to the introduction of foreign materials as indifferent or auxiliary bodies, "provided, let it be understood, that these salts or foreign materials, whatever they may be, will not produce decomposition of the aluminates employed." The addition of hydrofluoric acid in excess to aluminate of soda completely decomposes and destroys the aluminate, so that the bath which results after evaporation and fusion has nothing like an aluminate in it, but is a bath of fluorides. In view of the necessity for

this flagrant violation of Fuerst's injunction in order to produce the Hall bath, it is absurd to say that the bath can be found described within the four corners of the Fuerst patent. Fuerst does suggest that his bath can be kept constant by adding alumina, but, as his bath is not Hall's bath, he does not thereby come any nearer the Hall patent.

The other patents pleaded as anticipations of Hall's are even less like it than those already considered, and they were not pressed in argument.

It is objected to the validity of the Hall process that it is not operative. The argument is that it has no utility, as described in the patent, for three reasons: "First, because the fusion of the bath is maintained by external heat, and except with internal heat, produced by the current, the process is worthless and inoperative; second, because it contemplates continual interruptions in the process to remove the aluminum already deposited from the cathode, which would make the process too cumbersome and expensive for commercial use; and, third, because it does not provide for sprinkling powdered alumina over the top of the bath, to be gradually stirred down into it, without which the depositing of aluminum cannot go on without interruption.

There is nothing in any of these claims. The patent disclosed a process and suggested an apparatus by which the process could be operated. Said Mr. Justice Grier in *Corning v. Burden*, 15 How. 252, 267:

"A process *eo nomine* is not made the subject of a patent in our act of congress. It is included under the term 'useful art.' An art may require one or more processes in order to produce a certain result or manufacture. The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function or to produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature or of one substance to another, such modes, methods, or operations are called 'processes.' A new process is usually the result of a discovery; a machine, of invention."

Mr. Justice Bradley, in *Tilghman v. Proctor*, 102 U. S. 707, 728, in speaking of what was required in the specifications for a patent of a process, said:

"If the mode of applying the process is not obvious, then a description of a particular mode by which it may be applied is sufficient. There is, then, a description of the process, and one practical mode in which it may be applied. Perhaps the process is susceptible of being applied to many modes, and by the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure to himself the exclusive right to the process, if he is really its inventor or discoverer. But he must describe some particular mode or some apparatus by which the process can be applied with at least some beneficial result, in order to show that it is capable of being exhibited and performed in actual experience."

Now, it may be that the changes in the mode of using the Hall process, indicated in the objections of defendant stated above, from that recommended by Hall in his patent, are great improvements, but that does not in the slightest degree affect the validity of the patent if it appear that at the time when the application

was made a new and useful result could be accomplished with the process by the mode which Hall suggested.

It is pressed upon us that after Hall made his discovery he worked on his processes unceasingly for a year or more under the auspices and with the aid of the defendant company, but that with the apparatus described in the patent he was able to accomplish no useful result. It is said that not until he adopted the improvements above named, which are not included in his patent, did his process prove operative. The area of Hall's discovery was a wide one. The chemical substances within the scope of his patent which he might use in carrying it to a successful result were many, and he was in search of that method and those substances within the limits of his discovery which would most easily and economically produce aluminum. It does not at all reflect on the utility of his processes that he should have been a year or more experimenting to determine just exactly what apparatus to adopt. Nor is it surprising that with lack of experience in the practical operation of the process, with no means to try it on a commercial scale, he should meet with difficulties in small experiments which disappeared afterwards. It is no evidence at all, therefore, of the inutility of his method of applying the process that by nine months' experimental work under the auspices of the defendant company he did not satisfy its officers that he had made a valuable discovery. During that time he did satisfy the practical chemists who, immediately upon his leaving the Cowles Company, invested \$20,000 in a plant to produce the aluminum commercially, according to Hall's patent.

The apparatus suggested by Hall consisted of a crucible of iron or steel, lined with carbon, and placed in a furnace. The double fluoride was put in the crucible, which was then subjected to the heat of the furnace until the fluoride was fused. The poles of an electric dynamo were connected with the bath, the negative pole connecting with the carbon lining, and making that the cathode, while the positive pole was connected with a piece of carbon suspended over and extending down into the fused mass. Alumina is added to the bath when fused, and an electric current of from four to six volts deposits aluminum on the bottom of the crucible. When a sufficient quantity has been deposited, the patent says that the melted aluminum may be removed from the bath by suitable means, or the bath may be poured out, and the aluminum picked out. It is said that there are insurmountable difficulties in this apparatus. The carbon lining of the crucible must, on the one hand, be thick, to prevent the fluorides from attacking the steel or iron underneath it, and to prevent the radiation of heat and consequent cooling of the bath; while, on the other hand, it must be thin, to enable the heat of the furnace to get through the sides of the crucible to fuse the bath and maintain the fusion. That there may have been better ways of applying the heat than that suggested is doubtless true; but it does not appear that the mode just described would not make aluminum, and the burden of proof on this point is on the defendant. On the contrary, the

evidence is quite satisfactory that it would do so. The system was used by the complainant company for several weeks after its new plant was put in, and aluminum was made commercially as it had been made experimentally by Hall. The whole new plant was so constructed that heat could be applied exactly as Hall's patent suggests. This is strong evidence that neither Hall nor the men who put in \$20,000 on the faith of his invention inferred from the result of his experiments that the difficulty above stated was a serious one. After several weeks' operation, it was found that the resistance of the bath to the electric current necessary to decompose the alumina produced heat enough to keep the bath in proper fusion without external heat, so the furnace was not used. Hall had said early in his experiments that such a result was likely when the process was carried on in a large way. It is probable that a manufacturer of aluminum according to Hall's patent, who would use external heat only, (if, indeed, it were possible to make aluminum extensively without generating electric heat more than enough to fuse the bath,) could not compete, for economical reasons, with one who discarded external heat, and depended alone on the heat of the current. But that is far from saying that such useful results cannot be obtained from the use of Hall's first apparatus with external heat as to entitle him to an exclusive right to his process, whatever the improvements on his apparatus in applying that process. To hold otherwise would impose upon the patentee of a process, in order that he may enjoy the monopoly, the necessity of stating in his patent not only the process and suitable apparatus for its operation, but also the very best possible apparatus for that purpose. This would be absurd, and quite in conflict with the spirit of Justice Bradley's remarks in *Tilghman v. Proctor*, above quoted.

The same remarks apply to the other criticisms of Hall's first mode of putting his process into practice. More than that, the ladling out of the melted aluminum without emptying the crucible, and the adding of powdered alumina to the bath, are not even improvements upon Hall's first method, but are quite within it. He says that alumina shall be added to the bath. It was to be added for solution. It does not even take knowledge of chemistry to lead one to grind a substance to powder to facilitate its solution, nor does it require any invention or discovery to use a ladle to remove molten aluminum from the bottom of a crucible without emptying the crucible of its other and less weighty contents.

Hall's process is a new discovery. It is a decided step forward in the art of making aluminum. Since it has been put into practical use the price of aluminum has been reduced from \$6 or \$8 a pound to 65 cents. This is a revolution in the art, and has had the effect of extending the uses of aluminum in many directions, not possible when its price was high. An effort has been made to show that this reduction in the price is due to the improvements in the application of electricity to the manufacture of aluminum. That the new inventions in the line of producing electric currents of

great volume and intensity have contributed to render the Hall process an economical one is true, but without the Hall process the manufacture of pure aluminum must have continued to be a purely chemical one. The Cowles brothers made aluminum alloys by the use of electrical furnaces which they have brought to a high state of perfection, doubtless, and that had an effect to reduce the price of aluminum alloys, and perhaps indirectly affected the price of pure aluminum. The fact was that the price of pure aluminum was so high that its uses were few, and the market for it was small. When Hall's process, however, came into the field of commercial manufacture, pure aluminum was largely substituted for aluminum alloys, and, if alloys are now desired for particular purposes, they are generally made from pure aluminum. Hall was a pioneer, and is entitled to the advantages which that fact gives him in the patent law.

One other thing must be alluded to before we close this long discussion of the validity of Hall's patent, and that is the French patent of Heroult. Heroult has a patent granted to him by the French government, dated April 23, 1886. The process he described is substantially one of those described by Hall. He uses a fused bath of cryolite in which alumina is dissolved, and from which, by the electric current, aluminum is deposited at the cathode. His anode is of carbon. Heroult made application for a patent to the United States patent office May 22, 1886. Hall did not make his application until July 9, 1886. An interference was declared in the patent office between Hall and Heroult. Hall adduced evidence to show the commissioner of patents that he made his invention and put it into operation February 23, 1886. The same evidence has been introduced here. It establishes beyond all reasonable doubt by written evidence that Hall did put his process into successful operation on February 23, 1886. The patent office decided the interference proceeding in Hall's favor, and it was clearly right. There was no evidence, there or here, to show that Heroult discovered the process before Hall, and the fact that Heroult's French patent antedates Hall's application does not affect Hall's right to a patent, because by section 4887, Rev. St., an inventor's right to a patent in this country is not debarred by reason of the fact that the invention has previously been patented in some other country, provided that it has not been more than two years in use in the United States. The counsel for defendant do not dispute the correctness of this conclusion, but they rely on the Heroult interference proceedings to attack the validity of that part of the second claim in the Hall patent where he specifies as part of his process the use of a carbonaceous anode. It is conceded by them that Hall had used a carbon anode in his process before filing his application, but the contention is that because in his application he alluded to it as having some disadvantages, and did not include it in his first series of claims, which he afterwards amended, and did not finally include it in his claims until Heroult's patent suggested its value to him, and more than two years after his application, he thereby abandoned the use of a carbon anode to the public. No authority is cited to sustain this ar-

gument. The proceedings in the patent office are for the purpose of reducing the description of the real discovery and the claims to such a form that a patent may properly be granted for them. Until the patentee accepts the patent, he cannot be held impliedly to disclaim anything in his real discovery. If he makes a claim which is rejected, and he accepts the patent without the claim, then he waives the right to a monopoly therein. But we know of no principle by which such a waiver can be implied from defective claims in the proceedings preliminary to the issuance of a patent if the claim is fully set forth in the patent as granted, and admittedly covers only that which the patentee had discovered before he made his application, and which he fully described therein.

And now we come to the question of infringement. The evidence leaves no doubt that the defendant company began their manufacture of pure aluminum in January, 1891, with the aid of one Hobbs, who had been the foreman of the complainant company, and engaged for it in superintending the manufacture of aluminum by the Hall process. By that time the complainant company had adopted several improvements in the apparatus described in the patent for working the process. The defendant copied these improvements, as well as the process, and has sought to escape responsibility by maintaining that without these improvements the process was inoperative, and the patent which did not contain them was invalid. Much the same course is taken as to the defense of infringement. The improvements are said to make the present process a different one from that described in the patent, and therefore the defendant does not infringe. It is needless to say that a court is not inclined to favor such defenses. There is evidence tending to show that the defendant used Hall's preferred bath, but with the admissions in this case it is unnecessary to consider the issue made on that point. It is admitted that the defendant is using a process in which alumina is dissolved in a fused bath of the double fluoride of aluminum and sodium, and in which an electric current is passed through the bath containing the alumina thus dissolved, whereby aluminum is deposited at a carbon cathode and oxygen is released at a carbon anode. It is said, however, that they are not infringing the Hall patent, because the Hall patent does not cover the particular double fluoride of aluminum and sodium which they are using, which is cryolite; and because the Hall process contemplated and called for a fusion of the double fluoride by external means of heating, whereas the defendants are using, to fuse the bath, the heat generated by the resistance of the bath to the electric current. The whole defense of infringement is based on a narrow and wholly impossible construction of the Hall patent.

As has been before stated, this patent is a pioneer patent, and its terms will be liberally construed to cover the patentee's real discovery. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. Rep. 799; *Sewing-Mach. Co. v. Lancaster*, 129 U. S. 263, 273, 9 Sup. Ct. Rep. 299. Coming now to consider the claim that the patent does not cover fused cryolite as a bath, it should first be noted that cryolite is a double fluoride of aluminum and sodium, a metal more

electro-positive than aluminum. It is therefore exactly within the words of both claims here in suit. But the contention is that the patentee has disclaimed any right to the exclusive use of cryolite. It is not denied that the patentee had used cryolite as a bath before he made his application, but it is said that he described its use in his first application, and stated, in substance, that it was not so good as a different proportion of the fluorides, and then subsequently omitted reference to it as a bath altogether in his final specifications. This is said to be a disclaimer of cryolite as a bath material. Hall's description of his bath is as follows:

"In the practice of my invention I prepare a bath for the solution of the alumina by fusing together in a suitable crucible, A, the fluoride of aluminum and the fluoride of a metal more electro-positive than aluminum,—as, for example, the fluoride of sodium potassium, etc.,—these salts being preferably mingled together in the proportions of eighty-four parts of sodium fluoride and one hundred and sixty-nine parts of aluminum fluoride, represented by the formula Na_3AlF_6 . A convenient method of forming the bath consists in adding to the mineral cryolite 338-421 of its weight of aluminum fluoride. The object of thus adding aluminum fluoride is to secure in the bath the proper relative proportions of the fluorides of aluminum and sodium."

And again the patentee says:

"While I consider the proportions of fluorides of sodium and aluminum * * * hereinbefore stated as best adapted for the purposes, such proportions may be varied, within certain limits, without materially affecting the operation or function of the bath, as, in fact, any proportions which may be found suitable may be employed."

The patentee states first the proportion of the aluminum fluoride and sodium fluoride which he prefers for his bath. They are 84 parts of sodium fluoride and 169 parts of aluminum fluoride. Then he proceeds to tell a convenient way for reaching those proportions. Cryolite, as we have said, is an article of commerce. He suggests that the best bath can be made by taking cryolite and adding to it 338-421 of its weight in aluminum fluoride. After this, for the very object of including cryolite, which, as we know, he had used for the purpose, and all other double fluorides of sodium and aluminum which would work, he says that the proportions may be varied. What proportions does he mean? Why, the proportions of the two fluorides, of course. The labored construction that the proportions to be varied are those of the cryolite and the aluminum fluoride is wholly untenable. How may they be varied? Within certain limits. What does that mean? The patentee goes on to state when he says "that any proportions which may be found suitable may be employed." Cryolite is now found suitable, and the patentee had found it suitable when he made his application. Could anything be more unlikely than that Hall or his patent solicitor, after they had been successful in an interference controversy with Heroult, whose only bath was one of cryolite, would have framed his specifications with the intention of not including a cryolite bath in the monopoly he was seeking? We think the patent very aptly drawn to cover the use of every double fluoride of aluminum and sodium which can be made to produce aluminum

when used as a bath in the Hall process. The proportions are immaterial so long as it is a double fluoride of these metals.

Next is the defense based on the use of external heat in Hall's apparatus as described in his patent, and defendant's use of internal heat. Hall's claims do not say what heat shall be used to fuse the bath. The process is described as beginning with a fused bath. The argument is that because Hall in his specification describes an apparatus for the fusion of the bath by external heat, therefore he limits himself to a process in which external heat is used, and confers upon the world at large the right to use his process if only some other mode of applying the heat is employed; and this in the face of the words of the patent: "Nor does this apparatus described herein with more or less particularity form any part of the invention herein." We do not see how the patentee could have used stronger words to avoid the difficulty in which defendant wishes to involve him. Then, too, we have the refined point that the language of the claim itself excludes the possibility of electric heating because it speaks of dissolving alumina in a fused bath of the double fluorides, "and then passing an electric current, by means of a carbonaceous anode, through the fused mass." This language is as applicable to electric heating as to any other. The word "then" is used to indicate that the electrolysis is to follow the solution of the alumina in the fused bath. Now, whether the current or a furnace fire fuses the bath, the current which is passed through the fused mass to perform electrolysis is passed through after the fusion. The decision of the supreme court in the case of *Tilghman v. Proctor*, 102 U. S. 707, is conclusive on this point. There the patent was for a process for the treatment of fats and oils, in which the application of heat was one of the necessary steps. Mr. Justice Bradley, speaking for the court, said:

"Another ground assumed by the defendants to avoid the charge of infringement is that they do not heat the mixed mass in the manner pointed out in Tilghman's specification; but, instead of heating the containing vessel by an outside application of heat, they heat the contents by the introduction of superheated steam. But we think that this does not alter the essential character of the process. The heating by steam is clearly an equivalent method to that of heating by an external fire. The patent does not prescribe any particular method of applying the heat, except when using the pipe and coil apparatus described in the specification; and even in the use of this apparatus the outward application of the heat to the pipe is suggested incidentally and as a matter of convenience, rather than as an essential requisite. The patentee showed one method in which the heat could be applied. That was all that was necessary for him to do. If it could be applied in any number of different methods it would not affect the validity of the patent as a patent for a process. The method of heating the mixture by the introduction of steam may be attended by some beneficial results in producing an agitation, or an automatic circulation helpful to the perfection of the admixture of the water and fat; and so far it may be an improvement on heating from without. Suppose this to be so, as before said, the introduction of an improvement gives no title to use the primary invention upon which the improvement is based."

Finally, it is said the defendant does not infringe, because the claim calls for a carbonaceous anode and the defendant uses a

carbon anode. "Carbonaceous" means "pertaining to carbon," or "made of carbon." It includes anodes made partly of carbon and partly of some other substance, but it certainly covers an anode made all of carbon.

A decree will be entered for the complainant, finding that complainant's patent is valid, and that the defendant infringes both the first and second claims thereof, and perpetually enjoining the defendant from further infringement, with the usual reference to a master to determine the damages.

AREY et al. v. DE LORIEA et al.

(Circuit Court of Appeals, First Circuit. February 28, 1893.)

No. 18.

PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—INSTRUCTIONS.

In an action for the infringement of a patent, to which the defense was want of novelty, the court in its charge read to the jury an extract from the opinion of the court in a case between other parties involving the same patent, in which it was held, upon the law and the facts, that patents put in evidence to show the prior state of the art did not embody the combination claimed by the patent then in litigation; and the same patents were in evidence for the same purpose in the present suit. *Held*, that this was reversible error, even though the court told the jury that they were not to be controlled by this opinion, but were to regard it as a statement of the law merely, and to find the facts for themselves.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Joseph F. De Loriea and Griffin Place, as executors of James W. McDonald, against Reuben Arey and George H. Maddock, partners doing business under the name of Arey, Maddock & Locke, for damages for the infringement of letters patent No. 210,797, issued December 10, 1878, to said McDonald, for a machine for unhairing and scouring hides and skins. One of the defenses was want of novelty in the patent, and a number of patents were introduced to show the prior state of the art. The charge objected to was given upon this point. The jury brought in a verdict for plaintiffs, and defendants bring error. *Reversed*.

Ralph W. Foster, (Joshua H. Millett, on the brief,) for plaintiffs in error.

James Milton Hall, for defendants in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

NELSON, District Judge. At the trial in the court below the presiding judge read to the jury, as a part of his charge, an extract from the opinion of Judge Colt in *McDonald v. Whitney*, 24 Fed. Rep. 600. To this the defendants excepted. We are of opinion that this action of the court below was erroneous, and that the exception was well taken. The case of *McDonald v. Whitney* was a

suit in equity in the circuit court for this district, between different parties, brought for an alleged infringement of the McDonald patent. In the extract read to the jury Judge Colt gave his views upon the questions of law and fact involved in the case before him, and found expressly, as a matter of fact, that the gist of the McDonald invention, as described in claims 1 and 2, was the separation and adjustment of the rolls held together by spring pressure by means of a treadle and levers. The first and second claims were for combinations of feed rolls, supporting roll, and other mechanism, and the mechanical effect of these combinations, as well as the relations of the various elements to each other, and whether there was a substantial identity between them and the prior patents introduced in evidence, or with the machine used by the defendants, involved questions of fact to be considered and passed upon by the jury. Upon these issues the finding of another tribunal in a case between other parties was not competent evidence, and should not have been called to the attention of the jury. The presiding judge was careful to state that the jury were not to be controlled in their judgment by the opinion of Judge Colt, but were to consider his language as a statement of law only, and were to find the facts for themselves; but, in spite of these cautionary words, we think the jury were more than likely to give to the views of Judge Colt upon the issues before them a decisive effect in making up their verdict.

Other exceptions were taken by the defendants to the rulings of the court below, but as they do not present questions of importance, and may not arise on the second trial, we have not thought it necessary to consider them.

Judgment reversed, and case remanded to the circuit court, with directions to set aside the verdict and to order a new trial.

SEAGAR v. NEW YORK & C. MAIL STEAMSHIP CO.¹

(District Court, S. D. New York. June 21, 1892.)

1. SHIPPING—DELIVERY OF CARGO—CUSTOMARY FACILITIES—WHARF FACILITIES.

The contract in a charter party to discharge with "customary dispatch" is fulfilled if the vessel is afforded the customary facilities for speedy discharge; and hence, when charterers furnish ample dock room for a vessel, but the latter, either through misapprehension on the part of her stevedore, or acting under direction of the consignees of the cargo, given without the knowledge of the charterers, so discharge her cargo as to block the dock, and thus occasion delay, the charterers are not liable for demurrage.

2. SAME — "DELIVERY WITHIN REACH OF SHIP'S TACKLES" — VESSEL'S DUTY AFTER DELIVERY ON WHARF.

The clause in a charter that goods are to be delivered "alongside and within reach of the ship's tackles" does not necessarily require the consignee to receive the goods directly from the tackles, and determines nothing as to what may be required of the ship after the goods have been dropped from the tackles. The deposit of certain goods in tiers on the wharf has long been the ordinary practice; hence, where a vessel, after

¹For opinion on appeal, see 55 Fed. Rep. 880.

discharging bales of hemp, voluntarily piled them in tiers, and there was no evidence that such piling was excessive or unreasonable, or beyond the ordinary practice, *hckil*, that there was no implied contract on the part of the charterer to reimburse the ship for such labor.

In Admiralty. Libel for demurrage and for extra compensation for handling freight. Dismissed.

Convers & Kirlin, for libelant.

Carter & Ledyard, for respondents.

BROWN, District Judge. The contract in the charter party to discharge with "customary dispatch" is fulfilled if the vessel is afforded the customary facilities for speedy discharge. Steamship Co. v. Dempsey, [1892] 1 Q. B. 854. In the present case there were but two consignees of the hemp cargo, though the three bills of lading specified numerous lots of different marks and numbers. All the hemp, however, was directed by orders from the receivers to the same storehouse. The evidence shows that the customary mode of handling cargoes of hemp is that the bales are not removed until all have been discharged; to place together the bales that are for the same consignee; to separate the lots going to different consignees; and to pile such as are deliverable to the same consignee on top of each other, in two or three tiers.

In the present case abundant space was furnished to the ship by the respondents, the charterers, for the discharge of the whole cargo on the dock in the customary manner. The blocking of the dock and consequent delay arose solely from the ship's attempt to keep separate, not merely the bales belonging to the different consignees, but the different lots of the same consignee, according to the different marks. These lots were mostly of so few bales as not to admit of piling; and their separation required also much additional space for the passages between them. Had the bales consigned to the same consignee been placed together and piled in the usual manner, there would have been abundance of room for the complete discharge of the cargo upon the dock without blocking or delay.

It is contended that orders were given by the receivers at the dock to keep separate the different lots. I do not think this claim is fairly established. The separation made by the ship's stevedore seems to have been made through misapprehension and mistake; and, on the Friday before the days for which the demurrage is claimed, this misapprehension was corrected by instructions that only Thebaud's consignment was to be kept separate; and there was abundant room for this.

Even if the transferees of the cargo had given instructions that all these separate lots were to be kept distinct, such instructions were without the knowledge or authority of the charterers, who are the respondents in this action. Such instructions would have been in excess of the rights of the two consignees and receivers of the goods. It was no part of the ship's duty to obey such instructions except upon her own contract for extra compensation and such arrangements as respects facilities for discharge as she might make.

The charterers could not be bound by such instructions given without their knowledge or consent, nor were they required to provide the additional facilities for discharge which such unusual separation of lots might necessitate.

The consignees of the goods were not the agents of the charterers. The latter were bound under the agreement for "customary dispatch" to furnish sufficient space for discharge in the customary manner. If, on the request of the receivers of the goods, the ship undertook a different mode of discharge for their convenience, she must look to them, not to the charterers, for compensation or indemnity.

2. A claim is also made for extra handling in piling some of the bales, on the ground that the charter only required the ship to deliver "alongside and within reach of the ship's tackles," and that such piling was an extra service for the benefit of the charterers, for which the ship is entitled to compensation either upon an implied promise to pay, or as for a substituted expense, which saved the charterer a larger charge for demurrage.

If the obligation of the charterer to receive "within reach of the ship's tackles" were in any way incompatible with "customary dispatch," or with the customary facilities in discharging, and with the duty which, as the evidence shows, the custom would impose upon the ship to do more or less of piling within the allotted space on the dock, then the written provision, which required of the charterer only "customary dispatch," would probably be held to control the printed form, "within reach of the vessel's tackles," because the written parts are the "immediate terms selected by the parties" to express their intention. Insurance Co. v. Bowring, 1 U. S. App. 183, 193, 1 C. C. A. 583, 50 Fed. Rep. 613.

But there is no necessary incompatibility between these terms of the charter, and none should be raised by construction. To deliver within reach of the ship's tackles is a very different thing from requiring a merchant to receive the goods directly from the ship's tackles, as in the case of *The Santee*, 7 Blatchf. 186, or at the very point where the tackles may drop them without any further handling by the ship. In the absence of a special contract, something more than this is required of the ship, not merely by immemorial practice, but by the law itself. The legal duty of the ship to keep separate the consignments of goods going to different consignees is incompatible with the latter construction of this clause. On the argument, also, it was admitted that the vessel had other handling to do after dropping the bales from the tackles. The object of the provision for "delivery alongside and within reach of the ship's tackles" is to secure a certain convenience to the ship by not requiring her to carry the goods for deposit beyond a certain easily determinable limit of space, viz. the reach of her tackles, as a measure of distance. This is the practical construction which usage has placed on the phrase. It has nothing to do with the ship's obligation within those limits, and determines nothing as to how much may be required of her after the goods are dropped from her tackles. The deposit of goods in tiers more or less upon the docks and wharves

has been the ordinary practice from time immemorial as respects a great variety of goods. What is or is not a reasonable handling, in this regard, within a space not beyond the reach of the ship's tackles, is a matter properly falling within the scope of the custom and practice of merchants to determine. These customs, as well as those relating to "customary dispatch" at the port of destination, so far as they are lawful and reasonable, are presumably within the intent of both parties to the charter and form a part of their contract. *Smith v. Pine Lumber*, 2 Fed. Rep. 396; *Lindsay v. Cusimano*, 10 Fed. Rep. 302, 12 Fed. Rep. 504. Here the allotted space was "within reach of the ship's tackles." There is no evidence that the piling done or expected was either excessive or unreasonable, or beyond the ordinary practice. It was not incompatible with the provisions of the charter; and having been done voluntarily by the ship, and in accordance with the custom, there is no implied promise or duty of the charterer to reimburse her. Even departures from the charter provisions, when voluntarily adopted, and without objection, may be treated as a waiver of the literal provisions of the formal parts of the charter. *Arreco v. Pope*, 36 Fed. Rep. 606. On the former grounds, however, the libel should be dismissed; but under the circumstances of mistake, as indicated, without costs.

THE GOVERNOR AMES.

PAULSON v. THE GOVERNOR AMES.

(District Court, D. Washington, N. D. March 31, 1891.)

1. SEAMEN—NEGLIGENCE—PERSONAL INJURIES.

The maritime law gives a seaman no right to recover damages for permanent disabilities caused by the negligence of the ship's officers, but he is entitled, on the other hand, irrespective of any negligence on his own part or on the part of fellow seamen, to recover wages to the end of the voyage, and to be cured at the ship's expense, so far as cure is possible. *The City of Alexandria*, 17 Fed. Rep. 396, followed.

2. SAME—DEFECTIVE SHIPPING ARTICLES.

Nor is his right of recovery affected by the fact that the shipping articles signed by him did not conform to the requirement of the laws of the United States. The master cannot be permitted to take advantage of his own neglect in that regard.

In Admiralty. Libel in rem, against the schooner *Governor Ames*, by John Paulson, a seaman, to recover damages for a personal injury suffered while stowing cargo. Decree that libelant recover the amount of wages which he would have earned by completing the voyage for which he had engaged to serve.

W. V. Rinehart, Jr., for libelant.

John M. Gearin, for claimant.

HANFORD, District Judge. From the evidence in this case I find that the libelant was hired at San Francisco to serve as an able seaman, on board the schooner *Governor Ames*, for a voyage from San Francisco to Puget sound, thence to Australia, and return

to an American port on the Pacific coast. The wages contracted for were to be at the rate of \$40 per month until the vessel should be loaded at Puget sound for the contemplated voyage to Australia, and from that time, until the termination of the contract, at the rate of \$30 per month. The shipping articles signed by the libelant do not conform to the requirements of the United States statutes, and are insufficient to constitute a valid contract; but the document in evidence serves as a memorandum to corroborate the libelant's testimony as to the terms of the verbal contract of hiring entered into between the signers and the master. It shows that the vessel was to be employed on such a voyage as I have described, and that it was contemplated that the libelant should go in her as an able seaman, and receive wages as above stated. Pursuant to this contract, the libelant went on board, and served faithfully until he was injured by being struck by a heavy timber while doing his work in the hold, stowing her cargo of lumber, which she was to carry to Australia, in consequence of which he was, by the captain's orders, removed to the marine hospital at Port Townsend, and there paid the amount of wages earned during the time he was actually employed.

The libel charges that the injury was caused by negligence on the part of the officers of the vessel, and on this ground he claims to be entitled to recover compensation for an injury causing permanent disability. I find it unnecessary to decide whether or not there was negligence on the part of any officer or member of the crew, or whether the libelant contributed in any way to his own injury by negligence on his part. The law governing cases such as this is well stated in the following extract from the opinion of Judge Brown, of the southern district of New York, in the case of the *City of Alexandria*, 17 Fed. Rep. 396:

"In cases of accidents like the present, the provisions of the maritime law applicable to the rights of the parties are altogether different from those of the municipal law in regard to similar accidents on land. By the latter the person injured, if chargeable with contributory negligence, would recover nothing; he would not be entitled to wages while disabled, nor to be nursed and tended at his employer's charge. By the maritime law the mere ordinary negligence of the seaman, though that be the sole cause of the accident, makes no difference in his right to be cured at the ship's expense, and to his wages to the end of the voyage; and, as his own negligence does not debar him from these rights by the maritime law, so, conversely, these rights are in no way extended, though his hurts have arisen by the negligent acts of others of the ship's company. In effect, the maritime law makes no account of mere ordinary negligence in such cases. More or less negligence is in fact to be expected, and the rules long established, as regards the relief to be afforded, are irrespective of such negligence, whether by the seaman or others. When the owners perform all that can be reasonably done on their part by the proper equipment of the vessel for the voyage, and the selection of competent officers and a sufficient crew, no reason exists in natural justice for holding them or their vessel answerable for the accidents to seamen which happen during the voyage, beyond the limits which the maritime law has established."

Although the shipping articles signed by the libelant are defective, he is not blamable. The master cannot be permitted to take advantage of his own neglect in this regard, after the libelant has been

disabled in the service of the ship, by claiming a forfeiture of the wages which would have accrued if the law had been complied with. The libellant is by the maritime law entitled to the balance of his wages, at the rate of \$30 per month from the time of the accident to the date of the vessel's return from Australia to an American port, and costs. Decree accordingly.

THE TONGOY.¹

LIGHTBURNE et al. v. THE TONGOY.

(District Court, S. D. Alabama. March 25, 1893.)

1. SHIPPING—CHARTER PARTY—MASTER TO SIGN BILLS OF LADING.

Where the charter party required the master to "sign shippers' bills of lading as presented without prejudice to the charter party," he is bound to sign any usual bill presented describing goods actually delivered to the vessel, and a refusal to do so is a breach of the charter party, which entitles the shipper to such damages as may be shown; but such provision does not require the master to sign erroneous bills, and seek subsequent redress for shortage.

2. SAME—CHARTER PARTY LIBERALLY CONSTRUED.

The construction of such contracts as charter parties should be liberal, agreeable to the real intention of its parties as ascertained from the whole instrument, and conformable to the usages of the trade concerned.

3. SAME—BILL OF LADING—DEFINITION.

A bill of lading is both a written acknowledgment, signed by the master, that the vessel has received from the shippers the goods therein described, and a promise to transport and deliver them on the terms therein expressed.

4. SAME—AGREEMENT AS TO CONCLUSIVENESS OF BILLS OF LADING.

A provision in a charter party that "bills of lading are to be binding upon master and owners as proof of quantity delivered to the ship," makes the bills not only *prima facie*, but conclusive, evidence on that point.

5. SAME—MASTER CANNOT VARY TRUE BILLS OF LADING.

When true bills of lading are presented the master cannot make any indorsement impairing their negotiability, but he may, before signing, indorse a correction of any errors in bills of lading presented to him.

6. SAME—ACCEPTING BILLS OF LADING UNDER PROTEST.

Shippers do not prejudice their right to redress by accepting under protest bills of lading wrongly indorsed by the master.

In Admiralty. Libel in rem by shippers to recover damages for breach of charter party in that the master, before signing bills of lading, which he claimed were incorrect, indorsed on them that a certain amount of cargo was in dispute. The shippers accepted the bills under protest, and then libeled the vessel. Heard on the merits, and libel dismissed.

G. L. & H. T. Smith, for libellants.

John E. Mitchell and Pillans, Torrey & Hanaw, for claimants.

TOULMIN, District Judge. The libellants sue for a breach of a charter party made in London, Eng., on the 22d of October, 1892.

¹Reported by Peter J. Hamilton, of the Mobile, Ala., bar.

The charter party contains, among other things, the following stipulations:

"The master shall sign shippers' bills of lading as presented without prejudice to this charter party, but any difference in freight shall be settled on signing bills of lading. * * * Bills of lading are to be binding upon master and owners as proof of quantity delivered to the ship; the master's signature to be in all cases binding upon owners."

The charterers were the shippers, and the cargo consisted of deals and boards. The breach of the charter party alleged is that the master refused to sign bills of lading as presented by the shippers, unless there was expressed thereon, "seventeen hundred and seventy-five pieces in dispute, all on board to be delivered." The master refused to sign the bills of lading as presented for the quantity of lumber specified therein, on the ground, as he stated at the time, that he had not received that number of pieces; that the number of pieces delivered to and received by him was 1,775 less than the number named. Libelants were at first unwilling to have said indorsement made on the bills of lading, and did not consent thereto, but subsequently consented, and received from the master the bills of lading signed in the form proposed by him, but did so under protest.

The libelants then brought this suit to recover damages alleged to have been sustained by them by the master's refusal to sign the bills of lading as presented. The parties to the contract stipulated in the charter party, as they had the right to do, that the master should sign bills of lading as presented, without prejudice to the charter party. When this is the case the master is bound to sign any usual and ordinary bill of lading presented to him, and his refusal to do so is a breach of the charter party, and gives a right to damages, if any are shown. *Scrutton, Charter parties*, p. 45; *Macl. Shipp.* p. 408. But the master cannot be required to sign bills of lading unless the goods have been delivered. His authority to give bills of lading is limited to such goods as have been put on board. *Carter, Carr.* 156-161. The contention on the part of libelants here is that, under the contract in this case, the master was bound to sign any bills of lading presented by the shippers in good faith, whether the quantity of lumber specified in the bills of lading had actually been received by the master or not; in other words, he was bound to sign at all events, and if it thereafter appeared that the quantity of lumber receipted for had not been actually received, the owners or master of the vessel must seek such redress as might then be available. With this contention of the able counsel for the libelants I cannot agree. My opinion is that, under the clause in the charter party providing that the master shall sign shippers' bills of lading as presented without prejudice to the charter party, he is not compelled to sign bills of lading without reserve. He is not compelled to sign them for a specified quantity of cargo unless it is actually measured or counted into the ship. I think the meaning sought to be given to the clause referred to is too literal, too restricted.

The general rule is that the construction of contracts of this

character should be liberal, agreeable to the real intention of the parties to it, and conformable to the usages of trade in general, or of the particular trade to which the contract relates. 1 Pritch. Adm. Dig. p. 473, § 37. To ascertain such intention we should look to the whole contract, and not to a single part of it. 2 Pars. Cont. 13. We should consider the nature of a bill of lading, and, construing the contract conformably to the usage of the particular trade, determine the rights and obligations of the parties to it. Now, a bill of lading is a written acknowledgment, signed by the master, that he has received the goods therein described from the shippers, to be transported on the terms therein expressed. It is a receipt for the quantity of goods shipped, and a promise to transport and deliver them as therein stipulated. The Delaware, 14 Wall. 579. Can it be justly or reasonably claimed that the parties to this contract intended by the charter-party provision, "The master shall sign bills of lading as presented," that he should give a written acknowledgment that he had received lumber on board of his ship for transportation which he had not in fact received? Can such claim be made in the face of that clause of the charter party which provides that bills of lading are to be binding upon the master and owners as proof of the quantity delivered to the ship? For the bills are not to be mere prima facie evidence, subject to be rebutted by the master in case of dispute; not merely the medium by which the quantity delivered to the ship is to be prima facie established,—but they are to be conclusive evidence against master and owners as to the quantity received. Such a construction of the charter party as would compel the master to sign erroneous bills of lading is illiberal, unreasonable, and unjust, and one not, in my opinion, agreeable to the real intention of the parties. I think the true construction is that the master shall sign all true bills of lading correct as to the recital of facts therein as presented. If he signs bills of lading at all, he must sign them as presented, without any indorsement impairing their value or negotiability. If they are not true,—not correct in point of fact,—he should refuse to sign them. He does so, however, subject to liability for wrongful refusal. The master's refusal to sign the bills of lading as presented was no breach of the charter party if the quantity of lumber specified therein had not been received by him. But he took the responsibility and risk of such refusal; and if, as a matter of fact, that quantity had been received, his refusal to sign the bills of lading, however honest he may have been in it, was a wrongful refusal, and gave a right to the shippers to recover damages, if any could be shown; or, if the ship had sailed away without giving any bills of lading, it would have been liable to a suit for conversion. It makes no difference, so far as the shippers' right of action is concerned, whether the master refused to sign any bills at all or signed them, under the libellant's protest, with an indorsement which impaired their negotiability or value.

This brings us to the question whether the quantity of lumber specified in the bills of lading presented by the shippers was

actually received by the ship. The burden is on the libelants to show this. In the state of the proof on the subject I am unable to say that they have done so. From the testimony of libelants' witness Chandler it appears that he loaded 28 cars with lumber for them at a mill some 60 miles from Mobile, and whither they were brought. A copy of the specifications made by him is in evidence, and which specifications show an aggregate of 27,234 pieces. Pradoss, another witness for libelants, testified that he loaded 2 cars for the "Tongoy," and they aggregated 3,371 pieces; making a total as loaded at said mill of 30,605 pieces. Neither of these witnesses had any personal knowledge that the lumber they put on the cars at the mill was actually received by the ship. The mate of the ship is the only witness who testifies positively to the number of cars bringing lumber to the ship, and he gives the number of each car, and the number of pieces of lumber which he received on board the ship from each car. The number of pieces of lumber he claims to have received is 27,911. His testimony shows 26 cars corresponding in their numbers with numbers found in Chandler's specifications, and 4 cars with numbers that do not correspond with any of said specifications. Two of the last cars, I take it, were those loaded by Pradoss. But Chandler's specifications give the number of one car that does not appear from the master's testimony to have been received at the ship. There is no direct evidence accounting for this car, and I cannot find that it ever reached the vessel. The shippers were loading other vessels with lumber at the same time in the port of Mobile. The number of pieces of lumber claimed by the bill of lading to have been delivered to the ship "Tongoy," and for which the master was requested to receipt, is 29,686. The number claimed to have been loaded on the cars at the mill, and shipped to Mobile for her, is 30,605, nearly 1,000 pieces more than shown by the bill of lading, and the number claimed by the ship to have been received is 27,911 pieces, or 1,775 pieces less than shown by the bill of lading. In this condition of the evidence I am unable to find what the truth is. I must therefore hold that the libelants have failed to discharge the burden resting on them to show, at least by a preponderance of evidence, that the vessel did receive as her cargo 29,686 pieces of deals and boards, as they have averred in their libel. The libelants have not made a case which entitles them to damages, if any had been shown. The libel must be dismissed; and it is so ordered.

THE CYPRUS.

KEILEY v. THE CYPRUS.

(District Court, S. D. New York. March 29, 1893.)

SHIPPING—PERSONAL INJURIES—DEFECTIVE APPLIANCES—CONTRIBUTORY NEGLIGENCE.

A vessel is liable for maintaining defective and unsafe appliances, but an employe who knew of such defect, but failed to use additional care, is not entitled to full damages in case of injury.

In Admiralty. Libel by William S. Keiley, as guardian, etc., against the steamship Cyprus, for personal injuries. Decree for libellant.

Libellant, a boy of 16, was employed on board the steamship Cyprus by a boiler cleaner who was cleaning the steamer's engines under contract. The entrance to the boiler room was by means of an iron ladder, leading into the stoke hole. The ladder was bolted fast at the bottom on each side, and was designed to be fastened at the top to the deck on each side, but the evidence tended to show that the fastenings at the top on one side were not in place. The sides of the ladder were flat, iron plates, and, instead of single large rungs for steps, two iron rods, about an inch apart, were riveted in for each step. Libellant testified that the want of a fastening on one side of the ladder, at the top, caused it to sway under his weight as he was ascending it, in consequence of which he lost his foothold, and fell into the stoke hole. Libellant had been up and down the ladder several times previously on that day, and was aware that it was shaky, and insecurely fastened on one side, at the top.

William B. Tullis, for libellant.

Convers & Kirlin, for claimants.

BROWN, District Judge. The evidence leaves no doubt that the ladder in the present case was in a defective and unsafe condition through the absence of the usual fastening at the top on the right-hand side. The ship is responsible for this defect. *The A. Heaton*, 43 Fed. Rep. 592; *The France*, 53 Fed. Rep. 843. The libellant must, however, have had previous knowledge of the unsteadiness of the ladder from his previous use of it. He must have gone up and down the same ladder that day at least three times before. The witnesses show that its condition in the morning was the same. Notwithstanding the defect, I have no doubt that he could have gone up without falling, as he and others had already done, had he used the additional care which proper caution would show to be necessary. Both are, therefore, chargeable with fault. As the libellant has practically fully recovered, and is not entitled to his full damages by reason of his own contributory negligence. (*The Max Morris*, 137 U. S. 1, 11 Sup. Ct. Rep. 29.) I award him \$300, with costs. A decree may be entered accordingly.

THE PERSIAN MONARCH.

BRIODY v. THE PERSIAN MONARCH.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

SHIPPING—INJURIES TO STEVEDORE—FELLOW SERVANTS.

Plaintiff, a foreman stevedore, was requested by a fellow stevedore to pass a derrick fall rope, in plaintiff's charge, with which to haul a lighter alongside the ship on which they were at work. The derrick was unsuited to this purpose, and the rope broke, causing an injury to plaintiff, who was looking on. There were suitable appliances at hand for hauling the lighter alongside, in the use of which plaintiff and his fellows were skilled. The stevedores were not directed by the officers to use the derrick on this occasion, but they had been in the habit of using it, without objection

from the officers. *Held*, that plaintiff was injured by the negligence of his fellow servant, and was not entitled to recover. 49 Fed. Rep. 669, reversed.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by Briody against the steamship *Persian Monarch* for personal injuries. There was a decree for libellant, (49 Fed. Rep. 669,) and the libelee appealed. Reversed.

James Thomson, for appellant.

Wm. Allan, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The libellant was one of a number of stevedores employed by the corporation owning the steamship in loading and unloading its vessels. He was injured in consequence of the breaking of a guy rope, one of the appliances of a derrick provided for the purpose of loading cargo into, and unloading it from, the hold of the steamship. He was foreman of the gang at an after hatch where cargo was being discharged, his special duty being to attend the fall rope of the derrick at that hatch. Cargo was being taken on board at some of the other hatches, and the stevedores at one of those hatches concluded to use the derrick to haul a lighter alongside which was lying by ready to deliver cargo. Their foreman asked the libellant to pass him the fall rope of the derrick, and the libellant did so. It was fastened to the lighter, which was large and heavy, and in the attempt to haul the lighter against the tide, and while the libellant was looking on, the guy rope of the derrick broke, and the boom struck libellant in the chest. The steamship was provided with proper ropes and appliances to be used in case it became desirable to haul lighters alongside, but the derrick was not adapted or designed for such a use; and this was well understood by the stevedores, including the libellant, who was an experienced man, and had worked for the owner of the steamship for several years. It appears, however, that on previous occasions the stevedores, instead of using the ordinary appliances which were at hand for hauling lighters alongside, had used the derrick for the work; and this, on some occasions when the officers of the steamship were present, and must have been cognizant of what was being done. The guy rope broke because the derrick was subjected to the extraordinary strain put upon it by attempting to haul the lighter alongside under the existing conditions. The case presents the question whether the accident was caused by any negligent conduct or breach of duty on the part of the employer, or whether it was caused by the negligent acts of the libellant's fellow servants, in which he to some extent participated. It was of course obligatory upon the steamship owner, as employer, to supply and maintain suitable instruments and means with which to enable the stevedores to carry on their work, and to exercise reasonable diligence to see that such appliances were at all times safe for use. It had fulfilled its general duty in that

behalf; it had furnished all the requisite appliances for the various incidents of the service to be performed by the stevedores; and it is not asserted that any of these appliances were defective or unsafe for their appropriate uses. It was under no obligation of especial supervision, because the stevedores were experienced men, who knew which appliances to select, and how to use them. It was no part of its obligation as an employer to furnish a derrick which would be strong enough in all its parts for the hauling of vessels, or safe in any respect for an illegitimate use. If it was remiss in any sense it was because the stevedores had been permitted, more or less frequently, to put the derrick to a use for which they knew it was not intended. If the stevedores had been forbidden by regulations, or explicitly cautioned, not to use it except for the loading or unloading of cargo, they would have been no better informed than they were when their employer had placed at their disposition for the safe performance of their duties the various appliances, each adapted to its appropriate use, and known to them to be intended for that use. We know of no principle which imputes negligence to an employer, under such circumstances, merely because he permits his workmen to relax his regulations, or disregard his general instructions or advice, when they choose to do so for their own convenience, and with knowledge of the risk. It would be unreasonable and unjust to shift upon the employer the consequences of a risk to which he has not exposed his workmen, but which they have voluntarily and unnecessarily taken upon themselves for their own ease or whim. The case is very similar in principle to that of *Griffiths v. Gidlow*, 3 Hurl. & N. 648. In that case a workman employed with others in sinking a pit, while at the bottom of the pit, was injured by the fall of a tub of water. In a suit against the employer for negligence, the evidence was that the tackle was imperfect, not being pulled with a safe hook, and that a jiddy should have been used. A jiddy had been provided by the employer, who was at the work several times each day, but he had been informed by the plaintiff that the workmen were not using it. The court held, among other propositions, that, assuming the accident to have arisen from the neglect to use the jiddy, the employer, having provided a proper apparatus, was not liable for the neglect of the plaintiff's fellow workmen in omitting the use of it.

The libelant participated in the illegitimate use of the derrick, not very actively, but sufficiently to identify himself as an actor in the transaction. Like the other stevedores, therefore, he assumed the risk of its being so used. If the derrick had been used by the order of any of the officers of the steamship, or of any one not a fellow servant of the libelant, but in authority over him, different considerations would be suggested. As it is, he has no cause of action against the steamship owner, and his libel should have been dismissed by the court below. The decree is reversed, and the cause remitted to the district court, with instructions to dismiss the libel, with the costs of that court and of this appeal.

THE MARTIN KALBFLEISCH.

PENDLETON et al. v. THE MARTIN KALBFLEISCH et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

TOWAGE—NEGLIGENCE—IMPROPER PILOTAGE—WHO LIABLE.

C. chartered a schooner to take on cargo, without guarantying any depth of water, nor agreeing to put a pilot on board to carry her out to sea, nor reserving any control over the vessel. The master of the schooner employed a tug to take her out to sea, and, upon the request of C. or his agent, a pilot was put on the tug. The schooner was stranded on a bar, and lost, for want of proper pilotage. *Held*, that the pilot was the servant of the tug, and not of C., and that C. could not be held liable because the pilot was employed upon his insistence or request, or because the pilot was the captain of a boat in the employ of C.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by Winfred S. Pendleton and others against the steam propeller Martin Kalbfleisch and B. Frank Coe, respondents. The libel was dismissed below without an opinion, and libelants appeal. Reversed.

W. W. Goodrich, for appellants.

H. D. Hotchkiss, for appellee Coe.

J. F. Mosher, for appellee Kalbfleisch.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This suit was brought to recover for the total loss of the schooner Stella N. Kenyon, which ran on a quicksand bar while being towed on a hawser from Barren island, through Rockaway inlet, on December 10, 1890. The schooner had been chartered by respondent Coe to load a cargo of fertilizers at Barren island to a depth of 14 feet, for a voyage to Savannah. The charterers did not guaranty any depth of water, nor agree to put a pilot aboard the schooner to pilot her to sea, nor reserve any control whatever over the movements or navigation of the libelants' vessel. Having completed his loading, the master of the schooner employed the steam propeller Martin Kalbfleisch to tow her to sea. Thereupon, and before she left, discussion was had between the master of the schooner, the master of the tug, and one Fairchild, the agent of the respondent Coe, as to the propriety of her undertaking to cross the bar which lay between Barren island and deep water without the aid of an additional pilot. As the result of such discussion, one George Rohde was sent aboard the Kalbfleisch, took the wheel, and undertook the piloting over the bar. Rohde was a licensed pilot, and, so far as appears, a competent one. He was in Coe's employment at Barren island as captain of a small boat running between that place and Canarsie. The witnesses who testify to the discussion which led to the employment of Rohde do not entirely agree in their statements. For the schooner it is contended that Coe "insisted upon putting the pilot on board," and that therefore, as the loss occurred while under Rohde's piloting, and as Rohde was Coe's servant, Coe is liable.

Upon this branch of the case we are unable to assent to the libelants' proposition. Coe had no power of control of the schooner; no right or authority in any way to interfere with her movements. However strenuously he may have urged the employment of an additional pilot, the acceptance of such pilot was in the end wholly the act either of the schooner's master or the tug's, and, when employed, Rohde became the servant of the vessel, engaged solely in the transaction of her business, and not at all in the transaction of the business of respondent Coe. The circumstance that Rohde was in the general employment of Coe makes no difference. Touching the business in hand, he was the servant of his immediate employer. There is no question of bailment in the case. The schooner remained in the possession and under the control of her own master. Her management and navigation were at no time committed to the respondent Coe, and he exercised no authority over her. Nor is Coe responsible for any carelessness or negligence of Rohde as pilot of the tug, on any theory that the tug accepted his services because of Coe's insistence. He had no control over the tug; no authority to select its servants. The acceptance of Rohde as pilot, and the turning over of the wheel to him, were in the end the voluntary acts of the master of the tug, however much the latter may have objected, or Coe insisted. Although, in the general employment of Coe, Rohde, when he undertook to pilot the tug upon the procurement or with the assent of her master, who alone had the right to so employ him, was engaged in an independent service, over which Coe had no control. For his negligence of that service the particular employer whose business he was engaged in, and not the general employer, who had no concern with it, would be responsible. He was the servant of the tug, and could not be at the same time, and in the same business, the servant of both. The law does not recognize a several liability in two principals. We are unable to find any principle of law on which to hold the respondent Coe liable.

The Kalbfleisch, by her contract to tow the schooner into deep water, assumed liability for any carelessness or negligence of those employed by herself to do the work. The employment of Rohde as pilot was in the end the act of the master of the tug. He was under no obligation to employ Rohde, nor to yield up his wheel to him, even though by so doing he would please the master of the schooner. The evidence does not make out a case such as those cited upon the argument, where the pilot of the tow directs the movements of both vessels, (the tug merely furnishing the motive power,) and remains under the control of the master of the tow, who can displace him from the wheel should his incompetency be demonstrated. The testimony strongly indicates that the accident happened because a buoy intended to indicate deep water had shifted its position, and at the time marked the shoalest part of the bar. Such shifting was apparently unknown to Rohde, but was known to those on the Kalbfleisch, which had touched bottom at the same place, with another tow, a few days before. But, however that may be, it is averred in the libel, and admitted by the an-

swer of the Kalbfleisch, that "the grounding of the schooner was occasioned * * * by the negligence and carelessness of Rohde;" and, as he was the servant of the tug, she must respond for the consequent damage.

The decree of the district court is reversed, and the case remanded to said court, with instructions to dismiss the libel as to Coe, and to decree in favor of the libelants against the Kalbfleisch for damages. Costs to the libelants against the Kalbfleisch in both courts, and costs of both courts to Coe as against the libelants.

THE WIOMA.

BARBOUR v. THE WIOMA et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

COLLISION—BURDEN OF PROOF—EVIDENCE.

As the burden, in a collision case, is on the libelant to show that his adversary was in fault, the libel is properly dismissed when the court is convinced that the stories told by the principal witnesses on each side are both intentionally false.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by William C. Barbour against the tug-boat Wioma and others for collision with the schooner Sarah Potter. The libel was dismissed, and the libelant appealed. Affirmed.

W. W. Goodrich, for appellant.

H. Putnam, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. About 7 P. M. of October 3, 1889, a collision occurred, in the vicinity of Hart's island, between the schooner Sarah Potter, bound through Long Island sound from Perth Amboy, N. J., with a cargo of coal to Portsmouth, N. H., and two scows in tow of the tug Wioma, bound into the port of New York from Glenwood, L. I. The weather was clear, the tide strong ebb, setting to the eastward, and the wind a stiff breeze from S. S. W. The tug had two heavily loaded sand scows, towing on a hawser of about thirty fathoms to the first scow, and about six feet from the first scow to the second. The lights on both vessels were burning brightly. The schooner struck the head scow a glancing blow, and then came into collision with the starboard corner of the second scow, striking it with her own stem and port bow. The schooner sank. Contending that the collision happened solely through the negligence of the tug, the owners of the schooner filed their libel, setting out the facts as they understood them to be. Issue was joined by the filing of an answer. The burden of establishing the affirmative of the issues thus joined is, of course, with the libelant. He failed to satisfy the district judge of the truth of

his story, and the libel was dismissed, without opinion. Irrespective, entirely, of the conclusion reached by the district judge, the libelant has equally failed to sustain the burden of proof in this court.

The evidence is extremely conflicting on all material points. The theory of the libelant is that the schooner, sailing on a course N. E. $\frac{1}{2}$ E. had reached a point southeast of Hart's island, about the middle of the channel, when, at the distance of about three quarters of a mile, she sighted the red light of the tugboat about half a point on her port bow; that the vessels proceeded on their respective courses till they were about 200 yards apart, when the tugboat changed her course to port so as to cross the schooner's bow, at the same time blowing a long whistle and two or three short blasts; that those on the schooner immediately put their helm hard astarboard, and let the spanker sheet run off, for the purpose of avoiding the collision. The maneuver was unsuccessful, for, though the tug crossed the schooner's bows, (with a margin of 100 feet or less,) her tow was brought across the schooner's course, even as changed two points to port by her hard astarboard helm, in such a way that the schooner struck nearly head on upon the bow of the second barge. Had both vessels kept their course, the libelant contends they would have passed each other port to port, two or three hundred yards apart.

The navigators of the tugboat insisted that they sighted the Potter a mile and a half or two miles away, showing her green light on the tug's starboard bow. There was no change in her appearance as they came near her, her green light still bearing on the starboard bow. The tug's wheel was kept astarboard, and when about a quarter of a mile apart her master gave a signal and several whistles to attract the schooner's attention. Had the schooner kept her course, there would have been no collision, but, instead of keeping on her course, she suddenly luffed up, passed the tug, but struck the tow. They testified that the schooner's red light was not seen until she came abreast of the tug.

Upon a careful examination of the record we find it impossible to escape the conviction that the narrative given by the principal witnesses called for the libelant is not in accordance with the facts, and that it was intentionally misstated in order to give support to the proposition that, when they sighted the tug and tow, the respective positions and headings of the vessels was such as would harmonize with the theory that the collision happened by reason of an abrupt change of course by the tug. We are equally satisfied that the story told by the principal witnesses from the tug as to the lights seen on the schooner and their bearing from the tug before collision was false, and intentionally so, and it might be that, were the claimant the moving party, we should feel constrained to hold that he had failed to show fault on the part of his adversary by sufficient credible proof to warrant a finding in his favor. Certainly, the libelant has failed to produce sufficient proof to warrant a finding in his favor. Under these circumstances it would seem sufficient to say that the case must rest where it is left when the

party who has undertaken to prove some fault in navigation has failed to do so by credible evidence. We may say, however, that from all the evidence, fortified by the inherent probabilities of the case, we are satisfied that the tug and tow, at the time the vessels sighted each other, had the Stepping Stones and Fort Schuyler lights in range. That being so, both vessels were to the eastward of the courses on which libellant puts them; and as we are further satisfied that they sighted each other end on, or nearly so, it is extremely difficult to see how the collision could have happened as the libellant contends, even if his evidence as to the subsequent movements of both vessels were more satisfactory than it is.

The decree of the district court is affirmed, with costs.

THE EXPRESS.

THE A. P. SKIDMORE.

POWELTON BARGE CO. v. THE EXPRESS AND THE A. P. SKIDMORE.¹

(District Court, S. D. New York. March 30, 1893.)

COLLISION—EAST RIVER—TOWING LIGHTS—LOOKOUT—EXCESSIVE SPEED.

The steamboat E., going up the East river by night, in the vicinity of Brooklyn bridge, at a speed of 9 or 10 knots, overtook a tug with a tow, and collided with, and sank, libellant's barge, on the starboard side of the tug. Her defense was that the tug was not showing proper towing lights, and that the barge also had no light. *Held*, on conflicting evidence, that the tug and tow were exhibiting the proper vertical towage lights, and that the collision was caused by the lack of a sufficient and competent lookout on the deck of the E., and by the fact that her master and quartermaster were preoccupied by the duties of navigation and the attention given to other vessels,—her speed in excess of the statutory rate also possibly contributing to the collision; that the steamboat, therefore, was solely liable for the collision.

In Admiralty. Libel by the Powelton Barge Company against the steamboat Express and the steam tug Abram P. Skidmore for collision. Decree against the Express.

Hyland & Zabriskie, for libellants.

Page & Taft, for the Express.

Carpenter & Mosher, for the Skidmore.

BROWN, District Judge. At a little after 8 o'clock in the evening of December 24, 1892, the libellants' barge Emma, while in tow of the tug Skidmore, on her starboard side, and going up the East river, at the commencement of the flood, was overtaken by the steamboat Express, laden with some 19 cars, near mid river, and only a short distance above the Brooklyn bridge. Neither the Skidmore nor the tow was seen by the Express until she had approached them within one or two hundred yards, when they were perceived

¹Reported by E. G. Benedict, Esq., of the New York bar.

nearly directly ahead. The Express was going some nine or ten knots an hour; her wheel was put hard aport and her engines reversed; but her port bow struck the starboard corner of the Emma's stern and the guard of the Express overran and crashed into the Emma's house, so that she sank with her cargo in about 20 minutes. The above libel was filed to recover the damages.

The question turns wholly upon the lights exhibited by the Skidmore and her tow. The captain, the quartermaster, and a man forward on the deck of the Express all testify that the Skidmore before collision exhibited only one white pole light, instead of the two white vertical lights required by the inspector's rules for tugs having tows. They also testify that the single white light, which they did see, was dim and was seen as soon as it was visible, and that it could not be perceived more than the distance above named, i. e. from one to two hundred yards; whereas a proper light, even in that position by the bridge, notwithstanding the electric lights, should be visible at a distance of a mile. The same witnesses also testify that no light was visible on the Emma, which was on the starboard side of the Skidmore; nor on the Jackson, which was alongside on her port side. Both the captains of these boats, however, testify most positively that they each had a white staff light from 20 to 35 feet above the water, and that each was burning brightly. And the witnesses for the Skidmore also testify that at different times, namely, on the start from Jersey City, when off the Battery, and when near the bridge, the usual two vertical lights, properly set, were burning brightly on the Skidmore, although the lower of the two lights was put out by the shock of the collision.

Taking all the circumstances into account, I think the testimony in behalf of the Skidmore and her tows must prevail. The attention of the master of the Express was evidently occupied to some extent with the two other tugs and tows that were coming down from above the bridge just before the collision, a little on his port hand, as well as by a ferryboat coming down near the Brooklyn bridge on his starboard hand. He signaled, as he says, to those tows, and got an answer of one whistle which served for both. But he did not hear, or did not notice, three similar signals given by the Skidmore to the same tugs, though those signals must have been given at about the same time; nor does he seem to have noticed the two separate whistles of those tugs.

The lookout on the deck of the Express was plainly not properly performing the duties of a lookout. The evidence leaves no doubt that there were at least four different craft ahead of the Express, and he did not report one of them. He did not understand it to be his duty to do so. Having no duty to report, there could be little, if any, sense of duty to observe, other vessels; and hence little weight can be given to his testimony in that regard. The signals testified to as given by the Express, were not given until the forward one of the two tows coming down was within three or four hundred yards; and yet the testimony of the Express is that their lights could have been seen under the bridge at the distance of a mile. On the whole, the evidence on the part of the Skidmore and her two

tows is so explicit that I am not warranted in discrediting their statements. It is in the highest degree improbable that three out of four white lights would go out between the Battery and the bridge. I am inclined to think that the glare of the bridge electric lights had something to do with the nonobservance of the lights of the tug and tow, (*The A. Demerest*, 25 Fed. Rep. 921,) and that the collision arose from the lack of a sufficient and competent lookout on deck, and from the fact that the master and quartermaster in the pilot house were preoccupied with the duties of navigation and the attention given to other vessels, which is confirmed by the failure to notice the *Skidmore's* three whistles.

I think the lower of the two vertical lights on the *Skidmore* was put out by the shock of collision, and that they were of the usual brightness, though doubtless dim compared with the electric lights of the bridge, or of the *Express*. The *Express* rubbed along the stern of the *Skidmore*, which projected some 25 feet behind her tows. But this is not, perhaps, material; because even a single red light, properly burning, was sufficient warning to the *Express*, as an overtaking vessel, not to go so near as to run into the *Emma*, whether the latter had a light, also, or not. The statute forbids passing nearer than 20 yards; and also forbids a speed of more than 8 miles an hour between the Battery and Corlear's Hook, (*Consolidation Act*, 1882, § 757;) and those are but reasonable precautions, especially at night. Had she been going at the rate of only 8 miles, she might possibly have avoided collision. I do not find the *Skidmore* in fault. Decree dismissing the libel as to the latter, and awarding damages against the *Express*.

THE PEERLESS.

BYERS et al. v. THE PEERLESS.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

COLLISION—HELL GATE—EAST CHANNEL—SIGNALS—RULE 19.

A tug with two small schooners in tow on a hawser was going up the east channel of Hell Gate with the first of the flood tide, and was about in the middle of the channel. A steam yacht, bound west, took the east channel to avoid meeting two sailing vessels directly in front of her. On seeing the tug the yacht gave one whistle, and ported her helm. The tug immediately responded with one whistle, but did not alter her wheel. As soon as the yacht saw that the tug did not change her course, she reversed, but too late to avoid the tug, which was sunk. *Held*, that the yacht had the right to take the east channel, and her navigation was without fault; that the cause of the collision was the failure of the tug to alter her course in accordance with the whistle, which there was nothing to prevent her from doing, and she was consequently solely liable for the collision. 48 Fed. Rep. 844, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Suit to recover damages caused by collision. The court below dismissed the libel. See 48 Fed. Rep. 844, where the

case will be found stated in full in the opinion of BROWN, district judge. Affirmed.

J. F. Mosher, for appellants.
Harrington Putnam, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the opinion of Judge BROWN, who decided this cause in the court below. 48 Fed. Rep. 844. The decree is affirmed, with costs of the appeal.

THE MARY AUGUSTA.

LOW v. THE MARY AUGUSTA.

HIGGINS et al. v. LOW et al.

(District Court, D. Connecticut. April 17, 1893.)

1. COLLISION—SAILING VESSELS—RIGHT OF WAY.

The schooner A. was sailing free before the wind at night, on a course about E. by S., while the schooner T. was sailing closehauled upon her port tack on a course about W. $\frac{1}{2}$ N. Each vessel kept her course until they were close together, when the A. put her helm up and kept off. The T. did the same almost immediately. Then the A. put her helm hard down and struck the T. on her port quarter. *Held*, that the A. was in fault, being bound to keep out of the way, and that the T.'s change of course, if an error, was an error in extremis.

2. SAME—CREDIBILITY OF WITNESSES.

The principal defense of the A. was the absence of a red light on the T., to establish which the evidence of the captain of the A. and one of his seamen that they did not see the light was offered, and the testimony of a seaman on the T. that, after the collision occurred, the captain of the T. said to him and his fellow seamen, "Boys, we musn't allow but what these lights were burning all right." This testimony was contradicted by the captain, lookout, steward, and mate of the T., and the wheelsman of the A., and there were circumstances to discredit the testimony of the T. seaman. The captain and seaman of the A. admitted that they did not look, after the collision, to see if lights were burning on the T. *Held*, that the evidence was insufficient to show a want of a red light on the T.

3. SAME.

The assertion of the captain of the A. that the T., though sailing closehauled, having the right of way, and bound to hold her course, swung seven or eight points in twice her length and ran under the bows of the A., was so manifestly improbable and impossible as to discredit his whole testimony.

In Admiralty. Libel by Warren Low against the schooner Mary Augusta, her tackle, etc., and cross libel by Joseph M. Higgins and another against Warren Low. Decree for libelant, Warren Low.

Walter C. Noyes and Frank B. Brandegee, for libelant.

Samuel Park and Edward S. Dodge, for claimants and cross libelants.

TOWNSEND, District Judge. On June 24, 1892, at 11 o'clock at night, near Race rock in Long Island sound, the schooner Mary

Augusta was sailing free before the wind on a course of about E. by S., and the schooner Artemas Tirrell was sailing closehauled upon her port tack on a course of about W. $\frac{1}{2}$ N. It was a good night for seeing lights. The wind was between S. S. W. and S. W. by S. Both vessels were heavily loaded. Each vessel kept her course until they were close together, when the master of the Mary Augusta put her helm up, and kept off. The master of the Tirrell almost immediately did the same. Then the master of the Mary Augusta put her helm hard down, and struck the Tirrell on her port quarter near the stern. Both vessels were damaged; the Tirrell soon filled and sank; the Mary Augusta put into New London harbor.

Under the circumstances stated above, the Mary Augusta would clearly be alone liable. She had the wind free, and was bound to keep out of the way of the Tirrell. The master of the Tirrell kept his course, as he had a right to do, until just as the Augusta was about to strike him. Then he used his best judgment, and, by putting his wheel hard up, tried to ease the blow. The preponderance of evidence shows that the collision followed so quickly that the Tirrell's course was not materially changed. The change, if any, did not contribute to the collision or increase the damage. Even if it was an error of judgment it was committed in extremis, and, in the absence of other qualifying conditions, was not a fault. *Bentley v. Coyne*, 4 Wall. 509; *The Havilah*, 33 Fed. Rep. 875; *Id.*, 50 Fed. Rep. 333, 1 C. C. A. 519; *The E. A. Packer*, 49 Fed. Rep. 98.

Counsel for claimants and cross libelants did not press this claim except as incidentally bearing upon the main defense,—the absence of proper lights on the Tirrell. It is strenuously maintained that on the night in question, although it was a good night for seeing lights, and the master of the Augusta was forward, looking for lights, and saw the Tirrell when a quarter of a mile off, no lights were visible on her. And, in support of the testimony of the witnesses on the Mary Augusta to this effect, the claimants introduced the deposition, taken after the close of the hearing in court, of one Weaver, one of the seamen on the Tirrell, who swore positively that immediately after the collision he went forward and examined the red light, and found it burning so dimly that he could just see a very small blaze with his face close to the glass by climbing up in the rigging; that thereafter the cook, under orders of the mate, took it down, cleaned it, and replaced it; that it had gone out on his watch two or three times before; that when they got into the wharf that night the captain said to the mate and him, "Boys, we mustn't allow but what these lights were burning all right," and that he replied he was not going to perjure himself for him or anybody else. He further testified that, when he went out with the rest to look after the schooner the following morning, the captain told him to take the light out of the rigging, and that he then looked at the light and saw it was not burning. If the story of this witness is to be believed, it not only discredits the testimony of the other witnesses on board of the Tirrell, but it destroys the effect of the testimony of the disinterested witnesses on the wrecker,

who testified that when they went out to the Tirrell the following morning her red light was still burning brightly. A careful examination of the testimony of the witness discloses, as bearing upon its credibility, the following circumstances:

First. His testimony that the red light was not visible at the time of the collision is contradicted by the captain, lookout, steward, and mate of the Tirrell, and by Hausen, the wheelsman of the Augusta. His testimony as to the trimming of the lights after the collision, and that the captain told him what to swear to about lights, is denied by the captain. I attach little importance to the fact that this testimony was not denied by other witnesses, as Weaver's deposition was taken under a stipulation that, as he was to contradict certain statements of Capt. Low, only Capt. Low's testimony should be introduced in rebuttal. His testimony that the red light was not burning the following morning is denied by the captain and engineer of the wrecking steamer Scott. I have not considered the depositions of other witnesses on this point subsequent to the trial, as, under the stipulation, I think libelants had no right to call any one except Capt. Low to rebut Weaver.

Second. Certain statements of the witness are so improbable as to raise a serious question as to their truth. On his cross-examination Weaver swears that after he left the Tirrell, and before any conversation with anyone on board the Augusta, he received a letter from her captain, asking him simply whether he was aboard the Tirrell at the time of the collision, to which he replied that he was. He further swears that, having gone from New London to various places, he went to New York to ship again, and there, at a shipping office the name of which he did not know, but into which he happened to go the day before giving his deposition, to see if there were any sights, and without having intimated to anyone that he was going there, he met Capt. Bowden, the captain of the Augusta; that he did not talk over his testimony with the captain, nor the captain with him, although he came with the captain from New York to New London, but simply told him he would testify if summoned; that he was paid a witness fee the amount of which he did not know, and that no one, unless they were mind readers, could have told, the week before, that he would testify as to the declarations of the captain of the Tirrell. On the redirect he was shown a letter written by him to a Mr. Joy, one of the owners of the Augusta, in which the witness stated his inability to see the light except with his face close to the glass, but made no reference to the other parts of his testimony heretofore referred to. And yet, weeks before his deposition was taken, counsel for claimants had stated that they desired to take the deposition of a witness who would testify to certain declarations made by the captain of the Tirrell.

If the testimony of this witness be discredited, there remains, as already stated, the testimony of the four witnesses on the Tirrell that the lights were burning well, and of Hausen, the wheelsman on the Mary Augusta, who admits that, after the vessels struck, he could see a red light on the port side of the Tirrell, which was

burning brightly. The master of the wrecking tug who went out to the Tirrell the morning after the collision, apparently a competent and disinterested witness, testified that her red light then appeared to be burning brightly. His testimony is corroborated by that of the engineer of the tug. The captain of the Augusta saw no lights, but when he called to the captain of the Tirrell at the time of the collision, "Where are your lights?" and the captain of the Tirrell replied, "They are up," he did not look to see whether they were burning or not. One sailor, who was below on the Augusta, swore that he saw no lights on the Tirrell after the collision, but admits that he did not look to see whether they were burning. It is significant that the mate and cook of the Augusta were not called as witnesses. The deck hand on the wrecking tug saw no light burning on the Tirrell the morning after the collision. In view of the number, character, and appearance of the witnesses who testified that the lights were burning, and of the character of their testimony, as compared with the testimony to the contrary, I feel obliged to disregard the testimony of Weaver. I am of the opinion that the burden of proof on the part of the Tirrell of compliance with the statute as to lights has been successfully maintained.

There is much force in the suggestion of counsel for libelants that the question of presence or absence of the red light is not material to the decision of this case. The captain of the Augusta testified that he saw the Tirrell a quarter of a mile off, and was then able to tell that she was a schooner sailing by the wind on her port tack, and that if the Tirrell had held her course there would have been no difficulty in his keeping out of her way, and there would have been no collision; that it was the Tirrell's change of course that caused the collision, and that, therefore, whether she had lights burning or not, was not directly the cause of the collision. Furthermore, the captain and wheelsman of the Augusta locate the Tirrell as about a point on the Augusta's starboard bow when she was at a distance of a quarter of a mile. In that event it would be the green light of the Tirrell which would be more plainly visible to those on board the Augusta. Now, even Weaver testifies that there was never any trouble about the green light, and the evidence that it was burning brightly is only negated by the testimony of the captain of the Augusta and the seaman who did not look for lights. It may, then, be fairly assumed that the green light was burning properly on the Tirrell. The captain of the Augusta, having seen the Tirrell at the distance of a quarter of a mile, and having ascertained her course, was bound to keep out of her way.

In view of the irreconcilable conflict of testimony, certain other matters bearing upon the question of probabilities demand consideration. The testimony of the captain of the Augusta as to the Tirrell's alleged change of course is as follows:

"Question. And she began to change her course when you were about three ship's lengths apart? Answer. Yes, sir. Q. As nearly as you can state it, the Artemas Tirrell swung seven points out of her course in the distance of

a ship's length and a half, did she? A. It takes rather more than a ship's length and a half to do it. Q. If you were three lengths apart when you began to change, this would be so, would it not? A. Yes; but when we came together we were almost a length across her bows. Q. So that would make it about two ship's lengths, then? A. Yes."

And again:

"Q. And if she had held her course, you would have gone out of her way; is that it? A. Yes, sir. Q. And you say that, seeing that, after you had changed your course and gone out of her way, she deliberately changed her course seven or eight points and ran under your bows? A. Yes, sir."

The assertion that a vessel sailing closehauled, having the right of way, and bound to hold her course, swung seven or eight points in twice her length, and ran under the bows of a vessel sailing free, seems to me so manifestly improbable and impossible as to throw discredit upon the whole testimony of this witness. There is a conflict of testimony as to the respective locations of the two vessels just prior to the changes of course. The witnesses for the Tirrell locate the Augusta about half a point or a point off the Tirrell's port or weather bow. The witnesses for the Augusta locate the Tirrell about a half a point to a point off the Augusta's starboard or weather bow. It will be observed that the conflict is within a narrow compass, a matter of from one to two points. It seems to me probable, as is suggested by counsel for claimants, that the two vessels must have been approaching each other on courses which involved the risk of collision. For some reason not satisfactorily explained, the Augusta failed to keep out of the way of the Tirrell until the collision was inevitable.

I have not discussed the evidence upon the angle of collision, because none of the evidence introduced by the libelants is admissible under the stipulation of counsel heretofore referred to, as it was understood by the court, and the single witness introduced by the claimant on this point was not an expert, and did not show sufficient acquaintance with such blows to make his testimony of much value. Much of the difficulty which I have found in the decision of this case arises from the misunderstanding of counsel after the close of the hearing in court as to the character and extent of the evidence to be thereafter taken by deposition.

Let a decree be entered in favor of the libelant, Warren Low.

THE NORGE.

NEW YORK DREDGING CO. et al. v. THE NORGE.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

COLLISION—STEAMER AND DREDGE—EVIDENCE.

The N., a steamship in charge of a pilot, entered the main channel of New York harbor at a speed of 10 knots an hour, in the daytime, with the R. dredge boat on her starboard bow, and the A. dredge boat on her port bow, about half a mile away. The A. was on the west side of the channel, and there were three or four vessels near her also approaching the N.

The A. had her dredging signals flying, and was practically a stationary object. The N.'s course was set to pass between the A. and the R., and when about a quarter of a mile away she slowed up for that purpose, but, when within 500 feet of the A., the latter, supposing that the N. intended to pass starboard to starboard, suddenly hoisted her dredges, and changed her course so as to move directly across the bows of the N., and was struck by the N., and instantly sunk. If the A. had maintained position, no collision would have occurred. *Held*, that the N. was without fault.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by the New York Dredging Company and others against the steamship Norge. The district court dismissed the libel without filing any opinion. Libellant appeals. Affirmed.

J. F. Mosher, for appellant.

Harrington Putnam, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is an appeal by the libelants from a decree of the district court dismissing the libel in a cause of collision; the libelants being the owners, charterers, officers, and surviving members of the crew of the steam dredge Advance, which was sunk by the steamship Norge, August 2, 1890, and became a total loss. The collision took place in the main ship channel in the lower bay of New York, in broad daylight, when the sea was smooth and the weather fine. Judge Benedict, by whom the cause was heard in the court below, dismissed the libel without any opinion. We are called upon to determine the merits of a controversy which turns wholly upon the credibility of witnesses, without the benefit of the judgment of the trial judge before whom they were examined. We have given the case presented by the record our best consideration, and think the facts of the collision are these:

The Norge, a first-class ocean steamer, provided with the latest steering-gear improvements, was on her way from Stettin with passengers and cargo for New York. As she was about to turn from the swash channel northerly into the main ship channel, she observed the Advance. She entered the main ship channel under a port wheel, going at a speed of about 10 knots an hour, until, when about half a mile away from the Advance, she steadied to pass the Advance on a course N. by E. At that time the Advance was at work near the middle of the channel. She was heading about S. S. E., and had her dredging signals flying. She was practically a stationary object, having her drags on the bottom of the channel, and moving with the tide at less than a mile an hour. Opposite, and a little distance to the eastward from the Advance, was the steam dredge Reliance, proceeding towards the eastern side of the channel. On the westward side of the channel, in the vicinity of the Advance, and approaching the Norge, were three or four vessels. The Norge was in charge of a pilot. He was on the bridge, at the wheel, and her master was on the port side of the bridge, and her third officer was on the starboard side.

When the Norge steadied, she had the Advance between one and two points on her port bow, and her course was shaped with a view to pass the Advance port to port, quite near, and between her and the Reliance. As the Norge approached the Advance, and when about a quarter of a mile away, the order to stand by was given, and her engines were slowed; and at that time there was room, which was gradually widening as the Reliance moved to the eastward, sufficient to permit the Norge to pass safely between the two vessels. The proofs show that it is quite customary for pilots to take large steamers, while passing dredges like the Advance, at work, within a very few feet of them. The Norge maintained her course, and reduced speed until she got within about four or five hundred feet of the Advance, when the latter blew two blasts of her steam whistle, and was immediately after seen to be moving ahead, and to the port, directly across the bows of the Norge. Thereupon the latter immediately reversed, and hard-starboarded her helm, but notwithstanding struck the Advance nearly a right-angled blow on the starboard side, near the pilot house, and sunk her instantly. The master of the Advance, apparently acting under the supposition that the Norge was intending to pass the Advance starboard to starboard, and seeing that, instead of doing so, she was drawing to the port side, thought the Advance would be run down, and ordered her dredging apparatus hoisted, and put her ahead at full speed under a starboard helm. This movement on the part of the Advance could not have been anticipated by the Norge. By the time the Advance had got under headway, so that those on the Norge could understand her purpose, the vessels, were so near together that it was impossible for the Norge to avoid collision.

At the time when the Norge steadied on her course to pass the dredge, it was her duty, under article 21 of the international regulations, to keep to the eastward side of the channel; that being on her own starboard side. Under the circumstances, it was entirely safe and practicable for her to do so. It was apparently safer for her to pass the Advance on the eastward side, and go between her and the Reliance, than to attempt to pass on the westward side of the Advance, where she would be more or less embarrassed by the other vessels. On the other hand, the Advance, being practically at rest, and not immediately under control for maneuvering, had no duty to perform, by way of avoiding the Norge, except to maintain her position. The Norge fulfilled her duty; but the Advance, by suddenly abandoning her work, and going ahead full speed as the Norge was drawing near, violated hers.

There is not the slightest reason for attributing the collision to the want of a proper lookout, or of proper diligence in any other respect, on the part of the Norge. She did not go at an unreasonably high rate of speed while approaching the Advance. She did maintain vigilant observation of the Advance. There was no reason why she should not have passed the Advance safely port to port, if the Advance had not left her own position, and there was no

conceivable reason for any such change of course as is attributed to her by the witnesses for the Advance. The improbability that the Advance would have left her position, and run into the jaws of destruction, without good reason, is counterbalanced by the improbability that the Norge would have unnecessarily changed a course deliberately and prudently selected.

It is proper to say that, if we were not of the opinion that the collision should be attributed solely to the fault of the Advance, it would notwithstanding be our duty to affirm the decree of the court below, because, if the collision was not owing to her fault, there certainly is no preponderance of evidence to establish fault on the part of the Norge, and, as the libelants have the burden of proof, they have not made out their case. The decree is affirmed, with costs of the appeal, and the cause is remitted to the district court with instructions to decree accordingly.

THE A. B. VALENTINE.

(District Court, N. D. New York. March 27, 1893.)

COLLISION—STEAMER AND TUG WITH TOW.

A large steamboat, while passing upward through the draw of the New York Central Railroad bridge at Albany, noticed a tug which had just disengaged a tow from its berth, or from another boat, about 400 feet above the bridge, and immediately blew a signal of inquiry. Receiving no answer, she ported her helm as far as she could safely do in the narrow channel, and reversed, but, the tug having taken a course directly across the river, a collision ensued, whereby the tow was injured. *Held* that, in view of the steamer's ignorance of the tug's intention, she did all that good seamanship required, and was not in fault.

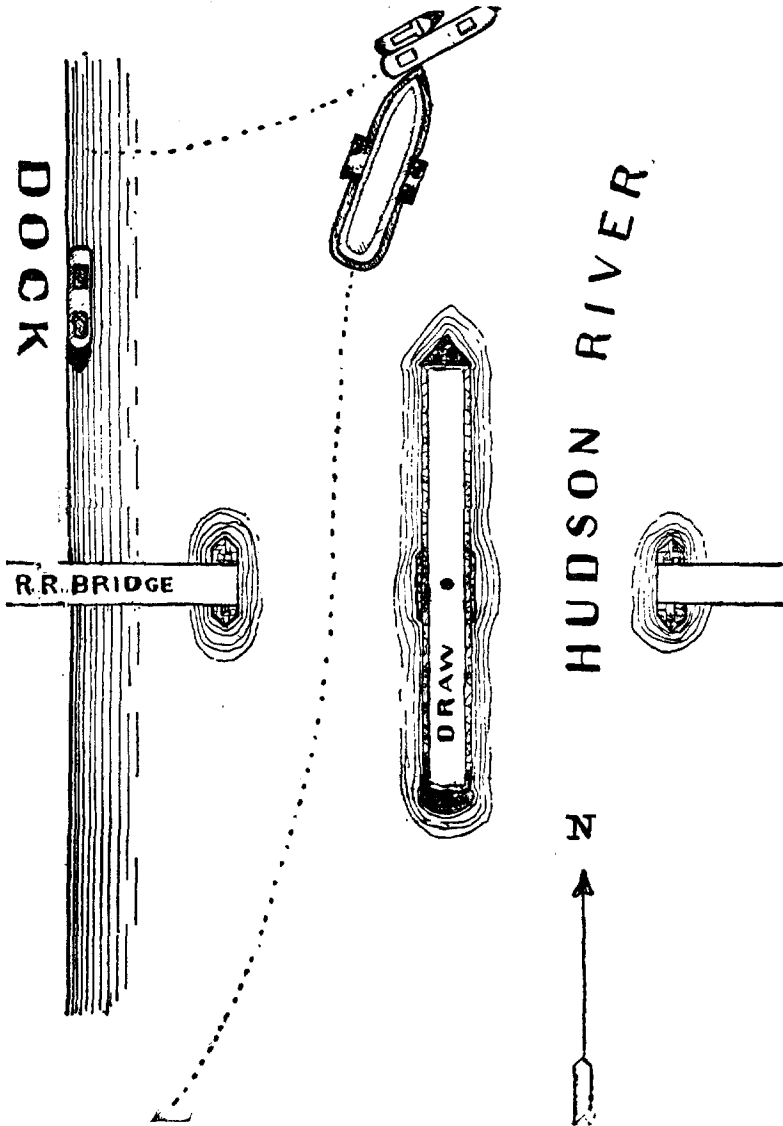
In Admiralty. Libel for collision. Dismissed.

George Clinton, for libellant.

Amos Van Etten, for claimant.

COXE, District Judge. On the morning of the 14th day of September, 1892, the canal boat Harrigan while lashed to the tug Vassar was injured by a collision with the steamboat Valentine. Soon after the accident and before this suit the Vassar was destroyed by fire. The libel is, therefore, against the Valentine alone. The Valentine is a large side-wheel steamboat, 218 feet over all and 62 feet beam. The Vassar is a small river tug. Just before the collision the Valentine, having discharged the tow which she had brought up the river, was lying some six or seven hundred feet below the railroad bridge of the New York Central & Hudson River Railroad at Albany. At the same time the Vassar was at Skinner & Arnold's dock about 400 feet above the bridge, and had swung the canal boat out from the dock preparatory to making a trip up the river. The Valentine having occasion to go to her dock, which was above the bridge, whistled for the draw which was

opened to permit her and two other vessels to pass. The drawbridge is some 400 feet in length. Between the center pier on which the bridge swings and the west pier there is a space of about 185 feet of clear water. The situation can easily be understood by an examination of the following map:



The libellant concedes the negligence of the Vassar. There is no dispute that the Vassar saw the Valentine when the latter was below the bridge and knew that she was coming up the river through the open draw. While the Valentine was in the draw the Vassar started with her tow on a course directly across that of the Valentine. Whether the Vassar steered directly east or was on a rounding course under a starboard helm is immaterial, for either course would have brought her directly across the bows of the Valentine. When the Valentine first saw the Vassar the Valentine was in the draw, and the Vassar had just disengaged the canal boat from the dock or a contiguous boat. Nothing in the tug's actions at that time indicated what her intention was. The Valentine blew a signal of inquiry but got no response. She then reversed and ported her helm as far as she could safely do so in the narrow channel of the draw. The Vassar in the mean time kept directly on her course and the collision followed.

It is manifestly unfair to judge the conduct of the Valentine in the light of subsequent events, and to charge her with a knowledge of all the facts which were developed at the trial. The question is, what did she do or omit to do which careful seamanship required, based upon the situation at the time? If she could have known that the Vassar intended, without signal or warning of any kind and in defiance of every rule of prudence, to keep directly on a course across the river, it is possible that she might have averted the accident. An elaborate and ingenious calculation based upon the supposed positions of the boats, their rate of speed, and distance apart, seems to indicate that the Valentine might, perhaps, have avoided the accident by starboarding and passing to the left under the stern of the Vassar. The difficulty with this reasoning is that it proceeds upon the erroneous hypothesis that the Valentine knew or might have known that the Vassar intended to take the dangerous and erratic course which she did take. The pilot of the Valentine was not endowed with prophetic power; he supposed, as he had a right to suppose, that upon discovering that the large steamboat was coming up the river the tug would not attempt to run across her bows. Believing that the Vassar would stop and reverse, the Valentine did all that prudent seamanship required. She gave the signal to go to the right, and immediately reversed her engines and ported her helm. The only tenable theory to be drawn from the testimony is that the accident was occasioned solely by the reckless course of the Vassar. If her course could have been foreseen it is possible that the accident might have been avoided, but the Valentine could not have foreseen it. It is thought that the absence of a lookout did not in any appreciable degree contribute to produce the collision. It follows that the libel must be dismissed.

LADD v. WEST et al.

(Circuit Court, D. New Hampshire. March 22, 1893.)

1. REMOVAL OF CAUSES—MOTION TO REMAND—SUIT IN AID OF ACTION AT LAW.

Defendants, B. and W., were residents of New York, and as partners operated a brickyard in New Hampshire. In 1889, plaintiff, an adjoining landowner, brought an action at law in a state court against B., the managing partner, alone, alleging that he was unlawfully damaged by smoke and noxious vapors arising from the brick manufactory, in which action there was judgment for the plaintiff. Later plaintiff brought another action at law against the same defendant, alleging a similar grievance at a subsequent period, and still later a proceeding in equity against both partners and B. individually, setting up the former judgment, and the pendency of the later action at law, and praying for consolidation, perpetual injunction, and the assessment and recovery of damages accruing subsequently to the proceedings at law. The defendants filed removal papers in the equity proceeding. *Held*, that the proceeding was not an original bill, but was a proceeding in equity, based upon and in aid of the prior proceedings and judgment at law, and as such was not removable; and that the fact that the plaintiff had brought in a new party defendant, who was a partner in the business sought to be regulated, did not alter the character of the proceeding.

2. SAME.

In such case, it being doubtful whether the court had power, on a motion to remand, to order the pleading recast for the purpose of separating law and equity matter, and compelling the claim for damages to be stated at law, with a view to taking jurisdiction of that part of the controversy only, it would not, on such motion, determine whether the claim for damages was incident to the injunction jurisdiction so as to be cognizable in equity, but the whole case, as presented by the record, would be remanded to the state court.

In Equity. Bill by Daniel W. Ladd against James G. West and William P. Bannigan, partners doing business as the Epping Brick Company, for injunction and other relief. Heard on motion to remand to the state court from which it was removed. **Granted.**

Streeter, Walker & Chase and Mr. Frink, for plaintiff.
Calvin Page and E. G. Eastman, for defendants.

ALDRICH, District Judge. In 1888 the defendants, who were residents of the state of New York, were operating a brickyard in Epping, N. H., under the name of the Epping Brick Company. In 1889 the plaintiff, who was an adjoining landowner, brought an action at law in the state court against Bannigan, the managing partner, alone, alleging, in substance, that he was unlawfully damaged by smoke and noxious vapors arising from the brick manufactory, in which action there was judgment for the plaintiff. Later the same plaintiff brought another action at law against the same defendant, alleging the same kind of a grievance at a subsequent period, and still later a proceeding in equity against both partners and Bannigan individually, setting up the former judgment, and the pendency of the later action at law, and praying for consolidation, perpetual injunction, and the assessment and recovery of damages accruing subsequent to the proceedings at law, by reason of the wanton and reckless manner of doing business, claimed in the sum of

\$3,000. The defendants seasonably filed removal papers in the equity proceeding, and the plaintiff moves to remand to the state court.

A proceeding in equity in aid of an action or judgment at law is a common remedy, and often employed to regulate, execute, and perfect rights appurtenant to land previously determined at law, and a rule which, by removal, should withdraw the use of this auxiliary remedy from the court which determined the right, would seriously interfere with the ordinary administration of justice in the state courts. The proceeding under consideration in its main feature is not an original bill to ascertain and regulate the use, but is a proceeding in equity based upon the prior proceedings and judgment at law, and as such is not removable. The right having been established at law in a case not removable, a subsequent proceeding in equity to regulate or perfect the right by injunction is ancillary to, or in aid thereof; or in other words, in a sense, at least, a part of the original proceeding. The Charter Oak Fire Ins. Co. Case, 6 Blatchf. 208, relied on by the defendants, was an original bill to reform a contract on the ground of mistake, and, although such contract was the basis of a pending action at law, there had been no judgment. Unquestionably, courts of equity have original jurisdiction to correct errors of this character, or to set aside judgments on the ground of fraud, and doubtless original proceedings of this nature are removable, but there is a broad difference between an original bill based upon independent ground for equitable relief, and a bill in aid of judgments and proceedings at law to regulate and perfect rights already ascertained. *Bank v. Turnbull*, 16 Wall. 190; *Barrow v. Hunton*, 99 U. S. 80; *Bondurant v. Watson*, 103 U. S. 281; *Cortes Co. v. Thannhauser*, 9 Fed. Rep. 226; *Buford & Co. v. Strother*, 10 Fed. Rep. 406; *Stackhouse v. Zunts*, 15 Fed. Rep. 481; *Filer v. Levy*, 17 Fed. Rep. 609; *Poole v. Thatcherdeft*, 19 Fed. Rep. 49; *King v. Shepherd*, 20 Fed. Rep. 337; *Wolcott v. Smelting Co.*, 34 Fed. Rep. 821. The fact that West, one of the defendants in the ancillary proceeding, was not a party defendant to the original action at law, which related to the same business, does not change the nature of the proceeding, or relieve it from the operation of the rule of law stated. Bringing in a new party defendant, who was a partner in the business sought to be regulated, does not make this proceeding any less a part and parcel and continuance of the original litigation. *Wolcott v. Smelting Co.*, *supra*.

The defendants place stress upon the fact that the plaintiff in the equity proceeding claims damages in the sum of \$3,000 for the alleged subsequent, unreasonable, wanton, and reckless conduct in connection with the management of the business, and contend that such claim or allegation creates a suit removable within the meaning of the federal statutes. The effect of this claim for damages by reason of alleged wanton conduct subsequent to the proceedings at law and before injunction, although it relates to the same business, is not altogether free from doubt. I am inclined, however, under the circumstances of this case, to view it as not con-

ferring jurisdiction upon the federal courts. It would not be contended that there is power in a court of equity to try and determine the rights of the parties as to a claim for damages of this character as a single question. Such a claim would furnish no independent ground for equitable interposition. If a claim of this character be a subject of equitable ascertainment, (which is very doubtful,) it comes as an incident to the jurisdiction to regulate by injunction the right previously ascertained in the proceeding at law; but for the purposes of this motion I am inclined to view it as an unhealthy graft upon the bill in equity, and as not having sufficient life or substance in a proceeding of this character, to amount to a suit within the meaning of the federal statutes, or to control the question of jurisdiction. If maintained in a court of equity it must be upon the theory that it is incident to some substantial ground of equitable jurisdiction. If it is incident to the right of the plaintiff to maintain his bill for perpetual injunction, it becomes a part of the ancillary proceeding, and is not removable. But if, on the contrary, a claim for damages resulting from an alleged subsequent (and perhaps different) unreasonable exercise of business rights of this character involves a new and different cause of action, and is not a subject of equitable ascertainment, (which is more probable,) and the plaintiff can only maintain his claim for damages by recasting his pleadings, (under the practice in the state courts of New Hampshire,—a practice recognized by the federal courts in *Perkins v. Hendryx*, 23 Fed. Rep. 419; *Phelps v. Elliott*, 26 Fed. Rep. 881; *Lacroix v. Lyons*, 27 Fed. Rep. 403; *Kellam v. Keith*, 144 U. S. 568, 12 Sup. Ct. Rep. 922,) and proceeding at law, then the question as to the right of removal of the subject-matter of such claim will be relieved of the doubt which surrounds the cause in its present aspect. Under the circumstances of this case, the relief sought by injunction is in aid of the judgment at law in the state court, which was not removable, the object being to regulate the rights involved in the prior proceedings in that court, and so much of the proceeding as relates to the injunction remedy should clearly be remanded. I have doubt as to the power of this court, at this stage of the proceedings, and upon a motion to remand merely, to order the pleadings recast for the purpose of separating law and equity matter, and compelling the claim for damages to be stated at law, with a view of holding jurisdiction of that part of the controversy for which the remedy is at law, and remanding that part cognizable in an equity proceeding in aid of the judgment and proceedings at law in the state court. Having such doubt, I do not undertake upon this motion to determine definitely whether a claim for damages of this character is, in an equitable sense, incident to the injunction jurisdiction, and therefore cognizable in equity, but remand the whole case as presented by the record in its present shape. Let the entry be, motion to remand granted.

HOWER v. WEISS MALTING & ELEVATOR CO. et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

1. INJUNCTION—ADEQUATE REMEDY AT LAW—TRANSFER OF SECURITIES.

Complainant alleged that he had deposited his note and stock, as collaterals, representing a controlling interest in a corporation, in the hands of a third person, to be delivered to defendant upon its performance of certain things, and that defendant had wrongfully gotten possession of the note and stock before such performance, and was about to dispose thereof. *Held*, that a prayer for an injunction was properly granted, there being no adequate remedy at law in case of a sale of the stock to an innocent purchaser, nor could the loss of the controlling interest be properly measured in damages. Wallace, J., dissenting.

2. SAME—REMEDY BY REPLEVIN.

In such case, also, he could maintain no action to recover the stock without tendering the money for which it was pledged, which would not be an adequate remedy, since he was entitled to hold defendant to its agreement without himself assuming any greater burden than he originally undertook. Wallace, J., dissenting.

3. ACTION AGAINST NATIONAL BANK — INJUNCTION — JURISDICTION OF CIRCUIT COURT.

Rev. St. U. S. § 5242, providing that no injunctions shall issue from a state court against a national bank before final judgment, does not deprive the federal circuit court of power to issue such an injunction, or to continue, after removal of the case, an injunction previously granted by a state court. *Bank v. Mixter*, 8 Sup. Ct. Rep. 718, 124 U. S. 721, distinguished.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

In Equity. Action by Fred Hower against the Weiss Malting & Elevator Company and the First National Bank of the City of New York, commenced in the supreme court of New York, and removed to the federal circuit court. Defendants appeal from an interlocutory order continuing an injunction *pendente lite* granted by the state court. Affirmed.

Emanuel J. Myers, for appellant Weiss Malting & Elevator Co.
Fisher A. Baker, for appellant First Nat. Bank.
W. C. De Witt, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. This action was brought in the supreme court of the state of New York, and was removed from that court to the United States circuit court for the eastern district of New York. Prior to the removal, the state court had granted an injunction restraining the defendants from transferring, disposing of, or in any wise interfering with, certain certificates of stock, representing 8,102 shares of the Fred Hower Brewing Company, during the pendency of the action. After the removal the defendants moved in the circuit court to dissolve the injunction. The circuit court, held by Judge Benedict, after hearing the parties, made an order denying the motion to dissolve, and continuing the injunction in force. The defendants have appealed from this order.

It is insisted for the appellants that the injunction should not have been granted, because the case presented by the pleadings is not one of equitable cognizance, but one in which the plaintiff has an adequate and complete remedy at law. Succinctly stated, the facts shown by the bill of complaint are these: On or about September 23, 1891, the defendant the elevator company had acquired 2,503 shares of the stock of the Fred Hower Brewing Company, pursuant to an agreement between the plaintiff and the elevator company that the plaintiff should buy the stock for the sum of \$25,033, payable in five years thereafter, in equal semi-annual installments, and that, as a security for the payment, the elevator company should hold in pledge these shares, together with 5,600 other shares of similar stock owned by the plaintiff. Shortly afterwards the elevator company delivered the stock to the plaintiff, and these shares, together with the other 5,600 shares, were left with one Meyers, acting for both parties, "upon the express understanding and agreement between the plaintiff and the elevator company that the said shares of stock should not be given or delivered to the elevator company until the agreement aforesaid had been reduced to writing, and executed by the elevator company." Pending the execution of the written contract, the plaintiff, at the solicitation of the elevator company, without any consideration therefor, and solely for its accommodation, and upon its promise that it would carry and renew the same for the period of five years, running parallel with the periods described in the agreement aforesaid, signed a negotiable promissory note, payable six months after date, to his own order, and indorsed by him, for \$25,033, and delivered it to Meyers upon the agreement with the elevator company that Meyers was not to deliver the note to it until the execution of the aforesaid written agreement. The note contained a recital that the maker had deposited, as collateral security for the payment of the note, two certificates of stock, one being for the 2,503 shares, and the other for the 5,600 shares, and a condition authorizing the holder, in case of default in the payment of the note, to sell the certificates at public or private sale, and apply the proceeds to the payment of the note. Shortly afterwards the elevator company "fraudulently and wrongfully obtained from said Meyers' possession the note, and all of plaintiff's securities aforesaid, and departed therewith from the state, without signing or executing the agreement reduced to writing as aforesaid;" placed the note and the certificates in the hands of the defendant the First National Bank of the City of New York for collection; and refused, and still refuses, to execute the written contract. When the note became due, the defendant the bank made presentment, and demanded payment of the plaintiff. The bill alleges that the defendants propose to sell and convert the shares of stock to their own use. The bill also alleges that the stock in question represents nearly all the property which plaintiff owns, that it has no market value, and that, if sold, it will be sacrificed at a loss of more than two thirds of its value. The prayer of the bill is that the defendants be enjoined from selling, or in any way disposing

of, the stock certificates, and that the elevator company cancel and destroy the stock note.

The chief contention of the appellants is that the complainant has an adequate remedy at law, and therefore cannot maintain a suit in equity to restrain the defendants from enforcing the note or disposing of the stock. If it were only a question of the note, this objection would no doubt be a sound one. All the equities could be pleaded against the payee, or, the note being now past due, against any one to whom he might transfer it. But the fact that a sale of the stock, which, for all that appears in the papers, might clothe the purchaser thereof with a title superior to complainant's equities, puts the case in an entirely different aspect. The stock is apparently of uncertain value; it represents a controlling interest in the corporation; and, in view of these circumstances, the possible recovery in any action for damages for its conversion would not be an adequate remedy. The theory of damages for the conversion of such property is that the sum recovered by plaintiff will put him financially in the position he was in before the conversion, but it is by no means certain that any possible recovery in such action would give to the plaintiff the equivalent of the controlling interest in the corporation.

Nor would an action for replevin lie. Complainant has no right to the possession of the stock. Upon the facts as set out in the bill he parted with his possession under an agreement by which the right to such possession was transferred to another party until complainant should have paid \$25,033, and he had five years in which to pay such sum. He could maintain no action to recover the possession of the stock without tendering the \$25,033 for which it was pledged. Such an action, requiring such anticipation of his promised payment, is not an adequate remedy. He is entitled to hold the defendant to his agreement, without himself assuming any greater burden than he originally undertook. As the damage which would probably be suffered by the plaintiff if the securities were sold is irreparable, and the bill and affidavits make out a case for equitable relief, and no irreparable injury would result to the defendant should the injunction be continued until all the facts are fully brought out upon the trial, the order appealed from should be affirmed.

On behalf of the defendant the First National Bank of the City of New York it is also insisted that under section 5242, Rev. St. U. S., there was no power in the state court to issue this injunction, nor in the United States circuit court to continue it. The practical effect of Judge Benedict's order was to enjoin the defendants pending the litigation, and, if that court had the power to issue an injunction against a national bank, such order should be sustained, irrespective of the question whether the state court which originally enjoined the defendant bank had or had not power to make such an order. The prohibition upon which the defendant bank relies is found at the close of section 5242, Rev. St. U. S., in the following language: "No attachment, injunction, or execution shall be issued against such association [a national bank] or its property before

final judgment in any suit, action, or proceeding in any state, county, or municipal court." This clause contains no direct restriction upon the power of circuit courts of the United States. It was held in *Bank v. Mixer*, 124 U. S. 721, 8 Sup. Ct. Rep. 718, that under this provision a circuit court was not authorized to issue attachments on mesne process against a national bank. That conclusion, however, was reached because the only grant of such power to the circuit court was found in section 915, Rev. St. U. S., which provides that "in common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof." Inasmuch as the prohibition of section 5242 left the state courts without power to grant attachments on mesne process against national banks, no such power was conferred on the circuit court by section 915. The power to issue an injunction, however, is inherent in the original jurisdiction in equity which is conferred upon the circuit courts by section 629 of Rev. St. U. S., and its various amendments, and is not curtailed by the provisions of the section upon which the appellant bank relies.

The order appealed from should be affirmed, with costs.

WALLACE, Circuit Judge, (dissenting.) I dissent from the opinion of the court upon the ground that, upon the case made by the plaintiff's bill, he is not entitled to any equitable relief. There may be facts which are not stated in the bill, by reason of which he may be entitled to resort to a court of equity, but his rights are to be considered upon the facts as he has presented them. Of course, he should not have the preliminary remedy if he is not entitled to the final one. Upon the statement of it, the case is one in which he has a complete and adequate remedy at law by an action of replevin for the recovery of the certificates. Replevin lies for all species of tangible property, whether choses in possession or in action,—for books of account, vouchers, and written instruments of every kind, as well as for negotiable securities. *Bank v. Bingham*, 118 N. Y. 349, 23 N. E. Rep. 180; *Baker v. Fales*, 16 Mass. 147; *Drake v. Auerbach*, 37 Minn. 505, 35 N. W. Rep. 367; *Savery v. Hays*, 20 Iowa, 25; *Flentge v. Priest*, 53 Mo. 540; *Roberts v. Bank*, 19 Pa. St. 73; *Gibbs v. Usher*, 1 Holmes, 348. Such an action is the obvious, as well as the complete and adequate, remedy for the wrongs set forth, if, as the plaintiff alleges, the stock note was merely an accommodation note, and the elevator company repudiates the agreement to that effect, and insists upon collecting the note, and proposes to sell the collateral pledged by it to satisfy the amount. I cannot see any obstacle in the way of maintaining such an action. It seems to me there is no force in the suggestion that the elevator company could defeat the action upon the theory that it is entitled to the possession of the certificates until the payment of the purchase money for the shares bought of it by plaintiff. By taking the stock note, and asserting a right to enforce it as a valid obligation of the plaintiff, the elevator company is estopped, until it has restored the certificates to

the plaintiff, from setting up any other right or claim to them than that of a pledgee according to the terms of the stock note, upon the principle that the bailee of property cannot dispute the title of the bailor, or set up any claim to it inconsistent with the terms of the bailment. The Idaho, 93 U. S. 575; Osgood v. Nichols, 5 Gray, 420; Supervisors v. Allen, 99 N. Y. 539, 2 N. E. Rep. 459; Williams v. Morgan, 50 Wis. 548, 7 N. W. Rep. 541; Jarvis v. Rogers, 15 Mass. 389; Beckett v. Bradley, 7 Man. & G. 994; Wiles v. Woodward, 20 Law J. Exch. 261; Bank v. Alexander, 120 Pa. St. 476, 14 Atl. Rep. 402. For these reasons I think the order appealed from should be reversed.

FT. PAYNE COAL & IRON CO. v. SAYLES et al.

(Circuit Court of Appeals, Fifth Circuit. January 16, 1893.)

No. 85.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

In Equity. Bill by A. L. Sayles and others—some of them as stockholders and bondholders and others as bondholders only, in the Ft. Payne Coal & Iron Company—against the said company, the Old Colony Trust Company of Massachusetts, A. B. Green, A. J. Butler, the Citizens' Bank & Trust Company, and G. N. Hensen, praying that a receiver be appointed for the Ft. Payne Coal & Iron Company, and that the respondents be enjoined from disposing of the assets of said company. Temporary injunctions were granted, and a temporary receiver appointed. Demurrers were overruled, and a decree entered for complainants, making the receivership permanent, and continuing the injunction against the Ft. Payne Coal & Iron Company, which now prosecutes this appeal. Affirmed.

Complainants are citizens of Massachusetts and other states, and the respondent Ft. Payne Company, a corporation organized under the laws of Alabama, and engaged in the business of developing the coal and iron resources of De Kalb county, in that state, and in building and developing the town of Ft. Payne. The company was organized November 22, 1888, with a capital stock of \$5,000,000, (50,000 shares, at \$100 each,) of which 40,000 shares were subscribed and paid for chiefly in New England at \$25 a share, the other 10,000 shares being reserved in the treasury of the company. The bill charges that financial difficulties forced the company to market the greater part of the reserved 10,000 shares at \$37 per share; that this did not afford sufficient relief, and in order to raise more money a mortgage on all the property of the Ft. Payne Company was given to the Old Colony Trust Company, respondent, a corporation organized under the laws of Massachusetts to secure an issue of \$300,000 of bonds, whereof \$212,000 worth were sold at or near par, and the rest hypothecated for debts; that valuable properties of the company had been disposed of at ruinous rates to meet debts of the company; that the real estate had been sold for taxes; that default had been made upon the interest of the bonds; that the price of the stock was depressed to \$1.50 a share; that at a meeting where W. P. Rice held a majority of the proxies, few stockholders being present, it was voted to issue \$1,000,000 in bonds; that the complainant stockholders were liable under the laws of Alabama for \$75 unpaid subscriptions on each share; that the Old Colony Trust Company had brought no suit to foreclose the mortgage made to secure the principal and interest of the bonds; that the management was wasteful and extravagant, and entirely controlled by W. P. Rice, the president.

J. A. W. Smith, for appellant.
Jas. Norfleet, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

MCCORMICK, Circuit Judge. In this case we do not deem it necessary to discuss the various questions made on this appeal. A careful examination of the case satisfies us that as between the bondholders, who joined in and seek relief by the bill, and the Ft. Payne Coal & Iron Company, appellant, the bill presents a case of which the circuit court had jurisdiction, and such equities as warranted the court to intervene for the preservation of the trust property, and grant preliminary relief by injunction, as well as by the appointment of a receiver. The order appealed from should be affirmed, and the cost of appeal adjudged against the appellant, and it is so ordered.

TRAVELERS' INS. CO. v. TOWNSHIP OF OSWEGO.

(Circuit Court, D. Kansas. April 11, 1893.)

No. 6,846.

1. CONSTITUTIONAL LAW—SPECIAL AND GENERAL LAWS—SPECIAL REFUNDING ACT—TOWNS.

The Kansas constitution recognizes and makes provision for the election and tenure of office of township officers, and by Laws Kan. 1868, which is a general act, the duties and powers of township officers are defined. In 1875, the legislature passed a general refunding law, which provides that, before any refunding bonds can be issued, an election shall be held, at which the question shall be voted upon, and that the proper authorities of any county, township, or city shall issue the refunding bonds provided for by the act. By Laws Kan. 1881, c. 170, as amended in 1883, commissioners were appointed to refund the bonded indebtedness of the township of Oswego, and were empowered to do all things needful for the compromising and refunding of the township bonds. *Held*, that as the act of 1881, as amended, is a special act, and as its effect is to suspend the uniform operation of the general township law and of the general refunding act, it violates the provision of the Kansas constitution that, "in all cases where a general law can be applicable, no special law shall be enacted."

2. SAME—PURCHASERS OF BONDS—ESTOPPEL.

The purchasers of municipal bonds are conclusively presumed to know the law of the state, both constitutional and statutory, bearing upon the power of the municipality to issue the bonds, and the municipality cannot be estopped, by recitals in the bonds, to deny, even as against bona fide purchasers, the powers of commissioners appointed by the legislature to issue them.

At Law. Action by the Travelers' Insurance Company against the township of Oswego upon coupons of certain refunding bonds. On demurrer to petition. Demurrer sustained.

W. H. Rossington, C. B. Smith, and E. J. Dallas, for plaintiff.
W. F. Rightmire and F. H. Atchinson, for defendant.

RINER, District Judge. This is an action upon coupons of certain refunding bonds, purporting to have been issued by the township of Oswego, through certain agents and commissioners of that township, appointed by the legislature. The plaintiff, in its petition, claims to be a bona fide purchaser of these bonds and coupons for value, and before maturity thereof. The petition contains 155 separate causes of action. The case is before the court upon a demurrer to each cause of action.

It is contended by the defendant township that the act of the legislature recited in the bonds, and under which the bonds and

coupons were issued, is void and unconstitutional, and confers no authority upon the persons therein named as commissioners to act for the defendant; that the acts of the commissioners, appointed by the act of the legislature, were not the acts of the defendant; and that the bonds issued by them were not the bonds of the defendant, and are not legal obligations of the defendant; and that they confer no rights upon the plaintiff even if it is, as alleged in its petition, the purchaser of the bonds and coupons for value, and before maturity. Several very interesting questions are presented, and have been ably argued upon both sides. The legislature of Kansas, by the act of 1881, (being chapter 170 of the Laws of 1881,) and by the act of 1883, which is amendatory of the act of 1881, attempted to provide for funding the indebtedness of this defendant township, and, among other things, provided "that for the purpose of compromising the bonded indebtedness, and the judgments thereon, of the said township of Oswego, and for the issuing of the bonds and coupons provided by this act, C. M. Condon, J. B. Draper, and Thomas Throat, of the county of Labette, are made and declared the commissioners and the agents of said township of Oswego, and they shall designate one of their number to serve them as chairman, and another to serve them as clerk, and all bonds issued by them under the provisions of this act, and the coupons thereunto attached, shall be signed by their chairman and attested by their clerk; and in the compromising and funding of said indebtedness of said township the said commissioners shall have full power and authority to do all things needful: provided, that no portion of said indebtedness shall be compromised by said commissioners at a higher rate than thirty cents on the dollar." By an act of the legislature of March 11, 1868, (being chapter 110 of the General Statutes of 1868,) it is provided "that each organized township in the state shall be a body politic and corporate, and in its proper name may sue and be sued, and may appoint all necessary agents and attorneys in their behalf, and may make all contracts that may be necessary and convenient for the exercise of their corporate powers." The act further provides that, at the township election in each year, there shall be elected in each municipal township one trustee, one clerk, one treasurer, two constables, and one road overseer in each road district in the township. The constitution of the state contains the following provision in relation to the election of township officers: "Township officers, except justices of the peace, shall hold their office one year from the Monday next succeeding their election, and until their successors are elected and qualified." Thus, it will be seen that these township organizations are recognized as such in the constitution of the state, and the legislature, by the act of 1868, (being a general law of uniform operation throughout the state, and still in force,) has provided what officers the township shall have, and has defined their duties and powers. In 1875 the legislature passed a general refunding law which was to have uniform operation throughout the state, and which has never been repealed. This act provides that, before any refunding bonds can be issued by any municipality, an election shall be held, at which

the electors of such municipality shall vote upon the question of refunding the indebtedness, and what particular indebtedness is to be refunded, and provides that the proper authorities of any such county, township, or city are to issue the refunding bonds provided for by the act. The constitution of the state contains this provision: "And, in all cases where a general law can be applicable, no special law shall be enacted." Hence one of the questions raised at the argument, and perhaps the only one which it will be necessary to consider in disposing of these demurrers, is, had the legislature the power to create an agency, or refunding commission, to carry out the requirements of these acts of 1881 and 1883, and to execute the bonds and to name such commission in the acts? There is no doubt but what these acts are in the nature of special laws. They apply only to the township of Oswego; they provide for refunding its indebtedness; they take away from the officers of the township the power to act as such officers in behalf of the township; they take away from the electors of the township the right to vote upon the question of refunding the indebtedness, and the right to say what particular indebtedness should be refunded. While not repealing, in terms, the act of 1868, providing what officers a township shall have, and of 1875, providing for refunding the indebtedness of counties, townships, and cities, yet, if valid, the effect of this legislation would be to suspend the uniform operation of the general laws, above mentioned, throughout the state; and that which was a general law, and had the required uniformity of operation, still remains a general law, but is no longer of uniform operation, and the provisions of the constitution would thus be nullified. Clearly, no such power is given to the legislature. Whatever may be the rule if the attempt to limit the operation of a general statute was a part of the statute itself, when the attempted limitation is sought by a separate act, the latter must fall while the former stand. I conclude, therefore, that the acts of 1881 and 1883, under which these bonds were issued, cannot be considered as a rightful exercise of legislative authority.

The purchasers of bonds are conclusively presumed to know the law of the state, both constitutional and statutory, bearing upon the power of the municipality to issue bonds; and no recitals contained in the bonds can estop a corporation or municipality to insist that the purchasers of the bonds knew the statute law of the state. The commissioners appointed by the legislature to issue these refunding bonds for and on behalf of the defendant township being wholly without power to issue the bonds, the purchasers are not aided by the recitals contained therein.

While it would be interesting to consider other questions raised at the argument, yet, as the views already expressed are sufficient to dispose of the demurrers I do not consider it necessary to do so. The demurrers will be sustained, and a judgment entered in favor of the defendant for costs.

VALLANCE v. BOSTON & ALBANY R. CO.

(Circuit Court, D. Massachusetts. April 22, 1893.)

No. 3,531.

1. RAILROAD COMPANIES—ACCIDENT AT GRADE CROSSING—STATUTORY SIGNALS—EVIDENCE.

In an action against a railroad company for injuries to a child 22 months old at a grade crossing in an unfrequented portion of a town, there was no evidence that defendant's failure to ring the bell or sound the whistle contributed to the injury, except such as could be reasonably inferred from the presence of the injured child at or near the crossing. *Held* insufficient to warrant a verdict for plaintiff.

2. SAME—WANT OF GATEMAN—EVIDENCE.

In such case there was no evidence of the volume of travel at the crossing, and nothing to show that it was a peculiarly dangerous place, except a remark of defendant's engineer that it was a bad place, and that an embankment on one side obscured a view of the train until a point within 30 to 60 feet of the track was reached. On one side of the track there was no house within a mile and a half of the crossing. Plaintiff's counsel stated in his opening that the place was unfrequented, and defendant produced no evidence of want of travel. *Held* insufficient to show negligence of defendant in not providing a gate and gateman.

At Law. Action by Alfred Vallance against the Boston & Albany Railroad Company to recover damages for personal injuries. Verdict and judgment for plaintiff. Heard on motion for new trial. Granted.

Alfred Hemenway and T. Henry Pearse, for plaintiff.
Samuel Hoar, for defendant.

ALDRICH, District Judge. This is a motion to set aside the verdict, and for a new trial, on the ground that the verdict is against the weight of evidence. The plaintiff, who is a child, sues by his father and next friend, and was, at the time of the alleged injury, 22 months old. The plaintiff sought to recover on two grounds: First, on the statutory ground that the defendant, through its servants, did not comply with the requirements of the statute as to sounding the whistle and ringing the bell as the train approached the crossing, and that the failure so to do contributed to the injury; and, second, on the ground that the defendant was negligent in not providing suitable safeguards at the crossing, and the particular complaint in this respect was the failure to provide a gate and gateman. In support of the first ground the plaintiff offered evidence tending to show that the bell was not rung nor the whistle sounded, and evidence tending to show that the child, without the fault of its parents, had strayed from its home, some 20 or more rods, and was found at or near the crossing, with injuries of such a character that it might reasonably be found that the child was run over by the train. The only evidence tending to show that the failure to ring the bell or sound the whistle contributed to the injury was such as could reasonably be inferred from the presence of the child at or near the crossing, with injuries of the character de-

scribed. In order to entitle the plaintiff to recover upon this ground, the jury were instructed that they must find from the situation that the omission to ring the bell or sound the whistle contributed to the injury. There was no evidence that the child was precocious, or that it had been warned that a railway whistle or bell was a signal of danger; therefore, upon the conceded facts on this branch of the case, the finding of the material and necessary fact that the failure to whistle or ring the bell contributed to the injury is against the weight of evidence, and an inference or deduction so unreasonable as to compel the conclusion that the jury were controlled by prejudice.

As to the second ground, it cannot be contended that reasonable care and diligence requires railroads to maintain a gate and gateman at all crossings. There must be evidence sufficient to warrant a finding that there was peculiar hazard at a particular crossing, in order to hold a railroad company culpable on the ground of negligence. *Commonwealth v. Boston & W. R. Corp.*, 101 Mass. 201; *Railroad Co. v. Ives*, 144 U. S. 408, 420, 421, 12 Sup. Ct. Rep. 679. At the trial counsel for the plaintiff stated, in opening to the jury, that "the crossing in question was an unfrequented place. This being an unfrequented part of the town, although a grade crossing, and entitled to protection, had neither gate nor watchman nor guard." Counsel for the defendant stated, in opening, that he should not controvert the statement that the crossing was an unfrequented place. The plaintiff offered no evidence as to the volume of travel, and the only evidence tending to show that the crossing was one of peculiar danger was a remark from the engineer, in giving his reasons for thinking he rang the bell, that it was a bad place. There was also evidence that this crossing was within the jurisdictional limits of the city of Worcester, and two miles and a half from the city hall, and that on the side of the track from which the child approached there was an embankment which partially obscured the train until a point was reached within 30 to 60 feet of the track. On the other hand, it appeared that on the west side of the railroad there was only one house for a mile or a mile and a half. The effect of the statement of counsel in opening, on which the defendant had the right to rely, was to leave in obscurity the material fact as to whether the character and volume of the travel was such as to reasonably require a gate and watchman at the crossing in question. The evidence as to the character of the crossing was such as to fairly warrant the verdict, provided the plaintiff had gone further, and submitted evidence as to the volume of travel.

Reasonable care and prudence would not require a gate and gateman at every obscure crossing. There must be some evidence, at least, that the crossing is used; how much I do not undertake to say, but, assuming that the crossing was obscure, and that the evidence in this direction was sufficient to warrant a finding that reasonable care and prudence would require a gate and gateman, provided there was travel, I must hold that the necessary and material finding that the volume of travel was such as to make

the crossing one of peculiar hazard was against the weight of evidence. As a matter of law, to entitle the plaintiff to recover, he must show travel. Until the case had progressed to the final argument the trial was upon the theory that there was no travel; at least, that it was an unfrequented crossing. The defendant was entitled to rely upon this course of the plaintiff, and withhold his evidence. It would not be just to a party who had tried his cause upon such lines to permit a verdict to stand upon unwarrantable inference, drawn from an obscure situation created by his adversary, under such circumstances as to warrant him in withholding his evidence and treating the situation as conceded. There was no actual trial upon evidence directed to the necessary and material question whether the volume of travel was such as to require a gate and gateman or watchman, and, upon the facts incidentally appearing, the weight of evidence was against the plaintiff. The verdict should be set aside, and a new trial granted, and it is so ordered.

MILLER v. HOUSTON CITY ST. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1893.)

No. 53.

1. APPEAL—DECISION—PLEAS—TRIAL BY COURT—ABSENCE OF FINDINGS.

Where, in an action tried by the court without a jury under Rev. St. § 700, the court overrules demurrers to a number of pleas, but makes no special finding of facts, for which reason it is impossible to determine whether any particular plea which may have been erroneously sustained was not relied on in giving judgment, it will be necessary to reverse the judgment if any one of the pleas is found to have been erroneously sustained.

2. SAME—TRIAL BY COURT—RULINGS ON EVIDENCE.

In an action at law, tried by the court without a jury, there is not the same necessity for nice distinctions in rulings upon the admission of evidence as when such evidence goes to a jury, for the same judicial mind which would exclude improper evidence from the jury can disregard it in considering the case; and hence, when there appears sufficient legal evidence to justify the conclusions reached, an appellate court will not reverse the judgment, although certain irrelevant evidence was heard, and was not positively excluded by order.

3. PLEADING—CONSTRUCTION OF PLEAS—VERIFICATION.

A plea averring that plaintiff "is not the owner in either or any of the capacities in which he sues" of the certificates of stock in question, or any right or interest therein authorizing him to recover thereon or to maintain the suit, does not deny plaintiff's right to sue on account of personal incapacity, but on account of his lack of property in the certificates; nor does it deny the execution or genuineness of any document or its indorsement; and such plea therefore does not come within the provisions of Rev. St. Tex. 1879, requiring verification by affidavit.

4. CORPORATIONS—STOCKHOLDER'S ACTION FOR REFUSAL TO TRANSFER STOCK—DEFENSES.

In an action against a corporation to recover damages for its refusal to transfer on its books certain shares of its stock, it is no defense that plaintiff acquired the same from a prior holder by means of an illegal gambling contract when there is no showing that the prior holder ever repudiated the transaction, or made any claim on the company for the stock.

5. SAME.

It is no defense to such a suit that the certificates of stock are held by plaintiff as collateral security for a debt which is barred by the statute of limitations, for stock so held is a pledge, and not a mortgage, and the right to the statutory bar is a privilege purely personal to the debtor.

In Error to the Circuit Court of the United States for the Eastern District of Texas. Reversed.

Statement by LOCKE, District Judge:

This was an action at law instituted by Walter T. Miller, the plaintiff in error, against the Houston City Street-Railway Company, the defendant in error, to recover damages for the wrongful refusal, in the year 1888, to transfer upon its books, in the name of plaintiff, 180 shares of the capital stock of said company, held by the plaintiff in error, who was the holder of the original certificates, which he offered to surrender to defendant at said time. The plaintiff in error alleges substantially in his petition that the defendant in error, the Houston City Street-Railway Company, by virtue of and in conformity with its charter and by-laws "did issue and deliver to one T. W. House on October 1, 1873, eleven certificates of stock of said company in due form, sealed with the seal and signed by the president and secretary of said defendant company, for 180 shares in the aggregate of the capital stock of said company, in each of which certificates it was acknowledged that the said T. W. House was the owner of the number of shares therein mentioned, of the par value of twenty-five dollars each, and in which it was provided that said stock was transferable only on the books of the company at their office in the city of Houston, Texas, in person or by attorney, upon the surrender of this certificate;" and that afterwards, under date of October 2, 1873, the said T. W. House, by certain assignments under his hand, did, for a valuable consideration, and in due course of trade, sell, transfer, and assign the said 180 shares of stock to the said plaintiff, and did authorize the plaintiff to make the necessary transfers on the books of the defendant company, and did then deliver the said eleven certificates, respectively, with the said assignment indorsed thereon, respectively, to the said plaintiff; that the plaintiff, being in the lawful possession, and entitled to the possession, of said certificates and shares of stock, and being the holder and owner thereof, and entitled to all the rights, dividends, and profits thereunto belonging, on or about July 30, 1888, and on divers days thereafter, and before the bringing of this suit, (which was filed September 16, 1889,) did apply to and require the defendant to transfer said shares of stock in the name of plaintiff upon its books, to issue to him in lieu of said certificates, which he then offered to surrender, certificates for an equal number of shares of the capital stock of the defendant company, in accordance with the formalities required by its charter; and did also then require the said defendant to pay to him all dividends declared by it upon said shares of stock, and to duly recognize said plaintiff as the owner of said stock, and entitled to all the rights, dividends, and profits thereunto belonging; but the said defendant did wholly refuse at the respective times of said application and requirement, and still doth refuse, to transfer said shares of stock in the name of the plaintiff upon the books of said company, or to issue and deliver to the plaintiff certificates for the said 180 shares of its capital stock, or to pay to him the dividends declared thereon, or to recognize said plaintiff as the owner of said stock."

The defendant company, in its answer, pleaded in substance and effect:

(1) A general denial of all the allegations contained in plaintiff's petition.

(2) That the plaintiff is not the owner, in either or any of the capacities in which he sues, of the certificates and stock in question, or of any right or interest therein authorizing him to recover thereon, or to maintain this suit. To which plea the plaintiff demurred specially on the ground that it was not verified by affidavit, as required by Rev. St. Tex. art. 1265.

(3) That the plaintiff, or his firm of W. T. Miller & Co., acquired the said certificates and stock by and through an illegal and gambling contract in cotton with one William Brady, who transferred and pledged said certificates to plaintiff, or his said firm, as collateral security for margins or commissions

charged Brady by W. T. Miller & Co., cotton brokers in New York, in furtherance of such illegal and gambling contract in cotton. To this plea the plaintiff demurred specially on the ground that the matters therein alleged between plaintiff and Brady were not a proper subject of inquiry in this suit, were of no concern to this defendant, and were immaterial, impertinent, and irrelevant as between the plaintiff and the defendant herein.

(4) That the indebtedness claimed by the plaintiff or his firm against William Brady, and to secure which the said certificates were pledged as collateral security, is barred by the statute of limitations of the state of Texas of two and four years, respectively; to which plea the plaintiff demurred specially on the ground that it was not a proper subject of inquiry in this suit, that it was of no concern to the defendant herein, and that it was immaterial, impertinent, and irrelevant as between this plaintiff and this defendant whether said indebtedness was or was not barred by limitation.

(5) That the certificates and stocks were canceled, discharged, and satisfied on or about June 15, 1874, by the issuance and delivery by the defendant to William Brady, then the owner of the certificates and stock in suit, of other and new certificates of stock; that William Brady, who was then the defendant's president, continued to hold the certificates in suit in his capacity as president, and as discharged and canceled, until he ceased to be president, in the early part of 1875; that the certificates and stock in suit are now, and have been ever since June 15, 1874, null and void, and of no force or effect whatever against the defendant; and that plaintiff or his firm acquired the certificates in suit from William Brady long after Brady ceased to be president of the defendant company, and with actual or constructive knowledge of such cancellation of said certificates and stock, and without paying valuable consideration therefor. To which plea the plaintiff demurred specially, as not showing and alleging any valid or lawful cancellation of said certificates and stock.

(6) That plaintiff's cause of action against the defendant is barred by the statutes of limitation of the state of Texas of two and four years, respectively.

(7) That at all times and on all occasions continuously ever since June 15, 1874, up to and at the present time, the defendant has treated and regarded the certificates and stock in suit as settled, satisfied, canceled, discharged, and null and void, and of no force or effect whatever against defendant, and refused to recognize said certificates or stock as valid or binding, or of any force or effect against the defendant, of all of which facts the plaintiff has had knowledge, actual or constructive, continuously ever since June 15, 1874; and that, therefore, the plaintiff's demands sued on herein "are stale demands," as well as barred by the statutes of limitation, "and do not entitle the plaintiff to any relief." To which plea the plaintiff demurred specially, as vague, obscure, uncertain, and attempting to set up in a case at law the defense of stale demand, which, when well pleaded, is good only in equity.

The plaintiff, by way of replication to defendant's answer, filed—First, a general demurrer, and also special demurrers to each of the special defenses set up by the defendant, the grounds of which special demurrers have been mentioned, all of which were overruled by the court; second, pleaded a general denial of the allegations contained in the defendant's answer; and, third, pleaded specially, by way of estoppel, to each of the special pleas of the defendant, in substance as follows, viz.: The due and legal issuance, signing, and delivery by the defendant company to one T. W. House, on October 1, 1873, of the said certificates, under the seal of the company and the signature of its president and secretary, and that the defendant company "thereby acknowledged and represented unto all persons interested that the said T. W. House was the owner of one hundred and eighty shares of twenty-five dollars each of the capital stock of the defendant company, and thereby also acknowledged and represented unto all persons interested that the said shares of stock could be transferred only on the books of the company, at their office in the city of Houston, Texas, in person or by attorney, upon the surrender of said certificates; and thereby also represented and acknowledged unto all persons interested that whoever in good faith purchased the said stock and produced to said defendant the said certificates, regularly assigned, with power to transfer, was entitled to have said stock transferred to him; and

thereby also acknowledged and represented unto all persons interested that the said defendant would not transfer said stock to any one not in possession of said certificates; and thereby also acknowledged and affirmed and represented continuously unto all persons interested that it would hold, for the use and benefit of the owner and holder of said certificates, the amount of stock therein specified, until said certificates were presented at the office of the defendant for surrender and cancellation. That afterwards, as alleged in said plaintiff's petition, and before the commencement of this action, said plaintiff, for valuable consideration, in good faith, and without knowledge of any adverse claim to said certificates and stock, or either of them, or any part thereof, in full faith that the said defendant would observe its acknowledgments, affirmations, undertakings, and representations as aforesaid, relying upon the same in good faith, purchased said stock, and became duly possessed of said certificates by regular assignments, in due course of business, with power to make the necessary transfer on the books of the company, and pursue in all respects the directions given in the certificates. Wherefore, said plaintiff prays judgment if the said defendant ought to be admitted to its pleas aforesaid, contrary to its own acknowledgements and representations by the certificates of stock aforesaid, etc. To this last pleading of the plaintiff the defendant filed a general denial.

Both parties duly made and filed a written stipulation waiving a jury, and agreeing to the trial by the court. The cause was tried by the court without a jury, and judgment was rendered for the defendant by the court below on March 9, 1892. The plaintiff sued out a writ of error, and brought up the case for review upon twenty-one assignments of error, the principal ones of which are that the court overruled the several special demurrers to defendant's pleas, and admitted the testimony of witnesses against plaintiff's objections.

F. D. Minor and R. B. Davidson, for plaintiff in error.

M. W. Garnett, (Jones & Garnett, on the brief,) for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts as above.) This cause having been tried without a jury by a stipulation of parties under section 700, of Rev. St., the rulings of the court, duly presented by a bill of exceptions, may be reviewed, and, were there a special finding of facts by the court, the review might extend to the determination of the sufficiency of the facts found to support the judgment. *Miller v. Insurance Co.*, 12 Wall. 285. In this case the judgment was a simple finding for the defendant, as appears from the record, in the following words:

"And now, upon due consideration, the court finds for the defendant, wherefore it is considered by the court, and so ordered, adjudged, and decreed, that the plaintiff's general and special demurrers and exceptions to the defendant's third amended answer be, and the same are hereby, overruled, to which ruling of the court on said demurrers and exceptions the plaintiff excepts; and it is further considered by the court, and so ordered, adjudged, and decreed, that the plaintiff take nothing by his suit, and that defendant recover from the plaintiff all costs about this suit incurred, and have execution therefor."

What in the record claims to be a finding of facts is an extended statement of the testimony introduced in the case, occupying some 89 pages of the record, with no ultimate finding or determination. This is not considered such a special finding of facts as is contem-

plated by the statute. In *Morriss v. Jackson*, 9 Wall. 125, where this question was under consideration, the court says:

"It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. * * * The bill of exceptions, while professing to detail all the evidence, is no special finding of facts." *Mining Co. v. Jackson*, 100 U. S. 37; *Crews v. Brewer*, 19 Wall. 70.

There being nothing in this case that can be considered such special finding, it is impossible to determine the amount of consideration given in the final determination of the question to any particular plea which had been pleaded, and thus decide whether, if there might be any plea which should not have been sustained, that particular one was or was not the one upon which final judgment was given. It necessarily follows, therefore, that if any one of the several pleas was improperly sustained it would be error.

It has been suggested that if in any plea sufficient grounds of defense are found to sustain the judgment it might be presumed that the court having the entire cause under consideration had given judgment upon that alone, regardless of the others, which might be bad; but, in the absence of a finding of fact showing that to have been the case, we do not think it can be presumed, and in reviewing and considering the pleadings the same practice must be followed as if the case had been tried by a jury, namely, a review of the rulings upon the pleadings and the admissions of evidence.

The first error assigned is the overruling of plaintiff's special demurrer to the second plea of defendant's third amended original answer, which denies that the plaintiff was, in either or any of the capacities in which he sues, the owner of the several certificates of stock mentioned and sued for, or of any right or interest in said certificates that authorized or could authorize him to recover thereon, or maintain this suit, because such plea was not verified by affidavit. Upon an examination of this plea it will be seen that, although the words, "in either or any of the capacities in which he sues," are used, yet the intended force and effect of the plea is not to deny the right to sue on account of his personal capacity, but on account of his lack of right of property in the alleged certificates. Nor does it deny the execution or genuineness of any document, or of its indorsement, and does not, we think, come under the provisions of article 1265, Rev. St. Tex. 1879.¹

The third plea alleges that the certificates of stock upon which suit was brought were acquired through an illegal and gambling contract between one Brady and plaintiff, but it does not allege that Brady had in any way repudiated that contract, or had made any

¹Rev. St. Tex. 1879, art. 1265: "An answer setting up any of the following matters, unless the truth of the pleadings appear on record, shall be verified by affidavit: * * * (2) That the plaintiff has not legal capacity to sue. * * * (3) That the plaintiff is not entitled to recover in the capacity in which he sues. * * * (9) A plea denying the genuineness of the indorsement or assignment of a written instrument, as required by article 271."

claim upon defendant company for said stock, or that defendant company had not obtained and held the benefits and advantages of the stock in the absence of these certificates. We do not consider that simply the plea of the illegality of the contract by which such certificates of stock were obtained, standing by itself, a sufficient plea, and the exception to it should have been sustained. *Railroad Co. v. Durant*, 95 U. S. 576; *Chit. Cont.* 976; *Myers v. Meinrath*, 101 Mass. 366; *Helm v. Swiggett*, 12 Ind. 194; *King v. Green*, 6 Allen, 139.

The fourth plea of defendant company urges as a ground of defense that the certificates sued on were only held as collateral security for an indebtedness claimed by said plaintiff against one William Brady, and that such indebtedness, if it ever existed, was barred by the statutes of limitations of the state of Texas. To this plea plaintiff demurred specially, because said matters were not a proper subject of inquiry in this suit; that it is immaterial and of no concern to the defendant herein whether any indebtedness owing by William Brady is or is not barred by the statute of limitations. The suit was upon certificates of stock alleged to have been assigned to plaintiff by one T. W. House in the course of business. Certificates of stock held as collateral security for an indebtedness are treated as a pledge, and not as a mortgage. Their possession passes with the pledging. Although the remedy may be barred by the statute of limitations, the debt is not extinguished, and it is within the discretion of the debtor to plead the statute or not. It was a personal privilege of Brady to plead the bar given by the statute, if he saw fit, or waive such rights; and it was for him alone. In *Hudson v. Wilkinson*, 61 Tex. 606, this question was directly passed upon, and it was held that "in case of a pledge the fact that the debt which it was made to secure is barred by the statute of limitations would constitute no defense to an action by the pledgee against another for the wrongful conversion of the property." This is accepted as the law of the state in which this action is pending, and controls in all matters of limitations. We consider the demurrer to this plea to be good, and that it should have been sustained.

We consider it unnecessary to review further the pleas and demurrers thereto, as they appear to allege matters upon which evidence might be given which would be directly relevant and material to the issue.

In the matter of the admission of evidence upon the several points specified in the bill of exceptions, we think it may well be said, as was said in *Mining Co. v. Taylor*, 100 U. S. 37, that "the admission of immaterial or irrelevant evidence is no sufficient reason for reversing a judgment when it is apparent that it cannot have affected the verdict or the finding injuriously to the plaintiff in error." It does not appear from the record how this testimony was taken, whether viva voce or by deposition, or whether the questions were objected to before being answered or not, or whether there was any motion to suppress any portion of the depositions or exclude the testimony, or whether there was any motion to exclude or suppress before the

evidence had actually been submitted to the court, or whether there was any direct ruling upon such question at the time, or exceptions, if rulings were made. The admission of evidence in a case being tried by a court without the intervention of a jury does not require the nice distinction of ruling that it does when it is to go to a jury, and the fact that testimony is given in an answer or read in a deposition does not necessarily imply that it is improperly considered in the final examination and conclusion of the case. The same judicial mind that would exclude it from a jury can as readily set it aside upon a final consideration; and, where there appears sufficient evidence to justify the conclusions reached, the presumption is that the irrelevant testimony, although heard and not positively excluded by order, was set aside eventually, and not considered to the injury of the plaintiff in error.

It is considered that the error in overruling the demurrers to the third and fourth pleas will necessitate a new trial, and it is ordered that the judgment below be reversed, and the cause be remanded for a new trial.

CALDWELL v. SCHOOL DIST. NO. 7 OF LAKE COUNTY.

(Circuit Court, D. Oregon. March 1, 1893.)

No. 1,945.

1. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS' CONTRACTS—DURATION.

In the absence of statutory limitations, a school district can enter into a contract of employment with a teacher for the period of two scholastic years, though such contract extends beyond the term for which some of the directors were elected.

2. SAME—COMPENSATION—CERTAINTY.

Such contract is not void for uncertainty where the stipulation for the teacher's compensation provides that he shall receive the same salary for his services as was established at that date for like services by the school district within which the city of Portland is situated.

At Law. Action by C. J. Caldwell against School District No. 7, of Lake county, Oregon, to recover for breach of contract. Defendant demurs. Demurrer overruled.

James F. Watson, for plaintiff.

Earl C. Bronaugh, for defendant.

GILBERT, Circuit Judge. The plaintiff sued School District No. 7, of Lake county, upon a contract made on June 1, 1889. The questions presented in this case on demurrer to the complaint are—First, whether under the laws of Oregon a school district can enter into a contract of employment with a teacher for the period of two scholastic years; and, second, whether such a contract is void for uncertainty if the stipulation for the teacher's compensation provides that he shall receive the same salary for his services as was established at the date of the contract for like services by the board of directors of the school district within which the city of Portland is situated.

It is contended on behalf of the defendant that the school directors have not power to enter into a contract extending

further into the future than the term for which all the members of the board hold their office. In support of this view citation is made to decisions of the state courts of Illinois. Undoubtedly that doctrine is supported by the decisions of that state. An examination into the grounds of those decisions, however, discloses the fact that they are based upon the interpretation given to the statute of Illinois. The statute there provides that at the annual election of directors the course of study for the ensuing scholastic year shall be determined by ballot of the electors. The courts have held it to be a necessary inference that no contract could be made for the employment of a teacher until it should be known what service was to be contracted for. In other states, where there is no statute limiting expressly or by implication the time for which such a contract may be made, the decisions uniformly concede the power to the directors to enter into agreements for a period longer than their term of office. *Gates v. School Dist.*, (Ark.) 14 S. W. Rep. 656; *Reubelt v. School Town*, 106 Ind. 480, 7 N. E. Rep. 206. In this state there is no such limitation by statute, and it is not perceived that any principle of public policy would prohibit the making of a contract for a period of two scholastic years.

Neither is the contract void for want of certainty as to the terms of payment. That is certain which may be rendered certain. It does not appear from the complaint that the compensation to be paid the plaintiff was not capable of being rendered certain by reference to a fixed and definite standard of compensation established by the directors of another district. The practice of so expressing the rate of compensation in a contract may be justly open to criticism when it is considered that the directors are trustees of the people, and owe to them full and accurate information as to the terms of all contracts; yet upon a demurrer to a complaint filed to recover compensation under such a contract, after the same has been executed, the court will not be justified in holding the contract void. The demurrer is overruled.

UNITED STATES v. CLOUGH.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1893.)

No. 26.

1 CLAIMS AGAINST THE UNITED STATES—COMMISSIONER'S FEES—AFFIXING SEAL.

Rev. St. § 1014, requires the process issued by a United States commissioner to be the same as that issued against offenders under the state law by examining magistrates. In Tennessee the seal of the magistrate is necessary to validate the process. Rev. St. § 828, allows clerks for issuing and entering every process, with certain exceptions, \$1, and a further allowance of 20 cents for affixing the seal of the court to any instrument when required. Rev. St. § 847, allows commissioners the same fee as is allowed the clerks for like services. *Held*, that the allowance of 20 cents applies only to those instruments for which specific provisions are not made, and that a commissioner in Tennessee is not entitled to such fee for affixing his seal to warrants, writs of mittimus, etc., issued by him upon preliminary examinations, since such action is a necessary part of the issuance of the process, and is paid for by the fee for the process. 47 Fed. Rep. 791, reversed.

2. SAME—STATUTES—CONSTRUCTION.

Where a statute allowing an officer's compensation admits of two interpretations, the words should be construed strictly in favor of the United States, and not liberally in favor of the officer. 40 Fed. Rep. 813, disapproved.

Appeal from the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

Petition by John B. Clough for the recovery from the United States of fees claimed by him for services as commissioner. A decree was rendered for the petitioner. 47 Fed. Rep. 791. The United States appeal. Modified.

S. W. Hawkins, for the United States.

John B. Clough, pro se.

Before JACKSON and TAFT, Circuit Judges, and SWAN, District Judge.

TAFT, Circuit Judge. This was an appeal from a decree of the circuit court for the western district of Tennessee adjudging the United States to be indebted to John B. Clough, a United States commissioner, the plaintiff below, in the sum of \$405.75 for fees earned by him as such commissioner. The petition was filed under an act of congress approved March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States," (chapter 359, 24 St. at Large, p. 505,) which conferred upon district and circuit courts of the United States a jurisdiction similar to that exercised by the court of claims over suits brought against the United States. The judgment rendered covered and included fees for a number of items, only one of which is objected to and assigned for error on this appeal. The court below held that the plaintiff was entitled to a fee of 20 cents for affixing his commissioner's seal to warrants, writs of mittimus, etc., issued by him upon preliminary examinations, amounting in the aggregate to \$141.40.

Under section 847 of the Revised Statutes, commissioners are entitled to the same fees as are allowed to clerks for like services; and under section 828 of the Revised Statutes the clerks are allowed for affixing the seal of the court to any instrument when required, 20 cents. Under section 1014 of the Revised Statutes the process issued by the commissioner is required to be the same as that issued against offenders under the state law by examining magistrates. In Tennessee the seal of the magistrate is necessary to validate his warrant or mittimus. *Tackett v. State*, 3 Yerg. 392. And it is therefore essential to the validity of a warrant of the United States commissioner, exercising jurisdiction in Tennessee, that his writs shall have his seal affixed.

It is contended by counsel for the appellee that it necessarily follows from the foregoing that the commissioner should be allowed 20 cents for affixing his seal to each writ. Were the foregoing all of the statute law bearing on the subject, the argument would be sound, but, in our opinion, the other provisions of section 828 show that it cannot be supported. By section 828, clerks are allowed

"for issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ, except the writ of venire or a summons or subpoena for a witness, one dollar." And under section 847 United States commissioners are allowed, "for issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services."

If the seal of a United States commissioner is essential to make a legal warrant or a writ of mittimus within the state of Tennessee, then we are clearly of the opinion that such service is included in the issuing of such warrant or writ, and that the one dollar provided by statute for issuing pays also for the affixing of the seal.

The provision in section 828, allowing 20 cents for affixing the seal of the court to any instrument when required, applies only to those instruments the issuing or preparation of which are not specifically allowed in the previous provisions of the same sections, and on which a seal may be needed. The provision allowing 15 cents a folio for making any record, certificate, return, or report has application to writings some of which might need a seal, and in charging for such record or certificate or other paper 20 cents should be allowed for affixing the seal, because the 15 cents a folio is obviously only for the writing required in the body of the paper. But where the fee is for issuing and entering a particular writ the service to be paid for is the issuing and entering a lawful writ with all that that includes. The learned judge below, in objecting to this view, says:

"The argument that section 828 of the Revised Statutes, giving a fee of one dollar for issuing and entering every process, etc., covers every charge in respect of and concerning the writ, is wholly untenable, because the subsequent part of the section in terms provides a fee for entering the return of it, and this service may just as well be said to be embraced in the one dollar as the fee for affixing the seal, also expressly given."

There is involved in this statement, it seems to us, a non sequitur. The issuing and entering of a process is one thing, and entering of the return of the process is another. The process is valid and complete in the hands of the executing officer without any return, and the entering of the return is therefore a service entirely separate from the issuing and entering of the process, and could not, it seems to us, by any force of reasoning, be held to include the entering of the return. We do not concur in the opinion of the court in *McKinstry v. U. S.*, 40 Fed. Rep. 813, as to the principle to be followed in the construction of the fee bill. We do not know any rule of public policy or of practical experience which requires that where a statute allowing an officer's compensation "admits of two interpretations, the words should be construed liberally in favor of the officer, and not strictly in favor of the United States." The well-known abuses under the fee system, by which the government has been defrauded of large amounts through unconscionable charges, and the lax administration of the law in this respect, would seem to require a strict interpretation in favor of the United States, rather than in favor of the officer. The decree of the court below will be modified in accordance with this opinion.

In re ADUTT.

(Circuit Court, N. D. Illinois. April 18, 1893.)

1. FEDERAL COURTS—CIRCUIT COURT—JURISDICTION—HABEAS CORPUS—UNITED STATES COMMISSIONER.

On a writ of habeas corpus, in behalf of one committed by a United States commissioner to the custody of the marshal to await action of the executive on demand of a foreign government for his extradition on the charge of forgery, the circuit court can inquire only as to the jurisdiction of the commissioner over the subject-matter, and whether there was legal evidence before him, supporting the judgment.

2. EXTRADITION—PROCEEDINGS—NECESSITY OF REQUISITION.

The initiative of proceedings for the extradition of an alleged criminal does not necessarily rest on a demand or requisition by the foreign government upon our government; but such proceedings may be commenced by the arrest of the person charged, under a warrant issued by a United States commissioner on complaint of a foreign consul. In re Kaine, 14 How. 103; Benson v. McMahon, 8 Sup. Ct. Rep. 1240, 127 U. S. 457,—followed.

3. FORGERY—UTTERING FORGED PAPER—TREATY.

The crime of uttering forged papers is included in the common-law definition of forgery, and in the term "forgery" as used in the treaty between Austria-Hungary and the United States.

4. SAME—FRAUD BY MEANS OF FORGERY.

The term "forgery," as used in the treaty, should have, so far as our government is concerned, its common-law definition, which includes forgery of commercial paper, though the crime of forgery, as known to the law of Austria-Hungary, comprehends the falsification of public obligations, and though the crime of forging commercial paper, charged against the prisoner, is there classified as "fraud by means of forgery."

5. EXTRADITION—PLEADING—COMPLAINT BY FOREIGN CONSUL.

Where the complaint states that complainant is the duly-accredited official agent of the foreign government, it is not necessary that a complainant should swear positively in the jurat that he is consul.

6. SAME.

The complaint, to give jurisdiction, need not have the precision and particularity of an indictment, but should set forth the substantial and material features of the offense, so that the court can see that the particular crime charged is one enumerated in the treaty.

7. SAME—WARRANT.

A warrant charging the prisoner with forgery and uttering forged paper is not objectionable as charging two offenses, since both are comprehended within the crime of forgery at common law.

Petition by Jacques Licco Adutt for writ of habeas corpus. Petitioner remanded.

A. Moses, for petitioner.

John C. Richberg, for Austrian Government.

JENKINS, Circuit Judge. The petitioner, upon complaint of the consul, at Chicago, of the Austria-Hungary government, was, by the United States commissioner, committed to the custody of the marshal to await the action of the executive upon demand of the Austria-Hungary government for his extradition, upon the charge of forgery. He thereupon sued out this writ of habeas corpus to obtain his discharge, and a writ of certiorari to the commissioner to bring up the proceedings before him.

Many objections were raised by the petitioner, at the hearing, to the jurisdiction of the commissioner, and to the regularity of the proceedings before him, but I deem it necessary to consider only the following: First, that there is no evidence in the record of any demand or requisition made by the government of Austria-Hungary upon the government of the United States of America for the extradition of the prisoner; second, that the treaty with that government covers only the crime of forgery, and not the offense of uttering forged paper; third, that the crime of forgery, as known to the law of Austria-Hungary, comprehends only the falsification of public obligations, and not the forging of commercial paper; fourth, that the offense with which he is charged at Vienna is "fraud by means of forgery;" fifth, that the complaint to the commissioner does not state that Mr. Claussenius, the Austria-Hungary consul, in preferring the complaint, acted in the capacity of the representative of his government; sixth, that the complaint is defective and void as to jurisdiction, in that it does not set forth the particulars of the commercial paper alleged to be forged.

The office of a writ of habeas corpus is not to correct irregularities; is not to reverse the decision of the commissioner because of some incompetent evidence admitted; is not to review his decision upon the weight and sufficiency of the testimony. This court can only inquire as to the jurisdiction of the commissioner over the subject-matter, and whether there was legal evidence before him, supporting the judgment.

The first objection presents a question which has vexed the courts and executive department of the government for many years. I need not here enter into a recital of the conflicting decisions upon this point, except to say that it would seem to have been decided against the petitioner in *Re Kaine*, 14 How. 103, and in *Benson v. McMahon*, 127 U. S. 457, 8 Sup. Ct. Rep. 1240. It would, I think, in the protection of individual liberty, be more seemly to require that the initiative of proceedings for extradition should rest with the government of the United States, upon demand of a foreign government, than that they should be allowed to be instituted by a consul of a foreign government without authorization of our own government, and would also, I think, better comport with the dignity of the government, and of judicial proceedings; but I feel concluded by the decisions to which I have referred, and am therefore unable to sustain this objection.

The second objection—that the crime of uttering forged paper is not comprehended in the term "forgery"—is, I think, not maintainable. The common-law definition of forgery does include the utterance of forged paper.

The third objection—that the crime of forgery, as known to the law of Austria-Hungary, comprehends only the falsification of public obligations, and not the forging of commercial paper—is, I think, not maintainable. The term "forgery," as used in the treaty, should have, so far as this government is concerned, its common-law definition, as it was undoubtedly used in that sense. The law of the Austria-Hungary government, as expounded by Mr. Ziesler, does

not indicate that "forgery" includes only the falsification of public documents. There is designated in its law the crime of falsification of public documents, and there would also seem to be the crime of falsification of private documents, treated in the Criminal Code of that country as one of the species of crime classified under the general head of "betrug," or "fraud." It is under that head defined to be a crime to manufacture false private documents, or falsify genuine ones. We must look to the essence of the offense, and not to its mere denomination in foreign Codes, to ascertain just the offense comprehended in the treaty. And the spirit of that treaty is, as I conceive, that one should be extradited for the commission of the offense known as forgery, by whatever name it may be called in the Criminal Code of Austria-Hungary; and if the charge before the commissioner is that of forgery, as known to our law, and the evidence is sufficient to hold the prisoner for the action of the executive, it is, I think, quite immaterial that the offense of forgery, as known to our law, is classified in Austria under the title of "Fraud by Means of Forgery."

I am unable to sustain the fourth objection. The complaint states that the complainant is the duly-accredited official agent and representative of the Austria-Hungary government, at Chicago. The criticism upon the jurat to the complaint, that he does not there positively swear that he is the consul, but that his title is merely *descriptio personae*, is ill sustained in view of the positive statement in the body of the complaint; and the description of his person in the jurat was unnecessary, and is superfluous. It is doubtful, also, if it be essential that the complaint should show that it was preferred by the representative of a foreign government. It is enough, probably, if to the commissioner, or to the executive acting upon the proceedings before the commissioner, it duly appears that the proceeding is in fact instituted and conducted by the demanding nation, or its duly-accredited representative. It would, I think, be the better practice that the initiative of the proceeding should show that it was instituted by the demanding government; but it seems to have been considered unnecessary, so long as it does appear in the proceedings, as a matter of fact, that they are sanctioned by the demanding government. *Benson v. McMahon*, *supra*.

The fifth objection—that the complaint is defective as to jurisdiction—cannot, I think, be sustained. It is, of course, necessary that the substance of the offense charged should be declared, so that the court can see that the particular crime charged is one enumerated in the treaty; but a complaint need not have the precision and particularity of an indictment, but should set forth the substantial and material features of the offense. In *re Henrich*, 5 Blatchf. 414; In *re McDonnell*, 11 Blatchf. 79. In the latter case the complaint charged that the prisoner did "commit the crime of forgery and the utterance of forged paper, to wit, did feloniously, in the said city, and at the time aforesaid, forge and utter, well knowing the same to be forged, several acceptances of two several bills of exchange, each for the payment of one thousand pounds sterling, lawful money of the United Kingdom of Great Britain

and Ireland." The court held that this complaint did charge the crime of forgery at common law, although without the particularity required in the formal indictment for the offense. The complaint here, while I think it greatly wanting in particularity of description, does charge the forging of certain bills of exchange, of the value of 81,000 gulden, Austrian coin. I am inclined to hold this complaint sufficient to give the commissioner jurisdiction, because it charges the crime of forgery. In all such cases as these, however, the commissioner, upon objection of the petitioner, should require an amendment of the complaint, that the petitioner may be fully informed of the particular charge for which he is sought to be extradited, and all the particulars of that charge. He ought not to be required to defend himself against a charge of forging certain bills of exchange without being advised by the complaint of all the particulars of the bills which he is charged with forging. That is, however, a matter for the commissioner, acting within his jurisdiction, and not a matter going to the jurisdiction of the commissioner to entertain the complaint.

There was a further objection made, that the warrant under which the prisoner was arraigned charges two offenses,—the forging and the uttering of the forged paper. It need only be said, as to that, that both are comprehended within the crime of forgery, at common law.

I desire to add, in conclusion, that I have been greatly impressed with the dissenting opinion of Mr. Justice Nelson, concurred in by Chief Justice Taney and Justice Daniel, in *Re Kaine*, 14 How. 103, and should be glad to see the principles there asserted adopted in all extradition proceedings. The danger to individual liberty by the institution of these proceedings, except under the sanction of the executive of the United States, is too grave to be tolerated. Proceedings in interstate rendition can only be set in motion by the executive of one state upon demand of the executive of another. So should it be with respect to extradition. I should be glad to see the jurisdiction of the commissioner called into action only upon the request of the executive. It is true that extradition can be had finally only upon the action of the executive, but there cannot be too many restrictions to the encroachment upon individual liberty. I should also be glad to see a requirement by law that the complaints in such cases as this should be required to have the particularity with respect to charging the offense that is required in formal indictments. This is important in view of the holding that one can be tried in the demanding country only for the offense for which he was demanded and extradited. I feel bound, however, by the decisions, and practice under them, to hold this proceeding sufficient.

It was urged at the hearing that there was not sufficient legal evidence before the commissioner to sustain his holding. I have carefully inspected the record, and, without particularizing the facts, I deem it only necessary to observe that I think there was abundant legal evidence before the commissioner, upon which he

might well find that the offense had been committed by the petitioner.

The prisoner will be remanded to the custody of the marshal, to be held under the commitment of the commissioner, awaiting the order of the president of the United States in the premises, and the writs of habeas corpus and certiorari are discharged.

UNITED STATES v. THOMAS et al.

(District Court, D. West Virginia. April 8, 1893.)

POST OFFICE—OBSTRUCTING MAILS.

Boys who place obstructions on the track of an electric railway whereon the United States mails are carried, and by so doing delay the mail, or force it to be carried in some other way, are guilty of the crime of obstructing the mails, under Rev. St. § 3995.

At Law. Indictment for obstructing the United States mails.

G. C. Sturgiss, U. S. Dist. Atty.

G. W. Atkinson and W. H. H. Flick, for defendants.

JACKSON, District Judge, (orally.) Gentlemen of the Jury: This case, up to this time, although very brief, has developed a very remarkable state of things in this community,—one that certainly is to be regretted by every one who has any respect for law and order. In a country like ours, where its institutions are based upon the common and free intelligence of the people, especially of the wage-earners, which are supposed to be the foundation of our form of government, it is surprising that people of intelligence should undertake to remodel and reform the obligations that exist between them and their neighbors, or, in other words, to upturn the strata of society. Every man who enters into a contract with his neighbor is under a mutual obligation to his neighbor, and has a reciprocal duty to perform. Contracts are based upon the mutual consent of the parties to the contract, and, if once entered into, the obligation should be held sacred.

Now, just exactly what is involved in this question of the strike here, which has brought about all this trouble, I do not propose to investigate. I do not propose to say which side is in the right, nor which side is in the wrong, or whether in fact either side is in the wrong; but I propose to say to these people in this community that there is but one way to redress a wrong known in this country, and that is in the civil tribunals of the land. No men, no set of men, no communistic combination of men, can lawfully undertake to redress a wrong, except in the way pointed out by law. When you attempt to bind yourselves together for the purpose of redressing a wrong, you strike at the very foundation of our government; you strike at the very foundation of those laws which give you the right of a citizen,—the protection of life, of liberty and the pursuit of happiness. Why don't you think of these things?

Whether the men who have employed you give you too little

wages, or whether the compensation for the service is too small, is not involved in this case. No man or set of men can compel you to work. When you go to a man and enter into his employment, that is a voluntary act on your own part, and, when you enter into an obligation to serve that man for a specific amount, you are bound to do so under the terms of the contract. The moment you enter into it you have reciprocal duties to perform, as well as legal obligations. Now, then, if one side breaks the contract, he has a remedy at law. If he does not pay what he stipulates to pay, the wage-earner has a remedy at law to force him to pay the amount. If he thinks the price is inadequate, the moment that his contract is at an end he has the right to cease the labor; or if he thinks it is inadequate, and there is no fixed time, all he has to do is to give his employer notice of the fact, and quit.

You have no right to go into a strike, and undertake to stop the transportation of the mails of the United States, undertake to stop the running of the cars of the country, or undertake to stop the business which is carried on on the great highways of the country, and which is the mainspring to the success of a country like ours. If all this is done, then you step upon a right which you have no right to interfere with. I make these general remarks on this occasion with a hope that I may reach the ear of the intelligent masses, that they may see at once the error they have fallen into. Rely not upon combinations and strikes to protect your interests. They are disastrous, stopping your mills, and stopping the enterprises and business of the community which furnish the wage-earner the means to support his home. Do not resort to such measures to stop our manufactures, our mills, or the transportation of the mails of the United States, which is so great and important an element of our country for the comfort and welfare of society. If you take this thing up, and look at it, and ponder over it, and see the result that must necessarily follow such a course of action, and the train of circumstances that must necessarily accompany it, you would refuse to enter into these combinations and strikes.

But, coming down to the present case, what is the remedy? Here is the evidence in this case. Ah, it is, as one of the witnesses said on the stand, when he would remonstrate with the people who were obstructing him, and inform them of his position, the boys would reply, "We want to win the strike." Twelve year old boys! I have read of prodigies; I have read the biographies of mere youths, of men like our Hamilton, who took control of the treasury department of this great country when he had barely passed his majority, and brought about such wonderful results. We hear of such cases, but they are exceptional. When you see boys 12 years of age telling the men who are controlling the operations of the railroad through the city that they "want to win the strike," you say it is exceptional. Where did the idea come from? Where else could it come from except from the fireside of the father and mother of the boys? Who put it in the heads of

the boys to assemble there in gangs of 30-odd (for the evidence shows that they sometimes came in gangs of 15, 20, 30, or more) to do this sort of thing? Do you believe these boys conceived the idea? What could be their object? "Train a boy in the way he should go," and, the adage now is, that he will not soon depart from it; and I begin to think there is a good deal in it. Taking one step in the wrong direction may lead to the boy's destruction. The first step taken, the second soon follows, and then the third, and so on to the end; and, when the end comes, bitter, indeed, are the recollections of the parent of the child.

I do not recognize the right of any man to make me work when the compensation is too small. When I was practicing at the bar, and a man employed me, I did the best I possibly could for him, but if he did not pay me he could get others, and if I did not serve him well I would expect him to secure some one else. There are two sides to every question, and there are two to this question. In an experience of 31 long years on the bench I have endeavor to discharge my duties without fear or favor, or respect of person. I have endeavored to discharge those duties as citizen to citizen.

The question involved in this case is in regard to the obstructions placed on the tracks of the Wheeling Railway Company, running through this city to Benwood. The only question to determine is whether these boys placed obstructions on the track, and, if so, whether they caused delay in the transportation of the mails of the United States. If you find from the evidence that this is true, you should unquestionably find them guilty.

In support, the government has offered evidence showing a contract between it and the Wheeling Railway Company for the transportation of the United States mails. The obstructions complained of were created in the vicinity of Benwood. Five witnesses, all of them intelligent men, have identified these boys. Five witnesses identified the larger boy, and four identified the younger one. The first government witness, Geisler, a very intelligent man, when giving his evidence, impresses one with the truth of his statements. He said these boys placed obstructions on the track, and that the obstructions delayed the mails of the United States. The next witness, Weigand, was on the car with Geisler, and corroborates his statements. The next one, Meyers, a motorman, identified both the boys as those placing obstructions on the track. Grayble, the conductor on Meyers' car, identified both. Groves, the mail messenger, rode on the cars frequently, and testified that very often obstructions were placed on the tracks, at times compelling the transportation of the United States mails on other routes. The evidence shows so many obstructions that sometimes the cars had to be abandoned, and that the mails had to be transported on other routes, by way of Martin's Ferry, Belaire, over the Ohio River Railway, and other routes. Now, then, this is a violation of the statutes imposing a penalty for obstructing the United States mails. The unimpeached testimony of two motormen and two conductors on two different cars shows that

these were the boys who placed obstructions on the tracks, delaying the cars, and hindering the delivery of the mails. On one occasion the trolley, I believe it is called, was thrown out, delaying the car. The first witness said he had been struck repeatedly by stones when removing obstructions.

But, while the boys undoubtedly placed obstructions on the track, some persons older than they are behind them, acting the part of cowards, and do not dare to undertake themselves what they put the boys up to do. They suppose, the boys being mere children, that the courts will not notice what they did. The counsel for the defense has made as strong a case as possible, and has attempted to set up what in law is called an "alibi," to show that the boys were not at the place when the obstructions were placed.

You have heard the evidence, and know whether or not the boys were there. I leave that for you to determine. You know whether they have accounted for all the time necessary to prove an alibi. You have heard the testimony of several lady school teachers. There is a good deal of conflict there, the testimony of those ladies conflicting with that of other witnesses. This you must yourself reconcile. The general remarks I have made have nothing to do with this case as to the boys. I have made them for the benefit of the people in the community, that they may see the error they have fallen into. It is for you to determine, from the evidence you have heard, whether they are guilty. Gentlemen of the jury, you are only to consider the evidence in this case. You have nothing to do with the amount of the penalty to be inflicted, which is only a fine, subject to the discretion of the court. Take the evidence, and decide the case.

In re BLUMLEIN et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

1. CUSTOMS DUTIES—LEAF TOBACCO—UNIT OF CLASSIFICATION.

Under the provisions of the tariff act of March 3, 1883, pars. 246, 247, that "leaf tobacco of which 85 per cent. is" suitable for wrappers, and of a specified grade, shall be subject to a certain duty, and that "all other tobacco in leaf" shall pay a lower duty, the unit upon which the percentage is to be calculated is the bale as packed at the plantation, if such bale is imported without any change other than such as is occasioned by sampling, or for the purpose of transportation, and reaches the hands of the consumer in that condition, through the ordinary channels of commerce; and duties cannot be assessed according to the proportions of the different qualities found in an entire lot, consisting of several bales, as ascertained by an examination of sample bales. 49 Fed. Rep. 228, affirmed. *Falk v. Robertson*, 11 Sup. Ct. Rep. 41, 137 U. S. 225, distinguished.

2. SAME—HOW QUALITY DETERMINED.

The 85 per cent. clause does not refer merely to size and fineness, but to size, fineness, and weight.

Appeal from the Circuit Court of the United States for the Southern District of New York.

At Law. Application to the circuit court by Blumlein & Co., importers, under the provisions of section 15 of the act of congress of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," for a review of the decision of the board of United States general appraisers at the port of New York affirming the decision of the collector in the classification for duty of certain Sumatra leaf tobacco entered at said port by the importers on June 30, 1890. The decision of the board of appraisers was reversed. 49 Fed. Rep. 228. The government appeals. Affirmed.

For decision on a motion for further return of the board of appraisers, see 45 Fed. Rep. 236.

James T. Van Rensselaer, Asst. U. S. Atty., for appellant.
W. Wickham Smith, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. On June 30, 1890, Blumlein & Co. imported from Amsterdam, into the port of New York, 37 bales of unstemmed Sumatra leaf tobacco, consisting of three separate plantation lots, containing 10, 18, and 9 bales, respectively. The tariff act of March 3, 1883, (22 St. at Large, p. 503; Heyl. Tariff Ind. pars. 246, 247,) which was at that time in force, provided for duty on tobacco as follows:

"246. Leaf tobacco, of which 85 per cent. is of the requisite size, and of the necessary fineness of texture, to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound. 247. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound."

To the method of examining and weighing the tobacco adopted in this case, many objections were interposed, which have been argued at great length; but, in the view we take of the construction to be given to the statute, such objections need not be passed upon, nor need the methods of examining and weighing be referred to in this opinion, otherwise than incidentally. As a result of such examination the collector decided that, of tobacco such as is described in paragraph 246, above quoted, there was:

In the lot of 10 bales.....	20%
In the lot of 18 bales.....	none
In the lot of 9 bales.....	60%

—And of the kind described in paragraph 247:

In the lot of 10 bales.....	80%
In the lot of 18 bales.....	100%
In the lot of 9 bales.....	40%

Duty was assessed upon 20 per cent. of the lot of 10 bales, and on 60 per cent. of the lot of 9 bales, at 75 cents per pound, and on the residue at 35 cents per pound. The importers appealed to the board of general appraisers, protesting that the entire importation was subject to duty only at 35 cents per pound. Upon the expressed ground that the questions raised were pending in the

courts, the board of general appraisers, *pro forma*, affirmed the collector's assessment, without discussing the merits. The importers thereupon appealed to the circuit court, which reversed the decision of the board and of the collector, and directed that the tobacco should be classified for duty under paragraph 247. The government has appealed to this court.

The report of the board of general appraisers finds as a fact that "the importation was Sumatra tobacco, running about the same through the bale, with the usual differences in weight and texture that occur in Sumatra tobacco." One bale in ten of each plantation lot was designated for examination by the collector, and, as the board finds:

"The examination was made by drawing ten hands from each bale, [so designated.] These hands were then weighed, and the number of leaves to each hand was counted, and the percentages were calculated according to a table authorized and adopted by the department. Where they ran over 100 leaves to the pound, they were returned for duty at 75 cents per pound, and the remainder at 35 cents per pound. If, out of the ten hands, seven of them were found to run over 100 leaves to the pound, seven tenths of the bale was returned for duty at 75 cents per pound, and three tenths at 35 cents per pound."

From the proof in this case, and in another now before this court, it appears that, when this kind of tobacco is packed at the place of production, the leaves are first tied together in packages called "hands." The number of leaves in the hand varies. Sometimes the hand contains less than 20, sometimes more than 50. But the general average of leaves is about 35 to 40. From six to seven hundred of these hands are then packed in a bale, which is covered with "bass,"—a species of split palm,—and in that condition shipped to Holland. There, when sold to outside buyers, the bass is covered by an outer wrapper of rush or cloth, and in that condition the bale is bought and sold in the markets of the world. Except for such opening as is necessary to admit of a proper commercial examination of the tobacco, after which examination the hands which have been withdrawn are replaced, and the bale closed up again, these bales, so far as appears, are unbroken until the tobacco, through ordinary channels of commerce, reaches the hands of the consumer. A bale varies in weight from about 160 to 190 lbs.

Conceding, for the purposes of the argument, that the examination of the customs officers was sufficient to give an accurate knowledge of the contents of every bale.—and that is the utmost the government can claim for its examination,—it is apparent that the result is an ascertainment of the percentage of tobacco of the higher grade (that of paragraph 246) in each bale, and in the entire lot. It is contended for the government that thereupon, although there is no actual separation of the tobacco, the collector may constructively separate it, mentally grouping all the higher grade tobacco into one lot, and all the lower grade tobacco into another, and treating the entire importation as if it had come into the port of entry in packages, some of which contained 100 per cent. of one grade, some 100 per cent. of the other, and none of which contained any mixture of

both grades. In our opinion the statute does not authorize any such method of classification. It plainly contemplates the importation of tobacco of mixed grades, and provides that when it is thus mixed, and 85 per cent. of it is of the higher grade, such mixed lot shall pay 75 cents per pound on all tobacco therein contained, whether of higher or lower grades. If the lot does not contain 85 per cent. of the higher grade, the entire lot is to pay the lower duty. The tariff does not impose the higher rate of duty upon all tobacco of the requisite size, fineness, and weight, but upon "tobacco of which 85 per cent." is of the higher grade. So much is perfectly plain upon inspection of the statute. When congress provides for the ascertainment of a rate of duty by the calculation of a percentage, the conclusion is irresistible that there is to be some base number, of which the percentage is to be found. The only difficulty is the determination of what that base number is to be, or, in other words, what is the unit of leaf tobacco which is to be subjected to the percentage test. It has been suggested that either each entire importation, or each separate plantation lot of which it is composed, should be taken as the unit. But the aggregation of bales into plantation lots and larger groups imported together is fortuitous, and not commercially permanent. They may be sold as entire lots, but need not be. So long as the individual bales are unbroken, they may be segregated into smaller groups, and so sold, as readily, no doubt, as if the original group included in a single entry were itself unbroken. Certainly, congress did not intend that a merchant could import, even from a single plantation, 70 bales entirely composed of the higher grade tobacco, and 30 bales entirely composed of the lower grade, at the lower duty for the whole, when the 70 bales, without repacking, or any change of condition, would be as commercially salable at the full market rate as if they had been separately imported. It seems plain that neither the entire entry nor the plantation lot is the unit.

Commercially speaking, the aggregation of leaves of tobacco into the bale, however, is permanent. The package thus formed remains unbroken, as in the course of trade it passes from hand to hand till it reaches the consumer. To that unit (the bale) any importation of tobacco can be reduced without difficulty. Below that unit it cannot be reduced without commercially changing its condition. Tariff acts, as the supreme court has repeatedly held, are concerned with trade and commerce. They are presumed to be framed after a careful examination of commercial conditions, and are to be interpreted in the light which a knowledge of those conditions affords. When, therefore, we find congress providing that the rate of duty on any commodity shall be regulated by an ascertainment of the percentage of a particular grade of that commodity, present in some aggregation of its different grades, which aggregation congress does not define, well-settled rules of construction indicate that such aggregation or unit is the one recognized in the commercial world as the standard, and that, for tobacco, is the bale. There is nothing in the decision of the supreme court in *Falk v. Robertson*, 137 U. S. 225, 11 Sup. Ct. Rep. 41, which conflicts with this

interpretation of the statute. The aggregation of leaf tobacco before the court in that case was not a commercial bale. Two different grades of tobacco, carefully separated from each other by strips of paper or cloth, were inclosed in a single package, which was in one sense a bale, but which certainly was not such a bale as was known to trade and commerce. Therefore that court held that "the unit is not the bale, [which was before them,] but it is the separated quantity of such leaf tobacco. That quantity stands, for the purposes of duty, as if it had been imported in a bale which contained nothing but itself. By the method of packing, the wrapper tobacco and the filler tobacco remained entirely distinct. The association of them in the bale was evidently only for the purpose of avoiding the higher duty imposed upon the superior tobacco. This association was to be dissolved the moment the bale was opened in the United States, because the two grades of tobacco sold for different prices in the market." This does not apply, however, to bales like these imported by the petitioner, which had been properly packed in the usual way in Sumatra, with no separation of grades, without fraud, or attempt to evade the customs laws of this country, which had not been repacked in Holland, and which could only be separated into grades by a complete breaking up and destruction of the bale as a commercial unit. We find no warrant in the Falk Case for the contention that the contents of commercial bales can be mentally segregated by the collector, and treated as if the component materials had come into this country in different packages. Nor do we find in the statute any support to the proposition that the percentage is to be taken of each individual leaf. The paragraph does not read "tobacco leaves, of which 85 per cent. is," etc., but "leaf tobacco, of which 85 per cent. is," etc; and to hold that congress intended to require an examination so exhaustive as to determine the percentage of available surface on each leaf is absurd. The labor would be enormous, and the result of such examination would, as the evidence shows, destroy the commercial value of the importation.

In the case at bar none of the bales examined contained 85 per cent. of the higher grade. The collector was satisfied from his examination that the bales not examined conformed in all respects to the selected sample bales, and there is nothing before us to show that any of them contained the requisite percentage. None of the tobacco, therefore, came within the provisions of paragraph 246, or the decision of the supreme court in the Falk Case; for upon examination there was not found any "separable and separated quantity" of leaf tobacco, of which it could be said that 85 per cent. was of the requisite size, fineness, and weight to be dutiable at 75 cents per pound.

The appellant further contends that the 85 per cent. clause refers only to size and fineness. We do not so read the statute. Though awkwardly expressed, its evident meaning is that leaf tobacco, 85 per cent. of which is of the requisite size, fineness, and weight, is dutiable at 75 cents per pound.

The decision of the circuit court is for these reasons affirmed.

HUBBARD, Collector, v. SOBY.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

In Error to the Circuit Court of the United States for the District of Connecticut.

At Law. Action by Charles Soby against Charles C. Hubbard, collector of customs at the port of Hartford, to recover duties paid under protest on certain importations of tobacco. There was judgment for plaintiff. 49 Fed. Rep. 234. Defendant sued out a writ of error to the supreme court of the United States which was dismissed for want of jurisdiction. 13 Sup. Ct. Rep. 13. He now brings the case to this court. Judgment affirmed.

Geo. P. McLean, for plaintiff in error.

Lewis E. Stanton, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. This is a writ of error to the United States circuit court for the district of Connecticut to review a judgment recovered in that court against the collector of customs for the port of Hartford, for excess of duties paid on certain Sumatra leaf tobacco. The plaintiff below imported two plantation lots of such tobacco in a single shipment, but before duty was collected one lot was withdrawn for transportation to New York, where the duty was paid. The only question in the case was as to the proper rate of duty on the remaining lot. The points raised are substantially the same as those discussed in *Re Blumlein*, 55 Fed. Rep. 383, (decided at this session.) The importer contended that the unit of tobacco on which the percentage should be calculated was the entire importation, including both plantation lots. This proposition, for the reasons expressed in *Re Blumlein*, supra, we hold to be unsound. Of the plantation lot which remained in Hartford, about 83½ per cent. was of the requisite size, fineness, and weight specified in paragraph 246 of the tariff act of 1883. We concur with the learned judge who tried the cause in the conclusion that the entire lot was liable to duty only under paragraph 247. It will be noted that in our opinion in the *Blumlein* Case we decide that the proper unit is the commercial bale. In the case at bar the learned circuit judge held that the "quantity of tobacco in the Senembah plantation lot" was the proper unit. Examination of his opinion, however, discloses the fact that such holding was based on the proved fact that all the bales in the lot were of uniform grade. Where all the bales in a lot are thus uniform, the same result is reached, whether lot or bale be taken as the unit. Where they are not uniform, however, the circuit judge expresses the opinion that the unit must be found in some smaller quantity. There is no substantial difference, therefore, between the decision of the circuit judge in this case and that of this court in the *Blumlein* Case.

The judgment of the circuit court is affirmed, with costs.

UNITED STATES v. STRAUSS.

(District Court, S. D. Ohio, W. D. April 14, 1893.)

No. 1,719.

CUSTOMS DUTIES—ENTRY BELOW VALUE—ACTION FOR PENALTY.

One who is assessed with a penalty for entering dutiable goods at a sum below their actual value cannot, in an action for the penalty, defend on the ground that he intentionally omitted certain items from the entry in order to pay them separately under protest. He must either give notice, and ask for a reappraisement, or take an appeal, as provided by law. Act June 10, 1890, §§ 13, 14; 2 Supp. Rev. St. 750.

At Law. Action by the United States against Henry Strauss to recover a penalty for undervaluation of dutiable goods. Judgment for plaintiff.

John W. Herron, U. S. Atty., and Henry Hooper, Asst. U. S. Atty., for the United States.

Harmon & Colston and Goldsmith & Hoadly, for defendant.

SAGE, District Judge. The agreed statement of facts is, in substance, as follows:

The defendant imported into the United States, from Cuba, six cases of cigars, which arrived December 4, 1890. On the 10th of December he made a consumption entry, and paid the duties thereupon. The value of the goods, as entered, was \$819. The surveyor of customs on the 13th of December appraised the cigars at \$819, as entered, and added the sum of \$148 for the case, packing, and charges, and the defendant paid the duty, and withdrew the goods. June 13, 1891, the surveyor and acting collector of customs caused said entry to be reliquidated, and a final liquidation made, which included in the value of said merchandise the boxes and packing charges, making the appraised value \$969; and the surveyor assessed a penalty thereon in accordance with the provisions of section 7 of the act of congress approved June 10, 1890, (2 Supp. Rev. St. U. S. p. 748,) which provides that, if the appraisement exceeds by more than 10 per cent. the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties, a further sum equal to 2 per centum of the total appraised value for each 1 per centum that such appraised value exceeds the value declared in the entry. The penalty, under this provision, in this case, is \$348.12, being the amount sued for. The defendant was notified of this reliquidation on the same day. On the 23d of June, 1892, he filed a protest with the surveyor, setting forth that the boxes and charges were intentionally omitted from said consumption entry; 'the omission being solely for the purpose of paying the duty on the value of the cigars, and excluding the value of the cases, boxes, and bands, with the intent to enter the same, and pay the duties thereon, under protest.' The additional duty of \$146.34 on the increased value, and on 24½ pounds additional weight, was paid on liquidation; but the penalty claimed under the statute was not paid at the time of the protest, nor has it been since paid. The defendant did not give notice to the collector of his dissatisfaction with such appraisement, and ask for a reappraisement by one of the board of general appraisers, or by the board of said appraisers, nor has any appeal been taken from the act of the surveyor of customs in said appraisement. The failure to give notice, and ask for a reappraisement, or to take an appeal from the act of the surveyor of customs, is fatal to the defense, which is that when the surveyor caused the entry to be liquidated the rate and the duties chargeable, together with all costs, charges, fees, and exactions, of whatever character, were decided by the surveyor and acting collector, and by him demanded of the defendant, and that the defendant then duly paid the same, and withdrew the cigars for consumption.

Section 13 of the act provides for a reappraisement if the collector shall deem the appraisement of any imported merchandise too low, which reappraisement shall be made by one of the general appraisers. The decision of the general appraiser, in cases of reappraisement, is made final and conclusive as to the dutiable value of the merchandise reappraised, against all parties interested, unless the importer, owner, consignee, or agent of the merchandise shall be dissatisfied with such decision, and shall within two days thereafter give notice to the collector, in writing, of such dissatisfaction, or unless the collector shall deem the appraisement too low. In either case it is made the duty of the collector to transmit the invoice, and all the papers appertaining thereto, to the board of three general appraisers which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the secretary of the treasury for such duty at that port or any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive.

Section 14 provides for an appeal within 10 days from the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all costs, charges, fees, and exactions, of whatever character, excepting on tonnage, and that in default of such appeal the decision of the collector shall be final and conclusive. The defendant has neglected to take any of the steps provided by law to review the action of the collector, which has now become conclusive and final. The judgment will be in favor of the United States, with costs.

DIXON-WOODS CO. v. PFEIFER.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

PATENTS FOR INVENTIONS—VALIDITY—DESCRIPTION—GLASS ANNEALING.

Claim 1 of letters patent No. 258,156, issued May 16, 1882, to Cleon Tondeur, for an improvement in glass-annealing furnaces, was for "the combination of the bars, d, d', arranged side by side, and alternately between each other, the set, d, supporting the sheets of glass while the bars, d', are pushed towards the leer or flattening wheel, a, and the set, d', supporting the sheets of glass, and moving them onward and through the tunnel." The drawings show the bars raised some distance above the floor, and the specification states that a space of about one foot beneath the bars is desirable; also, that in transferring the glass one set of bars is raised and the other is lowered, in all about one inch. It was shown that the advantages which this device had over prior ones were due to the fact that the glass was held some distance above the floor, and moved in a horizontal plane. *Held*, that the bars, d, d', are bars which are above the floor, and in such relation to each other that the glass is carried forward in practically the same horizontal plane, even though the inventor did not precisely point out the advantages to inure from this arrangement, and was perhaps not aware to what the improvements effected by his device were due. 51 Fed. Rep. 292, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

In Equity. This was a bill by the Dixon-Woods Company against Pfeifer for the infringement of letters patent No. 258,156, issued May 16, 1882, to Cleon Tondeur, for an improvement in glass-annealing furnaces. There was a decree for complainant, (51 Fed. Rep. 292,) and defendant appeals. Affirmed.

Mr. Wilkinson, for appellant.

Thos. W. Bakewell and Mr. Kerr, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a decree of the circuit court for the northern district of New York, upon a bill in equity which was founded upon the alleged infringement by the defendant of letters patent No. 258,156, dated May 16, 1882, to Cleon Tondeur, for improvements in glass-annealing furnaces. The circuit court rendered, upon final hearing, an interlocutory decree against the defendant, for an injunction and an accounting. This patent has been twice the subject of adjudication by the circuit court for the western district of Pennsylvania. Judge Acheson's opinions, sustaining its validity, are contained in 28 Fed. Rep. 561 and 37 Fed. Rep. 333. Judge Wallace doubtfully followed, in this case, the decisions of Judge Acheson. 51 Fed. Rep. 292. The three opinions in the circuit courts fully explain the mechanical character of the improvement upon pre-existing machines. The invention relates to an annealing glass furnace, which is generally called a "leer," and is a long, arched tunnel into one end of which the sheets of glass are placed as they leave the flattening furnace, through which they are conveyed, and are gradually cooled in their transportation. In order to properly temper the glass, and prevent breakage or warping, or undue hardness or unequal tension of its particles, the cooling process should be gradual, and equally distributed. To this end the glass should not be subjected to alternations of heat and cold, but the temperature should be uniformly decreasing, and uniformity is found in the same horizontal plane and above the floor. Free radiation and an equal distribution of heat should take place from both sides of the glass, and therefore it should not rest upon the floor or upon a broad surface.

Formerly, the glass was carried from the flattening furnace through the annealing leer upon loaded cars, which was obviously a slow and unsafe method. The state of the art before the Tondeur invention, as manifested by the patented inventions which substituted transportation of sheets placed side by side for transportation upon loaded cars, is described as follows by Judge Wallace:

The two types of leers which were said to have been used "are shown in the patents to Bievez and to Bouvy. The Bievez leer is of the usual rectangular form, with the usual tile or stone floor. The floor is divided longitudinally by a series of channels. Located in these channels, and connected together so as collectively to form a frame, are a series of iron bars, resting on a series of grooved wheels. The wheels are supported by axles located in transverse channels beneath the floor. Coacting mechanism is employed for actuating the

frame, whereby the series of iron bars are raised, advanced, lowered, and pushed backward. In operation a plate of glass from the flattening oven is placed upon the floor of the leer, and the mechanism is actuated to elevate the frame and lift the glass from the floor, carry the glass forward, and deposit it upon the floor. The frame is then lowered, pushed back to its original position, and the operation repeated until the glass is transported through the leer. The Bouvy leer, in general construction, resembles that of Bievez, but differs in the devices for transporting the glass through it. The frame which is supported in the longitudinal channels consists of two series of iron shelves, which reciprocate each between the other, each having a vertical and longitudinal motion, which is coincident and equal, and also continuous. Mechanism is employed which actuates one series of the shelves downward and forward, and the other at the same time upward and backward. In operation the glass is placed upon one of the series of shelves, the mechanism is actuated, and, as the two series pass each other, the ascending series removes the glass from the descending series, and carries it forward until it is in like manner removed again by the other series, and thus is transported through the leer.

"To summarize: In the Bievez patent the frame has a free vertical and longitudinal movement. Its function is to lift a sheet of glass by its vertical movement from the floor of the leer, and by its longitudinal movement carry it to an advanced position on the floor. In the Bouvy patent one series of shelves moved vertically and longitudinally, while the other set is moving vertically and longitudinally in an opposite direction. The function performed by the shelves is to transfer a sheet of glass from one set to the other, and advance it through the leer. In the Bievez leer the sheet of glass rests upon the bottom of the leer throughout its passage, except while being advanced at each elevation of the frame. In the Bouvy leer the glass does not rest, at any time in its passage through the leer, upon the floor, but it is not advanced in the same horizontal plane, and in its movement describes a circle, which varies the longitudinal plane about eight inches.

"Besides the patents introduced in the former litigation to show the prior state of the art, the defendant has introduced others in the present case, of which those relied on in the argument at bar are the French patent to Le-verne of 1868, and the Belgian patent to Bouillet of 1878. The Belgian patent to Guignon, set up in the answer, cannot be considered, because it was not introduced in evidence. Neither of these patents is of any value as impeaching the novelty of the claim as it has been construed. Each of them belongs to the Bievez type, but, in Bouillet's, two sets of parallel bars co-operate to lift the glass from the floor and advance it along the leer, instead of the single set of Bievez."

The improvement contained in the Tondeur leer consisted in a successful attempt to simplify the machinery, and lessen the large amount of breakage which had been the result of former annealing processes. The patentee says in his specification:

"My device for removing the glass out of the furnace consists of two sets of bars of iron, one of which reciprocates between the other. By this reciprocating motion the glass is carried through the annealing tunnel of the furnace, the bars of each set being one elevated, while the other is lowered, between the movements of the glass, by means of a lever attached to one of several transverse shafts that support the bars. Sets of arms are attached to each shaft,—one set of arms with rollers for the reciprocating bars, and the other set of arms with hinge joints for the other set of bars."

The vital part of the improvement resides in the two sets of bars, one set reciprocating, and called "d'," the other set supporting, and called "d," in the patent. The following description of the operation of the double bars is condensed from the description in the specification: Both sets are parallel to each other, and are placed alternately. When a sheet of glass is in readiness, it is taken from

the flattening furnace, and placed on the ends of the reciprocating bars, four in number and parallel to each other, and by the aid of wheels having a motion backward and forward of about four feet. The operator, who stands at the further end of the leer, then pulls these bars towards himself, which causes their ends to move, with the sheet of glass in them, until the ends coincide with the ends of the supporting bars, and the sheet is also over the ends of these bars, d. The movement of a lever, which is fast to the end of a shaft, lowers the bars, d', and raises the bars, d, simultaneously, to the extent of about one inch, which takes the sheet from the bars, d', and leaves it on the bars, d. The bars, d', are then pushed backward for another sheet. The bars, d, are fast to the arm of the shaft, and their motion is very small, since they can move only the distance the lever moves the arm, which has no effect on the progress of the glass through the tunnel, "but by the motion of the bars, d', together with the elevation and lowering of both sets of bars, a gentle change of the sheets is had from one set of the bars to the other, and the glass moves onward through the annealing tunnel, until a series of sheets fill the tunnel, after which the operator, at each reciprocal movement of the bars, d', removes from the exit a sheet of glass. This he repeats as long as the furnace is in operation. The specification says, also: "A space of about one foot deep is desirable beneath the bars."

The drawings of the patent, and the leer as made and presented to the public, show that, as a matter of fact, the supporting bars were at some distance above the level of the floor, and that the movement of the sheets was in the same horizontal plane. The invention, as a fact, consisted in substituting a pair of supporting bars, raised above the floor of the leer, for the floor or the floor ribs of the Bievez type, and in so arranging the reciprocating bars with the supporting bars that the sheets are pushed forward through the leer in the same horizontal plane, instead of through different degrees of temperature, by the oscillating or jumping movement of bars of the Bouvy type. The glass is continually supported above the floor, and is both supported and carried forward in the same horizontal plane. The advantages of the leer, and the reasons why it was an improvement, are abundantly proved, not only by the testimony of mechanics and manufacturers, but by its history. It has well-nigh displaced other systems, and is in almost universal use in glass furnaces in this country. The claims of the patent are as follows:

"(1) The combination of the bars, d, d', arranged side by side, and alternately between each other, the set, d, supporting the sheets of glass while the bars, d', are pushed toward the leer or flattening wheel, a, and the set, d', supporting the sheets of glass, and moving them onward and through the tunnel, substantially as set forth.

"(2) The transmitting bars, d', reciprocating between the alternate bars, d, which receive the glass at the times described, in combination with the arms, e', e'', which by the lever, h'', and shafts, f, change simultaneously the elevation of the sets of bars, d, d', and the glass supported by each, as set forth.

"(3) The furnace, x, and tunnel, h', made with a continuous and straight chamber from the section, c'', of the flattening wheel, a, in combination with

the bars, d, d', so constructed that the bars, d', shall enter the leer furnace over the section, e'', of the wheel, as set forth.

"(4) A furnace and tunnel made with a draft through both from the fuel chamber, a', and with a draft flue, m, and dampers, n, in combination with the bars, d, d', the several parts being constructed as set forth.

"(5) The furnace, x, with flattening wheel, a, and tunnel, h', constructed and adapted to the two sets of bars, d, d', the bars, d', being made by the wheels, e, to reciprocate and project alternately into the furnace over the segment, e'', and out of the exit, h, whereby the sheets of glass are received by the furnace ends of said bars, and discharged by their exit ends out of the tunnel, without opening the furnace or tunnel, as set forth."

The case depends upon the construction which shall be given to the bars, d, and d', in the several claims of the patent. The first claim is the broadest and most important one, being for the two sets of bars, irrespective of the particular mechanism by which they are operated. The second is for the two sets of bars with the described operative mechanism. The third, fourth, and fifth are for the two sets of bars, in combination with the furnace and tunnel, and specified details of construction mentioned in the respective claims. The defendant's theory of the invention as it existed in Tondeur's mind, and as he presented it in his specification, is that it was a modified construction of the bars so as to avoid violent movement, and consequent breakage; that its intended result was a gentle change of the sheets from one set to the other; that, so far as appears from the specification, the supporting bars could be on a level with the floor, and the reciprocating bars could move in a variable plane; and that it was a mere mechanical change, and not an improvement in the art of annealing. If this theory is correct, there was no patentable invention in the improved leer. The defendant's argument relies upon the fact that the alleged distinctive features of the bars, viz. their elevation above the floor, and the forward movement in the same horizontal plane, are not mentioned in the specification or in the claims as patentable features or patentable improvements, or as the causes by which breakage is avoided, and that elevation above the floor is only alluded to as desirable.

It is perfectly true that the description in the specification is confined to the purely mechanical features of construction of the bars and the other operative mechanisms, and that the patentee nowhere told why his improvement diminished breakage, or pointed out as a part of his invention that the movement was in the same horizontal plane, and that the supporting bars must be above the floor, although he does mention the amount of space beneath the bars which would be desirable. The specification closely, and altogether too closely, adheres to mere mechanical features, and creates doubt as to whether Tondeur thoroughly understood his invention. It indicates that the patentee did not understand the philosophical principles which caused his mechanism to produce an improved annealing. If he had known, they would have been alluded to in the patent; but an examination of the specification and its drawings leaves little doubt that the patentee meant, and that the specification means, to describe bars in such relation to each

other that the glass is carried forward constantly in the same horizontal plane. He meant to instruct the public that the glass was to be carried through the tunnel on a level, though he might not have known why it was to be so conveyed. A very slight vertical movement transfers the glass from one set of bars to another, and it is, during its entire progress through the tunnel, in substantially the same horizontal plane. The motion of the bars, d', is called a backward and forward one, and the specification says that the operator draws the exit ends of the bars, d', out with a sheet of glass on them when the bars, d', are up or elevated, and he pushes them in when they are lowered, and the bars, d, are up or elevated. The bars, d', are pushed backward and pulled forward on wheels which are mounted on shafts whose journals are either made fast to the sides of the tunnel, or set in them, all at one level. Any other motion than one in a horizontal plane would not seem to be practicable.

The fact that the supporting bars are raised above the floor is not so clearly found in the written parts of the specification. It is plainly implied, because the distinctive feature of these bars is that they are supporting, and the glass passes through the leer upon a grating, and the plan of movement is inconsistent with a rest upon, or contact with, the floor. Moreover, Fig. 1 of the drawings clearly shows that the bars are above the floor. In addition, the fact that the advantages arising from the elevation of the supporting bars above the surface of the floor, over the old hearth-leer construction, were immediately understood by practical glass manufacturers, is suggestive that they understood the real nature of the invention as described in the patent. The patentee told the trade of which he was a member by what mechanical means breakage of glass in the process of annealing could be saved; in other words, how to anneal glass better and more economically. His patent described clearly enough the way in which bars and the operative mechanism should be constructed and operated, and the glass should be conveyed through the leer. He did not know, or he did not tell, why the new method would produce better results. He simply told how to construct a machine which carried the glass through the leer on a level, and saved much breakage; but he ought not to lose the statutory benefits which would certainly belong to him if he had seen and described the philosophy of his machine accurately.

Our conclusion is, in accordance with that of Judge Acheson, that the bars, d', d, are two sets, arranged alternately, side by side at some distance above the floor of the leer, so that the sheets of glass are supported by one set, and moved onward by the other through the tunnel, in practically the same horizontal plane, when coacting mechanism is applied.

The defendant is a builder of leers, and constructs them substantially in accordance with the description shown and described in letters patent No. 400,708, which were issued to him, and dated April 2, 1889. In the opinion of the circuit court it is said "the combinations which are the subject of the several claims [of the

Tondeur patent] are each employed in the furnaces or leers of the defendant." The questions which were actually in controversy before the circuit court, and are before this court, relate to the construction of the patent and to patentable novelty. If the validity of the claims is sustained, infringement is not controverted.

The decree of the circuit court is affirmed, with costs.

DIXON-WOODS CO. v. SYRACUSE GLASS CO.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

Appeal from the Circuit Court of the United States for the Northern District of New York.

In Equity. Bill by the Dixon-Woods Company against the Syracuse Glass Company for infringement of a patent. There was a decree for complainant, and defendant appeals. Affirmed.

Mr. Wilkinson, for appellant.

Thos. W. Bakewell and Mr. Kerr, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The facts in this case are the same as in the case of Dixon-Woods Co. v. Pfeifer, 55 Fed. Rep. 390, (which has just been decided.) Judgment of the circuit court is affirmed.

ANDERSON v. MONROE et al.

(Circuit Court, W. D. Pennsylvania. April 5, 1893.)

No. 38.

1. PATENTS FOR INVENTIONS—VALIDITY—INVENTION—MANTELS.

Design patent No. 19,872, issued June 3, 1890, to W. Anderson, for a design for mantels, is valid, as showing invention, inasmuch as the elements, though old, are combined in a new and harmonious design, which presents a different impression to the eye from anything that preceded it.

2. SAME—INFRINGEMENT—DEFENSE—ABANDONMENT.

In a suit for infringement of a patent, where the defense is public sale and the use of the patented device more than two years before the patent was applied for, the burden of proof is on the defendant; and the defense is not sustained by evidence which leaves in doubt the identity of an exhibit which embodies the device, and is alleged to have been so sold.

Suit by William Anderson against W. T. Monroe and Edward T. Germain for the infringement of a patent. Bill dismissed as to Germain, and decree for complainant as to Monroe.

W. L. Pierce, for complainant.

W. Bakewell & Sons, for respondent.

BUFFINGTON, District Judge. This bill is filed by William Anderson against W. T. Monroe and Edward T. Germain, alleging infringement of design patent for mantels, No. 19,872, applied for by Anderson 20th February, 1890, and granted June 3d following. The design is known as the "Anderson AA Mantel." On application

the bill was heretofore dismissed, as to Germain, for want of jurisdiction. The answer of Monroe, the respondent, admits that in August, 1890, he sold mantels of the design shown in the letters patent sued on, but that he did not then know of the grant thereof; denied subsequent infringement; averred that complainant, having before the grant of the patent sold mantels of the design in controversy, continued to sell them thereafter without marking them "Patented," together with the date of the patent; denied novelty and patentability in the design. In a supplemental answer, public sale, use, and exposure to sale, of the designed device, more than two years previous to the application, were alleged.

On the question of the novelty and patentability of the design there is a prima facie presumption from the grant of letters patent. *Railroad Co. v. Stimpson*, 14 Pet. 448; *Seymour v. Osborne*, 11 Wall. 516; *Smith v. Dental Co.*, 93 U. S. 486; and *Lehnbeuter v. Holthaus*, 105 U. S. 94. While this particular design was not before this court in the prior litigation, yet the BB design, which was issued the same day as this, and between which and this there is a generic similarity, was sustained in *Anderson v. Saint*, (No. 22; November term, 1890,) 46 Fed. Rep. 760; and to the design now in controversy we may apply and adopt the language of that case:

"Keeping in mind the limitations and principles of the cases I have cited, I think the design shows invention. It is necessarily a small invention. The complainant was restricted within narrow limits. His mantels must conform to the general shape and configuration of mantels, to be of any utility. To be marketable, the design must be simple, not elaborate. Remembering this, the design shows invention. * * * It is a conventional design, and, while some of its elements are old, still the combination has been into a new and harmonious design. * * * It presents a different impression to the eye from anything which has preceded it, and is pleasing and attractive. The testimony shows that complainant's mantel has commended itself to the trade, and immediately became popular. This public acceptance is to be considered as persuasive in favor of the patent."

We are of opinion the design must be sustained.

So, also, on the question of prior use, sale, and exposure, we feel the respondent has not met the burden of proof cast upon him; for, not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that "every reasonable doubt should be resolved against him." *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. Rep. 970. Measured by this standard, the proof falls short. In a case between the same parties, No. 39, November term, 1891, (55 Fed. Rep. 398,) involving the BB design, we have noted the general facts, the relation of the parties, etc. It is contended that the order of February 2, 1888, from Heckert & McCain to Anderson, there discussed, included the A mantel; that it was charged in the Heckert & McCain invoice, by Anderson, at \$2.50, and was included in the invoices of February 9th and February 11th; that it was sent to the Schmidt house along with the mantels in dispute in that case. No such mantel is now in the Schmidt house, and it is contended by counsel that the failure to find any is to be accounted for by

the fact noted in that case,—that two A mantels were returned on March 16th. This is but an explanation, and is not proven as a fact, nor is any A mantel produced. In view of the peculiar facts shown in regard to these Schmidt house mantels, we feel the production and identification of the alleged A mantel is a burden resting upon the party here setting it up as a prior sale to defeat this patent. We would not be understood as laying down any general rule in regard to the production of such exhibits. Each case must rest on its own facts, but in this case, and under its peculiar facts, we are of opinion the complainant should not be deprived of his property, viz. the patent, in the absence of this vital evidence. It is true the entry in the Schmidt invoice of February 21st shows a purchase of two A mantels from Heckert & McCain; but Mr. Morrow, the manager, on whose testimony these transactions rest, does not seem to regard this as conclusive, and says the lettering may be incorrect. In view of the fact that he has used in this particular entry both letters and figures, "2A, 1-2, 1-3," to designate the mantels, (a difference in designation for which there must have been some reason;) of the fact, as he says, that he "used the numbers until his [Anderson's] mantels came to be known to us by letters;" that Shuette, with whom Heckert & McCain also dealt, used the letters "A," "B," and "C," etc., to designate his mantels,—it is not impossible to reconcile the seeming conflict of testimony by the fact that the numbered mantels in this entry were Anderson's and the lettered were Shuette's. The uncertainty and grave doubt in which the identity of the alleged A mantel in the Schmidt house is left by the proofs is sufficient to warrant us in saying that prior sale, use, etc., have not been made out, and renders it needless to discuss such further evidence as we may say satisfies us that the A design had not been perfected by Anderson when these shipments were made by him on February 9th and 11th. Let a decree be prepared.

ANDERSON v. MONROE et al., (nine cases.)

(Circuit Court, W. D. Pennsylvania. April 5, 1893.)

No. 39.

1. PATENTS FOR INVENTIONS—ABANDONMENT—PRIOR SALE.

In a suit for infringement of a patent, to sustain the defense that the device was exposed for sale more than two years before the patent was applied for, defendant offered evidence that an exhibit embodying that device was sold by him for the patentee at such a time, but the testimony as to the identity of the exhibit was conjectural, merely. On the other hand, there was direct evidence that this exhibit, after being offered to a purchaser who did not find it satisfactory, was stored at such witness' place of business, and was not sold until less than two years before application was made for the patent. *Held*, that the evidence was not sufficient to sustain the defense.

2. SAME—INFRINGEMENT OF DESIGN—MANTELS.

Design patent No. 19,873, issued June 3, 1890, to William Anderson, was for a mantel in which the essential features were—First, a transverse groove giving the plain face of the plaster the appearance of a fin-

ished and distinct base; second, the raised and rosetted caps at the top, which give the distinctive appearance of a capital to the pilaster; third, a reeded frieze, which served, in appearance, to bind the pilasters. *Held*, that this is infringed by mantels made in accordance with design patent No. 21,153, issued November 10, 1891, to Edward T. Germain, inasmuch as the latter embodies the same distinctive features, and, while changing nonessential details, retains the general appearance of the Anderson mantel.

3. SAME—INJUNCTION—FAILURE TO MARK DEVICE.

Where the infringement is shown, the failure of the patentee to mark the devices "Patented," with the date of the patent, will not affect his right to an injunction, whatever may be its bearing on the question of damages.

In Equity. Suit by William Anderson against W. T. Monroe and Edward T. Germain for infringement of complainant's patent. Decree for complainant as to defendant Monroe, and bill dismissed as to Germain.

W. L. Pierce, for complainant.

W. Bakewell & Sons, for respondent.

BUFFINGTON, District Judge. This present is one of a series of nine cases brought by William Anderson against sundry defendants for infringements of his several design mantel patents. The testimony was taken for all cases at once, and they were argued together. The present bill is against W. T. Monroe and Edward T. Germain, alleging infringement of design patent for mantels, No. 19,873, applied for by Anderson the 20th February, 1890, and granted June 3d following. The design in controversy is known as the "Anderson BB Mantel." On application the bill was heretofore dismissed as to Germain, it being shown that as to him the court had no jurisdiction. In his answer, Monroe, the respondent, admits that in August, 1890, he sold mantels of the design shown in the letters patent sued on, but that he did not know of the grant of the patent; denied subsequent infringement; averred that complainant, having before the grant of the patent sold mantels of the design afterwards patented, continued to sell them thereafter without marking them "Patented," together with the date. He denied the novelty and patentability of the design. In a supplemental answer he set up public sale, use, and exposure to sale, of the designed device, more than two years prior to the application. The novelty and patentability of this design were sustained by this court in *Anderson v. Saint*, (No. 22, November term, 1890,) 46 Fed. Rep. 760. No proofs now shown lead us to a different conclusion. Upon the question of prior use and sale a large amount of testimony has been taken, and the intricate and confused questions of fact therein involved have required, at the hands of the court, a most laborious examination.

Where prior use is set up to defeat a patent the burden of proof is upon the party setting it up, and "not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that every reasonable doubt should be resolved against him." *Cantrell v. Wallick*, 117 U. S. 695, 6 Sup. Ct. Rep.

970. The proofs in the present case do not come up to this standard. Taken in their strongest light, and supported by the most careful analysis and earnest argument of counsel, as they are, we are constrained to say they lack that conclusiveness which should avail to avoid the patent.

To their consideration we now turn. To support the branch of the case at present considered, the respondent called Julian Morrow, manager for Heckert & McCain, lumber dealers of Pittsburgh. He said, in February, 1888, and thereafter, Anderson, the complainant, called on his firm to sell mill work, and, needing mantels, the firm proposed buying. Witness went to complainant's mill, at Verona or Hulton, a few miles above Pittsburgh, prior to the date of the two freight bills which he produced, dated February 9 and 11, 1888, and was there shown three or four mantels, and made purchases after that. He further says that respondent's Exhibits Anderson B Mantel and Anderson C Mantel show "the general appearance of the mantels" he saw; that the freight bills calling for nine mantels are the ones purchased, and he produces an account of Anderson against Heckert & McCain, where, under date of February 2d, they are charged with nine mantels. He produces the books of his firm, showing that on February 21st four mantels, which he testifies were part of the foregoing, were sold to George Schmidt, and delivered to his house; that he saw them there, and identifies them as Exhibits Anderson B Mantel, supra, and respondent's Exhibit Anderson Mantel No. 1, both painted red. The Exhibit B, being of the same general appearance as design mantel BB, in controversy, would seem to show conclusively a sale more than two years prior to the application, February 20, 1888. His attention was called to the fact that on the back of Exhibit B the name of "W. P. Price" was written in pencil. He said that the first four mantels, (shown in the account,) under date of February 2, 1888, "were shipped to a man named Price, and we bought them from Mr. Anderson, as Mr. Price's name shows;" that during one of Anderson's visits he told him they were at the depot, where witness sent and got them; that he was able to particularly trace them by the lead-pencil mark. We may state, in passing, that the freight bills for the mantels, dated February 9th and 11th, to which witness had already testified, and made from the manifest, showed them shipped to Heckert & McCain, and not to Price. Brown, the driver of the firm, showed that he had taken the four mantels to Schmidt's house, and it was also shown that the two red mantels (Exhibits B and No. 1) had been detached from the walls of the house, and produced in evidence. These facts seemed to prove, beyond question, that they were two of the four thus bought from Anderson.

The necessity for the application of the rule laid down in the proof of prior use is apparent in the rebuttal testimony. W. P. Price, whose name appears on Exhibit B, was a traveling salesman, and in the spring of 1888 began to sell Anderson mantels, on commission, in connection with grate fronts and other articles he had previously sold. He testified, from a memorandum made in his or-

der book, that, some time subsequent to February 15th, Exhibit B was shipped to him by Anderson, to have it and three other mantels photographed, and afterwards to let the Knoxville Land Company see them, with a view of ordering some for houses to be built; that the mantels were shipped to him a week or so subsequent to said date, taken to the photographer's, and a picture taken, which picture of Exhibit B is produced. They were then taken to the land company,—just when, it is not definitely shown,—were not satisfactory, and were afterwards returned to Woodwell's hardware store by Anderson's direction. This testimony is corroborated fully by Anderson, who further says he saw the mantels at Woodwell's, disfigured and covered with coal dust; that he went to Heckert & McCain's, and asked the privilege of storing them in their shed, as they were not fit for sale; this was accorded him, and the mantels sent for by Heckert & McCain; that, a month afterwards, Morrow told him he had sold the mantels, and he was paid for them in a settlement made later. This statement is corroborated by letter of Heckert & McCain to Anderson of March 9th, which, after ordering some mantels, and urging haste, says: "We do not want to send the mantels you sent us oiled, as they are not clean, and are very much injured by sending them to the photographer's and Woodwell's." As to the other red mantel,—respondent's Exhibit Anderson No. 1,—he testifies that it was not made by him, and in this he is corroborated by the workmen in his mill. This testimony conclusively shows (1) that Exhibit B was not one of the mantels bought by Heckert & McCain from Anderson, and included in the freight bills of either February 9th or 11th; that it was one of the Knoxville mantels, and was not placed in the Schmidt house until March 16th; and that on March 9, 1888, which was less than two years before the application, it was still on storage at Heckert & McCain's as the property of Anderson. Morrow was called in rebuttal of this testimony, and has sought by the help of his letter book to fix definitely the time of his order as February 2d, and his consultation with Anderson over designs as between January 13 and February 2, 1888. But this does not avail to disprove the clear testimony in regard to Exhibit B. Whatever mantels he did order, and whenever it was done, it still remains certain that Exhibit B was not one of them. It appears by the account of Heckert & McCain with Schmidt that on March 16th Schmidt was charged with two mantels for two returned. To say that the mantel which Exhibit B thus replaced in the Schmidt house on March 16th was a BB mantel is purely conjectural, and its refutation is the pertinent inquiry why, if a BB mantel was already there, was it replaced by one of a similar design? And, indeed, respondent's counsel argue that it replaced an A mantel. We are of opinion the testimony fails to show a sale by Anderson of the BB design more than two years prior to the date of his application, February 20, 1888, nor does the testimony show an exposure to sale in the Knoxville mantels prior to February 20th. The testimony as to time is, at best, but conjectural, and not definitely proven.

pilaster, a; (2) rosettes, C, formed on the cap pieces, b; (*3) beveled lower edges of the cap pieces, b; (*4) a series of reeds, e, on the pilasters, A; (5) beveled outer edges of the pilasters; (6) the deep V-shaped groove, f, across the pilasters; (*7) a series of reeds, h, on the frieze, g; (*8) the lower beveled edge of the frieze, g; (9) a quarter round molding, i, beneath the frieze, g; (10) a backing strip, k, having a lower moulded edge; (11) a moulding, l, across the strip, k, and caps, b; (12) molding on the upper edge of the mantel board. That the four marked with an asterisk are not found in the Germain design, and that there are five striking points of difference, viz: (1) In the appearance of the rosette on the cap blocks, they being intagliated in the Germain; (2) in the Germain design there is a raised reeded panel, J, across the frieze, which does not appear in the Anderson design; (3) in the Germain design there is a molding, i, running across the base of the cap piece, which is not found in the Anderson design; (4) in the Germain the pilasters have a U-shaped transverse groove, instead of a deep V-shaped one; (5) in the Germain the edge of the mantel is moulded with grooves, while in the Anderson it is moulded with a hollow bevel. It is true in the Germain mantel, Exhibit B, the rosettes are more distinctly intagliated than those on complainant's exhibit BB, but it will be noted that the specification is not restricted to any special form of rosette. The drawing in the Anderson design is not shaded, and in appearance, as well as in the language of the specification, would include the more restricted style shown by Germain. And, indeed, in the respondent's Exhibit Anderson Mantel B, (which is urged as constituting a prior sale of BB,) we find a rosette of the same contour as that used in the Germain.

The Anderson frieze has "a series of reeds extending in the direction of its length." The Germain has reeds extending in the direction of its length, as well, but they are placed on a narrow raised strip placed thereon. The reeded strip is not a material departure, in appearance, from the reeded frieze of the Anderson design, and is made less so by its beveled edges. These make its raised feature even less marked. In the Anderson design the cap blocks taper to the pilasters by a beveled lower edge; in the Germain, the lower edge is also beveled, and a moulding is added, below, which gives the effect of a grooved and deepened bevel. In the Anderson the deep V-shaped groove running transversely across the foot of the pilaster is practically duplicated by a U-shaped groove in the Germain; a difference which close inspection alone reveals. The Anderson mantel board "is molded about its upper front edges," while in the Germain the entire front surface of the shelf is molded by rounded edges and reeds; a slight and unimportant change. The reeds on the Anderson pilasters are omitted in the Germain, but this omission, so long as the beveled edges and transverse grooves are retained, is a trivial one. To the eye the striking lines of the Anderson design are—First, the transverse groove, which gives to the plain face of the pilaster the appearance of a finished and distinct base; secondly, the raised and rosetted caps at the top, which give the distinctive appearance of a capital to the pilaster; thirdly, the reeded frieze,

which serves, in appearance, to bind the pilasters. On these distinctive lines the design is based, and on them the minor details are worked out. The same distinctive lines mark the Germain design. In thus analyzing the two, one cannot but feel that the Anderson had thoroughly impressed the design of the Germain, and that the latter was the outgrowth of a purpose to so change the nonessential details as to seem to have evolved something new, while retaining the general appearance which had proved essential to the popularity of the old. Nor, in this connection, can we lose sight of the fact that Anderson had spent several thousand dollars in experimenting and perfecting his designs before they were finally adopted, that they at once became popular, and that Germain himself copied them before the present patent was issued. And it is a pertinent fact in the present inquiry that the application for the Germain design was made a short time after the litigation of Anderson in sustaining this patent had ended in his favor. The departure from the Anderson design has been so slight in the Germain that an ordinary purchaser, who had seen the Anderson in a house, been pleased with it, and wanted it duplicated in his own, would be misled by the statement that the Germain was the Anderson mantel. It is to be noted, also, that imposition would be the easier from the fact that the two articles, in the nature of things, would rarely be placed together for comparison, as braid, spoons, and small articles might, but the mental image of the Anderson mantel, fastened to the wall of a house, would alone be carried by the purchaser to the warehouse of an attempting infringer. Tested by the law of infringement, as laid down in *Gorham Co. v. White*, 14 Wall. 511, and cases following its lead, we are constrained to hold the respondent has infringed the patent in suit by the sale of the Germain B mantel.

It is alleged that Anderson having simply stamped his mantels, "Our Designs Patented," and omitted the date, until October or December, 1890, respondent cannot in any way be held liable for a sale made in August, 1890, before he knew of the issue of the patent. What the effect of this might be, were it the sole issue, and the only infringement, we are not called upon to discuss, for the respondent tendered a number of other issues, denied novelty and patentability, which have not been sustained. And it has been held (*Goodyear v. Allyn*, 6 Blatchf. 33, and *Association v. Tilden*, 14 Fed. Rep. 741; 2 Rob. Pat. § 628, note 4) that this omission does not affect the right to an injunction, however it may affect the question of damages. We are of opinion the complainant's bill must be sustained. Let a decree be prepared.

ANDERSON v. MONROE et al.

(Circuit Court, W. D. Pennsylvania. April 5, 1893.)

No. 40.

PATENTS FOR INVENTIONS—ABANDONMENT—MANTELS.

In a suit for the infringement of design patent No. 19,876, issued June 3, 1890, to W. Anderson, for a design for mantels, the defense was that the patented device had been sold publicly, and used, more than two years before the patent was applied for. It was shown that a witness had received a consignment of mantels from the patentee more than two years before the application, and another consignment within the two years. Defendant's own evidence was conflicting, as to whether the exhibit produced, and embodying the patented device, was received in the first consignment, or the second. Plaintiff introduced express evidence that it was sent in the second consignment, and the exhibit itself was marked with a stencil which it was shown was not in use until after the first consignment was made. *Held*, that the evidence was not sufficient to sustain the defense.

In Equity. Suit by W. Anderson against W. T. Monroe and Edward T. Germain for the infringement of a patent. Bill dismissed as to Germain, and decree for complainant against Monroe.

W. L. Pierce, for complainant.

W. Bakewell & Sons, for respondent.

BUFFINGTON, District Judge. This is a bill filed by William Anderson against W. T. Monroe and Edward T. Germain, alleging infringement of design patent for mantels, No. 19,876, applied for by Anderson March 17, 1890, and granted June 3d following. The design is known as the "Anderson FF Mantel." On application the bill was heretofore dismissed as to Germain for want of jurisdiction. The answer of Monroe, the respondent, admits that in August, 1890, he sold mantels of the design shown in the letters patent sued on, but that he did not then know of the grant thereof; denied subsequent infringement; averred that complainant, having before the grant of the patent sold mantels of the design in controversy, continued to sell them thereafter without marking them "Patented," together with the date of the patent; denied novelty and patentability in the design. In a supplemental answer, public sale, use, and exposure to sale, of the designed device, more than two years previous to the application, were set up. The novelty and patentability of this design were sustained in this court in *Anderson v. Saint*, (No. 20, November term, 1890,) 46 Fed. Rep. 760. We see no reason, under the proofs, to depart from that decision.

As bearing on the question of prior use, we may refer to the opinion in the case between the same parties at No. 39, November term, 1891, involving the BB design mantel. 55 Fed. Rep. 398. The relationship of the parties, the general facts, the measure of proof required, and other matters akin to this case, are there set forth. As therein stated, as here also, we decline to sustain, so far as injunction is concerned, the defense set up by reason of complainant's failing to stamp his mantels.

The question of prior sale, so far as this case is concerned, is based on two orders given to Anderson by Heckert & McCain, by letters,—one dated March 9, 1888, calling, *inter alia*, for "one mantel, at \$4.00; two brackets, instead of one wide bracket;" the other, March 12th, for "one mantel at \$4.00, same as now ordered." The entire orders in two letters are for eight mantels. On March 15, 1888, by an account between Anderson and Heckert & McCain, shown in evidence, the latter are charged with eight mantels, viz. 1 A, \$2; 1 BB, \$2.75; 5 C, \$15; and 1 D mantel, \$3.50. It is contended by the respondent the Anderson F design mantel, in controversy, is an Anderson D design, with brackets added, and, this order being for such brackets, the mantel charged as a D was in fact an F, and was a prior sale. It is to be noted that on March 17th, in the same account, Anderson charges for 3 F mantels at \$4 each, and the shipment is verified by a freight receipt dated March 19th. Morrow, the manager of Heckert & McCain, testifies his order of March 9th was for an Anderson F mantel; that the charge of March 15th in the account comprises the same; and that it is included in the sale made by Heckert & McCain to T. J. Williams, a contractor, on March 17th. He also produces the wagon receipt book of the firm, showing a delivery to Williams of eight mantels, and a charge of seven mantels in the account with Williams on said day, one D mantel being named among them. Williams, the contractor, testifies to placing the mantels received from Heckert & McCain in two houses he was building for Steim; says the houses were finished and occupied April 1st following. His testimony is not very specific. He says the front rooms in the two houses had mantels resembling the F mantel, shown in evidence, while the balance of the house had the C mantels; facts at variance with his account, the account of Anderson with Heckert & McCain, and Morrow's testimony, if the contention of the respondent's counsel be correct. Respondents also produce from the house an Anderson F and a C design mantel. Both are stamped with a stencil shipping mark, and Exhibit F has a stencil brand as an F mantel. This latter fact is significant. If F mantels are distinctively charged as such on March 17th, and at four dollars, why are they in the same account, two days before, charged as D mantels, and at a different price? This doubt of respondent's contention amounts to refutation when the further fact is considered that the mantel in evidence is stencil-stamped as an F mantel. Why should Anderson's employes stamp this mantel as an F design, which it confessedly is, and charge it at a less price, and as a D design, which it confessedly is not? To add to the uncertainty, the testimony of Means, and he is corroborated, is that these stencils were not used at Anderson's establishment until after April 1, 1888, when he went there to work. A careful examination of the testimony does not convince us that the charge of March 15th, and the shipment evidenced by the freight receipt of March 17th, included an Anderson F design mantel. If it was embraced in the charge of March 17th, and the shipment evidenced

by the freight receipt of March 19th, the sale was not made two years before the application. We are of opinion the bill must be sustained. Let a decree be prepared.

ANDERSON v. MONROE et al.

(Circuit Court, W. D. Pennsylvania. April 5, 1893.)

No. 41.

PATENTS FOR INVENTIONS—ABANDONMENT—MANTELS.

In a suit for the infringement of design patent No. 19,877, issued June 3, 1890, to W. Anderson, for a design for mantels, the defense was public sale and use more than two years before the patent was applied for. It was shown that one witness had received articles embodying the patented device from the patentee at such time, and the order, receipt, and accounts of the parties showed that the transaction was a simple sale. Complainant and his traveling salesman testified that the articles were only shipped to the witness as samples, and the sale was not consummated until afterwards, and within the two years. *Held* that, as four years had elapsed since the transaction took place, the written evidence is more satisfactory than the verbal testimony, and the defense is sustained.

In Equity. Suit by W. Anderson against W. T. Monroe and Edward T. Germain for infringement of a patent. Bill dismissed.

W. L. Pierce, for complainant.

W. Bakewell & Sons, for respondent.

BUFFINGTON, District Judge. This bill is filed by William Anderson against W. T. Monroe and Edward T. Germain, alleging infringement of design patent for mantels, No. 19,877, applied for by Anderson, 17th March, 1890, and granted June 3 following. The design in controversy is known as the "Anderson CC Mantel." On application the bill was dismissed as to Germain, it being shown this court had no jurisdiction as to him. Several defenses were set up. The one material one, however, to be here considered, is that of public sale, use, and exposure to sale, of the designed device, more than two years prior to the application. The proofs show that, early in the spring of 1888, Anderson had been perfecting several mantel designs at his planing mill at Hulton, Pa. Price was a traveling salesman, selling grate fronts; and it was arranged between them that Price should take orders for Anderson's mantels, on commission, in connection with his regular business. Price visited the mill, consulted about designs, and, when they were determined upon, began taking orders. On March 17, 1888, he went to Washington, Pa., and took an order from McElroy & Moninger, contractors, for four Anderson mantels. This order he noted in his memorandum book as follows: "Shipped McElroy & Moninger, Washington, 1 A, 1 B, 1 C, and 1 D mantel, at \$2.25, \$2.75, \$3.25, and \$3.75; total, \$12.00." Price testifies these mantels were ordered as samples, on approval, and McElroy & Moninger were under no obligations to keep them. McElroy says they were ordered as samples, "as what we might expect to get in the future from Anderson."

Price says he sent the order to Anderson. He shipped the mantels within a few days,—just when is not shown; but under date of March 15th, more than two years prior to the date of the application, Anderson rendered a bill for them to the purchasers, charging them, inter alia, with one CC mantel, the design patent in this case. Whether he was informed by Price of the alleged conditional nature of the sale does not appear. Price does not testify to that effect. It would seem that some communication must have passed between them, from the fact that Anderson paid the freight, or allowed credit for it in the bill, as far as Pittsburgh; but, in the absence of proof of the terms of such communication, we are justified in regarding it as not containing such information. It is true Anderson testifies, in explanation of the bill, "Price ordered these mantels to be sent there for approval, and directed me to send an invoice along, so as he would know what to do about the price of them;" but in view of the fact that Price had visited the mill, and they had already agreed on the prices, coupled with the fact that Price had specified in his order the prices and styles, we do not think this attempted explanation sufficient to change the character of a positive sale, as evidenced by the papers. The mantels were duly received by the purchasers, and on March 29th, which was within the two years prior to the application, Price called on the purchasers, made a slight reduction in the bill, was paid for the mantels, receipted the bill, and was afterwards allowed by Anderson 10 per cent. commission for the sale. The written evidence, made at the time, clearly shows a sale of the mantels, executed and completed as early as March 15th. After the lapse of four years this evidence is more satisfactory and conclusive than uncertain verbal testimony, which would turn it into a mere display of samples. In Price's order book no mention is made of any such arrangement. The order is positive. The prices and styles are designated. That Anderson accepted it as such is evidenced by his bill. Indeed, in a letter written the day before, March 14th, to Heckert & McCain, another customer, he says:

"Will ship mantels to-morrow. I am hurrying all I can to get a stock of mantels up, but they are called for as fast as I can get them made. I have orders from Allegheny, Glenfield, Hazenwood, Washington, Pa., Johnstown, Wilkinsburgh, East Liberty, and Pittsburgh. Expect to load a car with mantels and moldings to-morrow."

Under all the facts, we are of opinion a sale was intended by the parties, and was consummated as early as March 15th, which was more than two years prior to the application. Such being the case, the mere fact the price was not paid until March 29th makes it none the less what the parties intended,—a sale. Anderson, therefore, was not entitled to apply for a patent more than two years after March 15th. Having done so, his patent was invalid, and the bill must be dismissed at his cost.

GATES IRON WORKS v. FRASER et al.¹

(Circuit Court of Appeals, Seventh Circuit. January 16, 1893.)

No. 31.

PATENTS FOR INVENTIONS—INFRINGEMENT—ORE CRUSHER.

The first claim of reissue patent No. 3,633, granted to J. W. Rutter, September 7, 1868, for an ore mill, covers "the cone, B, on the arbor, D, when sustained and operated in such manner as to swing in a conical orbit around the axis of its surrounding cylinder, without rotating around said arbor, substantially as set forth." *Held*, that the essence of this invention consists in making the cone fixed, so as not to revolve on its own axis or arbor, but to swing in a conical orbit without turning, and so produce a grinding or rubbing action; and this claim is not infringed by a machine having a similar cone which revolves on its own axis.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Suit by David R. Fraser, Thomas Chalmers, and Hiram L. Scoville against the Gates Iron Works to restrain the alleged infringement of a patent. Complainants obtained a decree. Defendant appeals. Reversed.

The patent in suit contained the following claims:

"(1) The cone, B, on the arbor, D, when sustained and operated in such manner as to swing in a conical orbit around the axis of its surrounding cylinder, without rotating around said arbor, substantially as set forth. (2) The gauge ring, C, arranged and operating in combination with the cylinder A, and crusher or grinder, B, substantially as and for the purposes herein set forth. (3) The combination with the gauge ring, C, and cylinder, A, of the stripper or clearer, J, substantially as and for the purposes herein set forth."

Coburn & Thacher, for appellant.

Bond, Adams & Pickard, for appellees.

Before WOODS, Circuit Judge, and JENKINS and BUNN, District Judges.

BUNN, District Judge. This is a suit in equity brought by the appellees against the Gates Iron Works for the infringement of reissue letters patent No. 3,633, to J. W. Rutter, September 7, 1868, for an ore mill. The original patent, No. 88,216, was issued to Rutter on March 23, 1869. There was a finding sustaining the complainants' patent and claim for infringement, and, the case being referred to a master to take testimony as to the damages, a report was made, and a decree entered in favor of the complainants on October 9, 1891, for the sum of \$29,734.04. A great number of exceptions were taken to the decree, and an appeal was prayed and allowed. We have not found it necessary to consider all of the assignments of error in the finding and decree of the court. The second one assigned is as follows:

"(2) The court erred in construing said first claim to be for a cone that rotates around its arbor on its own axis, when the claim expressly states that it does not rotate around said arbor, and the specification states that it does not rotate on its own axis."

¹ Rehearing pending.

We think this assignment of error is fully sustained by the record and proofs, and that the decree of the court below must be reversed.

The complainants' patent is for an ore mill, the purpose of the machine being to crush and grind ore or stone. The patentee states in his specifications that he has invented a new and improved crushing and grinding machine, and that the invention relates to that class of crushing and grinding machines in which a conical grinder or crusher, with concentric and eccentric bearings, is operated within a stationary upright cylinder or chamber, or in which the crushing chamber is made conical, and the crusher straight. This class of machines is aptly described in the brief for appellant as follows:

"This type of machine for crushing ore is known as the 'gyrating type,' from the fact that one end of the vertical shaft rests on the bearing, concentric with a line drawn through the center of a surrounding case, which incloses a vertical cone that is carried on the shaft of the machine, while the other end of the shaft or arbor is placed in a bearing eccentric to this line. The eccentric end of this vertical shaft or arbor, which carries the vertical crushing cone, is placed in a revolving wheel, so that when that wheel is revolved one end of the crushing cone is carried around in a circle within the inclosing case, approaching the inclosing case as it is carried around the circle, the opposite side of the crushing cone receding from the inclosing case; thus crushing the stone between the crushing cone and the case, and allowing the crushed stone to fall out at the bottom of the machine. In this type of gyrating machines, the crushing cone or the shaft or arbor was left free to rotate on its own axis, as a wagon wheel rotates on its axle, or the axle revolves with a wheel, like car axles, on its bearings, so that, when the crushing cone was carried around with the outside case or cylinder, it would roll against the stone, and impinge it between the crushing cone and the case, cracking it and breaking it into fine pieces, just the same as a wagon wheel rolls upon the gravel or stone in the street when the wheel is left free to revolve on its own axis in addition to its being moved around. If the arbor of the crushing cone be made rigid in its bearings, and the cone be rigidly attached to the shaft or arbor, then the crushing cone, when gyrating or carried around the circle within the case or cylinder of the machine, would crush and grind the stone by rubbing rigidly against it as it was squeezed between the surface of the cone and the inclosing case, the same as a wagon wheel would operate if chained so as not to revolve on its own axis."

The evidence shows that the defendant is engaged in the manufacture of a crushing machine as above described, in which the crushing cone is left free to rotate on its own axis. These machines they manufacture under previous patents which they own, and particularly under a patent known as the "Pearce Patent," and another known as the "Wood Patent." The Pearce patent is very similar in its action to the Rutter patent, if the latter is what it is claimed to be by the complainants, except that it did not have its crushing cone suspended by a ball and socket at the top. The Wood patent had a gyrating cone which rotated on its arbor, while the Pearce patent had a gyrating crushing cone rigid on the shaft or arbor, but rotating on its own axis, and producing the same effect. Neither of them rubbed or ground, but both crushed. Now, the question turns upon the proper construction of the Rutter patent, under which the complainants claim. Does that describe such a machine as the defendant is manufacturing, or

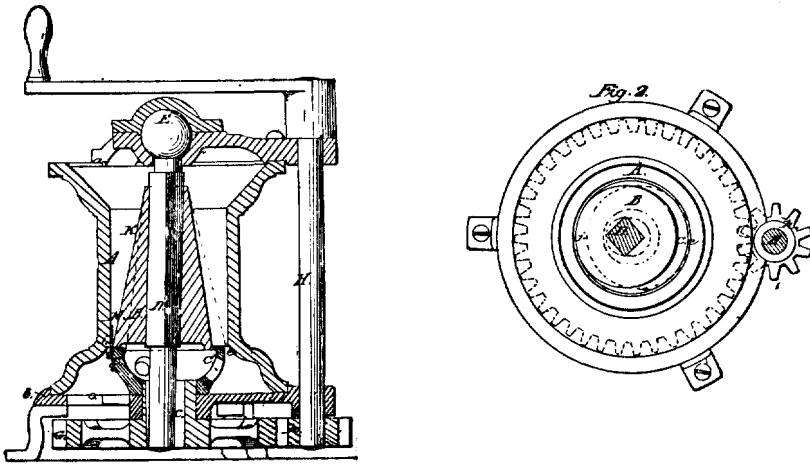
was it the other kind, where the crushing cone simply swings around in the cylinder without rotating on its axis? In the judgment of this court, the court below erred in giving the patent in suit the first-named construction, instead of the latter. The appellees, or complainants below, never made or claimed any such invention as is given them by the judgment of the court. All Rutter claimed in his original patent was: (1) The gauge ring, C, arranged and operating in combination with the cylinder, A, and crusher or grinder, B; (2) the combination with the gauge ring and cylinder of the stripper. There is no suggestion in that patent of any claim to the invention he now relies upon. In that patent he says the crusher, B, as represented in the drawing, does not rotate upon its axis, but in some cases may be made to do so, and he claims no invention or improvement of this character. In the reissue he claims all he had claimed in his first patent, and in addition thereto another claim, named in the patent as "No. 1," to wit, the cone, B, on the arbor, D, when sustained and operated in such a manner as to swing in a conical orbit around the axis of its surrounding cylinder, without rotating around said arbor. And in several places in his patent he makes it very plain that his additional claim to invention consists in making his cone fixed in such a manner as not to revolve on its axis or arbor, but to swing in a conical orbit, and so produce a grinding or rubbing action. He says his invention consists in a universal or ball and socket support above the cylinder, from which the cone is suspended on an oscillating arbor, rigidly connected with a rotating eccentric box carrying its lower extremity, and which is fitted in the hub of a horizontal gear wheel, so as to rotate in an annular conical orbit, within said gear wheel, but having no rotation on its own axis, whereby a grinding or rubbing action, as well as a crushing effect, is produced, instead of a crushing action only, as in similar machines wherein the cone rotates around its own axis. Again, he says B is a crusher and grinder of conical or tapering form, and secured to an oscillating arbor suspended, etc., and is made to swing in a conical orbit around the axis of the cylinder. It would seem as though the patent were not open to any doubt in its meaning, because the patentee has made himself clear in so many places that his invention in the reissue consists in making his cone fixed, so that it will swing in the cylinder, but not revolve on its axis, as he admits former machines of the kind did.

But the court has given him an invention which he did not claim, and just the reverse of what he did claim. The court has given him credit for inventing a crusher with a cone revolving in a cylinder on its own axis or arbor. If this was his invention, it was not new, as appears from the other patents named. Nor did his invention consist in attaching his power at the lower end of the shaft, as the court suggests. He makes no such claim, and, if he did, there could be no invention in attaching the power at one end or the other. All he says about the power is that the motion is imparted to the shaft by any suitable application of power. If the prior state of the art showed that the power was applied only at the upper end

of the shaft, the change would be a merely mechanical one, not involving invention. But the evidence shows, clearly, not only that Rutter made no such claim, but that in the prior machines of the kind it was as much the habit to apply the power to the bottom as to the top of the shaft. For instance, in the R. Vose patent for an ore mill, issued December 4, 1885, the power was applied at the lower end of the shaft, in the same manner as in the Rutter patent. It is difficult to perceive upon what ground the judgment of the court can be maintained. When counsel is asked to point out the parts in the Rutter patent invented by him which the defendant infringes, he is forced to resort to the claim that Rutter was the first to produce a good, practical machine for crushing, and that his patent is fundamental. But Rutter himself makes no such claim, either in his original patent or in the reissue. He is no pioneer in the art, and his claim is very limited. It is not pretended that the defendant, in his machine, uses either of the two little improvements, if they can be called such, set out as the invention under the first patent. The defendant has never used either the gauge ring of the Rutter first claim, or the stripper or clearer of his second claim, and these are all there was of the original patent. If the additional claim made in the reissue is what we suppose it to be, and what Rutter over and over describes it to be, then the defendant has not infringed, as it is not claimed that he has ever used the cone, B, on the arbor, D, as described in the patent, sustained in such a manner as to swing in a conical orbit around the axis of its surrounding cylinder, without rotating around the arbor. On the contrary, the defendant is making machines with a similar cone, which revolves on its axis, producing altogether a crushing, rather than a grinding or rubbing, effect, as well as a crushing, which it was the aim of the Rutter machine to accomplish, by making the cone rigid, so that it would swing around in the conical orbit, but not revolve on its axis. If there is any meaning to language, this is what Rutter's additional claim in the reissue patent means. There is no transposition of pauses, or correction in the punctuation, that can read anything different into the claim, and the effort that was made in that direction seems to us unwarrantable. It is manifestly inadmissible to make any change in the punctuation, or in the position of words, as the court below did, whereby the cone in the Rutter patent shall be made to rotate upon its axis. The door to any such construction is closed in too many ways and places; and, even if it could be allowed, the patent, in this respect, would show no invention over the prior art. Rutter himself, in his claim for a patent, admits this, by distinctly recognizing the existence of machines with this same crushing cone rotating in a cylinder around its own axis, producing a crushing action only.

Granting that, as the court below concluded, the description should be read, "the crushing cone is rigidly suspended on an oscillating arbor connecting with a rotating eccentric box," etc., the result would be that the cone and arbor would become practically one piece, having one and the same axis; and if the cone could not revolve around its axis, as it is explicitly said it cannot, neither can

the arbor upon which the cone is carried. And it follows that if the lower end of the arbor, as suggested by counsel, is fastened rigidly to the eccentric box, then that box, the arbor, and the cone become one piece, and the box must be fastened in the wheel hub, else the box, arbor, and cone will all revolve together around a common axis, and that, as we have seen, is not allowable in respect to the cone. This conclusion is fortified by the diagrams, especially Fig. 2, which shows a horizontal section through the base of the machine, and which, by what it shows, could not be "near the base of the cone," as shown in Fig. 1. But more conclusive still is the statement in the patent that "in this arrangement the crusher, B, does not rotate on its axis," and, again, in the claim "that the cone is operated without rotating around said arbor." Not rotating either around its axis or arbor, no other rotation is possible.



Rutter's scheme, whether it was an improvement or not, was to make the cone fixed at one end in an eccentric, and fastened in such a manner to the gearing that it would not rotate. The previous patents show clearly that what is now claimed for the Rutter reissue was already invented and in use. There was nothing new in having a conical shaped crushing iron cone revolving in a cylinder with concentric and eccentric connections, so as by its action to crush stone or ore, or whatever was put into it. Rutter saw this, and admits it, and his purpose seems to be to avoid the objection of a want of novelty by limiting himself to a rigid connection of his crushing cone axis to his drive wheel, so as to secure the two operations of grinding and crushing. It is evident that in his machine it was intended to cause the arbor and driving gear to move together, so as to cause the iron cone to swing around in the cylinder, instead of revolving on its axis. In both the original patent and in the reissue, Rutter described, as already in existence, just such a crusher or grinder as his assigns are now claiming that he

himself patented, whereas Rutter was only claiming certain improvements, which improvements are not being used by the defendants. The decree of the circuit court is reversed, with costs.

UNITED STATES v. GRANT.

(Circuit Court, D. Oregon. March 1, 1893.)

No. 1,984.

1. SEAMEN—DESERTERS—PENALTY FOR HARBORING—EVIDENCE.

Upon an information for harboring deserting seamen it appeared that defendant was apprised of the shipping contract of the seamen, and of their coming by steamer to defendant's town for the purpose of embarking with their employer; that defendant induced them to come ashore and disregard their contract, guaranteed delivery of their baggage, kept them for some time at his boarding house, and, when some of them were arrested as deserters, gratuitously furnished them with legal assistance. Defendant was engaged in the business of furnishing vessels with sailors, and had had trouble in that respect with the master of the vessel employing the deserters. *Held*, that the evidence was sufficient to show a harboring, within the meaning of Rev. St. § 4601.

2. SAME.

The penalty of the statute being denounced against "harboring and secreting" seamen, defendant was none the less guilty because there was no concealment of his acts.

3. SAME—PAROL EVIDENCE OF EMPLOYMENT—SHIPPING ARTICLES.

The fact that the shipping articles, having been carried to sea, were not produced to show the employment of the seamen in question, was immaterial, in view of the testimony of the seamen that they were so employed, and of the admission of the defendant that he knew they had signed the articles.

4. SAME—PROCEDURE—INFORMATION—WAIVER.

Under Rev. St. § 4610, an information as well as an action at law will probably lie for the recovery of the penalty for harboring deserting seamen; but, even if information is not the proper procedure, an objection on that ground comes too late when first raised at the final hearing.

At Law. Information against Peter Grant for harboring and secreting deserting seamen. Judgment for the prescribed penalty.

F. P. Mays, for the United States.

Jas. F. Watson, for defendant.

GILBERT, Circuit Judge. An information was filed against the defendant charging him with harboring seamen, in contravention of section 4601, Rev. St. That section provides as follows:

"Sec. 4601. Whenever any person harbors or secretes any seaman belonging to any vessel, knowing him to belong thereto, he shall be liable to pay ten dollars for every day during which he continues so to harbor or secrete such seaman; recoverable, one half to the person prosecuting the same, the other half to the United States."

The evidence shows that five seamen signed shipping articles at San Francisco to go on board the Invergarry, a British vessel, on her outward voyage from the port of Astoria. They were transported by the steamship Queen from San Francisco to Astoria. The defendant was the keeper of a sailor boarding house in Astoria,

and was in the business of furnishing seamen to vessels at the port of Astoria. He had had some trouble with the master of the *Invergarry* about the terms on which men were to be furnished for that vessel, and he was apprised of the fact that five seamen were coming by the steamer *Queen* to join the *Invergarry*. On the arrival of the *Queen* at Astoria, and before she was brought alongside the dock, the defendant, and certain others acting in concert with him, entered into a conversation with the seamen for the purpose of inducing them to come ashore, and to disregard their agreement to go on board the *Invergarry*. The defendant personally guaranteed them that he would see that they got their baggage. The men went ashore, and they all accompanied the defendant to a saloon. From there one of the men went into the country back of Astoria, where he remained about two weeks, and then returned to the defendant's boarding house, where he remained until January 4, 1893. Two of the others went from the saloon to the defendant's boarding house, and remained there until January 4, 1893. Shortly after their arrival at Astoria these two were arrested as deserters from the *Invergarry*. The defendant thereupon proffered them legal counsel, and informed them that they need not go aboard the *Invergarry* unless they chose to do so.

The question arises whether by these acts the defendant has harbored or secreted deserting seamen, within the meaning of the statute above quoted. It is contended that, since all of the acts of the defendant were without concealment, he has not incurred the penalty of the statute. Various shades of meaning may be found for the word to "harbor," and, while it may be aptly used to describe the furnishing of shelter, lodging, or food clandestinely or with concealment, it may also, under certain circumstances, be equally applicable to those acts divested of any accompanying secrecy. In the statute under consideration the inhibition is against both harboring and secreting. The intention evidently was to declare unlawful other acts than the mere concealment of deserting seamen. In view of the language used and the evils intended to be corrected by the statute, the reasonable interpretation of its terms would be to hold that the penalty therein provided is denounced, not only against all persons who conceal and secrete deserting seamen, but against all persons who knowingly furnish them food, shelter, or other aid with the intent thereby to encourage them to continue in their violation of law, and to defeat the rights of the master and owners of the vessel. This interpretation is in harmony with the judicial construction applied to these words where they have been found in other statutes. *Van Metre v. Mitchell*, 2 Wall. Jr. 311; *Driskill v. Parish*, 3 McLean, 631; *Eels v. People*, 4 Scam. 498.

There can be no doubt that the acts of the defendant tended to and did encourage and support the seamen in their desertion of the ship. The mere fact that he entertained them as inmates of his boarding house would not of itself constitute a violation of the statute. His other acts, however, disclose his purpose to aid and harbor them in their desertion. He met them at the dock. He

counseled them to disregard the obligation of their shipping articles. He led them away in his company, and finally he furnished the most convincing proof of his purpose by gratuitously engaging legal counsel in their behalf to frustrate the efforts of the master to reclaim them.

It is objected that section 4610 of the Revised Statutes, prescribing the method of the recovery of penalties and forfeitures incurred under section 4601, does not authorize the prosecution of the defendant by information. The method of procedure is not clearly defined in that section. Certain expressions therein used would seem to indicate that the procedure contemplated is an action at law, in the name either of the district attorney or the United States as plaintiff. There are other provisions therein contained which support the view that the proper procedure is by information or indictment. Of the latter class are the clauses declaring that, upon a "conviction," the court shall impose a penalty, and that, upon failure to pay the penalty, the offender shall be committed to prison. I am inclined to believe that, under the language of the statute, either method of procedure would be allowable; and that, even if the procedure adopted in this case is not in all respects such as is contemplated by the statute, an objection upon that ground comes too late if first presented upon the final hearing.

The objection is also made that there was no legal proof that the seamen who were harbored by the defendant belonged to the Invergarry. The shipping articles properly signed by the seamen would undoubtedly be competent evidence of that fact; but, the articles having been carried to sea, the seamen were allowed to testify that they belonged to the Invergarry; that they had signed the shipping articles at San Francisco, and had been brought by steamer to Astoria to go on board that vessel. This evidence, being uncontradicted, was sufficient in itself; but it was supplemented by the admission of the defendant, who testified upon the trial that he knew that those five men belonged to the Invergarry, and had signed to go on her. The defendant harbored two of the men 26 days, and one 12 days. It is the judgment of the court that he pay a penalty of \$640.

THE VENEZUELA.

INSURANCE CO. OF NORTH AMERICA et al. v. THE VENEZUELA et al.

MERRITT et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

1. SALVAGE—RIGHTS BETWEEN SALVORS—ADMISSION OF LIBELER.

Separate libels for salvage were filed by the M. Co. and the I. Co., which were tried together, and, the amount which the vessel was to pay having been fixed by agreement, a controversy arose between the plaintiffs as to how the salvage should be divided, the M. Co. claiming that the I. Co. acted in subordination to it, and under its direction. *Held* that, in view of such agreement, neither company could derive any benefit from

the nondenial by the libeled vessel of allegations by the libelants showing rights of each against the other.

2. SAME—EVIDENCE.

The evidence having plainly shown that the M. Co. was originally employed by the owner's agents to effect a rescue, and that the I. Co. and another came in as subordinates, and that the rescue was principally due to the efforts and skill of the M. Co., the court will not reverse a decree in its favor on account of a numerical predomination of witnesses in behalf of the I. Co., testifying chiefly to an allegation which all the surrounding circumstances showed unworthy of belief.

3. SAME—APPORTIONMENT—EVIDENCE.

The M. Co. furnished 76 men and six vessels and materials of the value of \$65,000 for 13 days, expended \$3,333, and applied three times the hauling force of the I. Co. The I. Co. furnished a vessel worth \$25,000, occupied 4 days, and expended about \$100; and its assistant, the T., acted as a lighter for transferring the cargo to New York, about 100 miles. *Held*, that the sum of \$33,500 to the M. Co., \$5,000 to the I. Co., and \$1,500 to the T., was a proper apportionment of the salvage. 50 Fed. Rep. 607, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libels by the Insurance Company of North America and the Atlantic & Gulf Wrecking Company against the Steamship Venezuela, her cargo, etc., (Boulton, Bliss & Dallett, claimants,) and by Israel J. Merritt and others against the same defendants. From a decree in favor of libelants Merritt and others, (see 50 Fed. Rep. 607,) defendants and libelants the Insurance Company of North America and the Atlantic & Gulf Wrecking Company appeal. Affirmed.

For the opinion of this court on the question of receiving new evidence, see 52 Fed. Rep. 873.

George A. Black, for Insurance Co. of North America.

Robert D. Benedict, for Merritt and others.

Coudert Bros., for the Venezuela.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. On February 5, 1892, the steamship Venezuela stranded upon Brigantine shoals, on the coast of New Jersey. The steamer North America, owned by the Insurance Company of North America, the steam lighter Tamesi, owned by the Atlantic & Gulf Wrecking Company, the schooner Rapidan and tug Buckley, owned by Israel J. Merritt and others, went to her rescue. Other vessels were summoned by the Merritt Company. Her cargo of coffee was put on board the Tamesi and the Rapidan during February 6th, and was taken to New York. About 10 o'clock on the morning of February 7th the Venezuela was pulled from the shoal, and proceeded to New York. On March 11, 1892, the Insurance Company of North America and the Atlantic & Gulf Wrecking Company filed their libel for salvage against the steamship and her cargo. The fifth article alleged, in substance, that the successful pulling service was performed by the North America, and that, prior to the discharge of the cargo, an anchor had been laid by the Buckley nearly six points on the

starboard bow of the Venezuela, and efforts made, by hauling on that anchor, to help the vessel off, which had no effect, the anchor coming home. The answer of the claimants admitted the allegations of the fifth article, with sundry exceptions, not necessary to be specified here, and except the allegations that efforts had been made to haul the steamer off with the anchor, and that the North America pulled the steamer from the shoals, but admitted that she assisted in pulling said vessel off the shoals. It did not deny that an anchor had been laid nearly six points on the starboard bow of the steamer.

On April 7, 1892, the Merritts, under the name of Merritt's Wrecking Organization, filed a libel for salvage against the steamer-ship. The seventh article alleged that the service of getting off the steamer and cargo was performed by the libelants; was under the sole charge and direction of their superintendent; that the Tamesi and North America were employed by him alone, the compensation to be subsequently determined by agreement of their owners and Israel J. Merritt, and that the service rendered by the North America was of some assistance in getting the vessel off, although the main work was done by the libelants' men on board the Venezuela, with their winches, cable, and anchor. The answer of the claimants made no reference to the seventh article, but admitted that libelants rendered some assistance in rescuing the steamer. On April 11, 1892, the district court ordered that the two libels should be tried together. On May 4, 1892, the trial commenced pro forma. On the next day, the value of vessel, cargo, and freight was agreed to be \$903,057.82, and a substantial agreement upon the total amount of salvage, viz. \$40,000, was reached. The taking of testimony was continued upon the assumption that the offer would be accepted. It was subsequently accepted by all the parties, and it was accordingly found by the district court that the amount to be awarded for the entire salvage service of all engaged therein was in open court agreed upon and fixed at \$40,000. The claimants, after this agreement, did not take part in the trial, which became a contest between the salvors whether the stipulated sum of \$40,000 should be apportioned, and, if apportioned, as to its proper distribution. Three questions were before the district court: (1) Whether the insurance company and the wrecking company, on the one hand, and the Merritt Company, on the other, were independent salvors, or whether the latter company was the principal and the other two were, by mutual agreement, merely subordinate and under its control. (2) If the last-named theory was true, whether the whole sum should not be paid to the Merritt Company, as the result of the agreement between the parties, which was stated in its libel. (3) The proper division of the \$40,000, in case the whole sum was not to be paid to the Merritt Company.

The district court found that the insurance company and the Gulf Wrecking Company acted together; that the entire charge of the undertaking to get the ship afloat was given, both by the

agent of the owners of the Venezuela and its captain, to the Merritt Company, and that the services of the Tamesi and the North America were accepted by Capt. Chittenden, the representative of the Merritt Company, who was in charge of the work, in no other way than as assisting him, and as subordinate to him and in his employment. Upon the pleadings of the two separate libels the court was of opinion that it could not dismiss the libel of the owners of the Tamesi and North America on account of the proved agreement in regard to compensation, but must fix the amount which, upon the proofs, should be properly allowed to them out of the whole sum agreed upon. It further found that "the suggestion that the anchor and cable were laid broadly off the line of movement is not entitled to credit; nor that the anchor finally came home, and gave the great cable no efficient hold. The main reliance was upon the steady and continuous tension of the immense fifteen-inch cable of the Merritt Company." The court decreed \$33,500 for the Merritt Company and \$6,500 for the other libelants, who thereupon took an appeal, as did also the claimants in the Merritt Company libel, for their own protection in case the amount found in favor of the other libelants should be increased. Inasmuch as the Merritt Company has not appealed, the first and third questions are only to be considered. The opposing salvors took new proofs. The new testimony of the North America and the Tamesi was principally directed to the point of the improper location of the anchor and large cable of the Merritt Company, and the resulting inability of the cable to be of help to the Venezuela. They introduced 6 witnesses who were before the district court, and 21 new witnesses, 14 of whom were the crews of two life-saving stations near the Brigantine shoals. The numerical preponderance of new testimony is largely on the side of the appellants.

Before entering upon the subject of the effect of the testimony in the two cases, the insurance company and the Gulf Wrecking Company insist that, inasmuch as the answer of the Venezuela to their libel admits, by silence, the truth of those allegations of the fifth article which are not denied, the district judge was absolutely bound by the pleadings as to the facts so admitted, and the admissions of the answer of the Venezuela could not be overcome by any proof given by the Merritt Company on the trial of its libel. The Merritt Company could, with equal propriety, have insisted upon the same technicality, for the allegations of its seventh article were not, in substance, denied by the Venezuela. In this contention the insurance company and its cosalvor ignore entirely the circumstances of the trial of the two cases. They were tried together upon an agreement as to the total amount to be paid by the Venezuela for salvage, which thereafter disappeared as an actor, leaving the contest entirely between the contending salvors upon their opposite theories of fact, in which contest the admissions of the Venezuela performed a very inconspicuous part. The technicalities on which these appellants insist are not applica-

ble to the circumstances of this litigation, and are of no importance in view of the real nature of the trial, both in the district court and in this court.

The additional light which the appellants' new testimony furnishes upon the relative position of the salvors towards each other does not vary to an important degree the accuracy of the conclusions of the district judge. Mr. Bliss, one of the agents of the Venezuela, was informed on February 5th that she had stranded. He promptly employed the Merritt Company to go to her assistance, which sent Capt. Chittenden, with the Rapidan and Buckley, and a quantity of wrecking material. He was put in charge of the Venezuela on the morning of February 6th. The Tamesi had arrived the night before, but her services were then declined. After Mr. Bliss had employed the Merritt Company, he was visited by Mr. Chubb, an underwriter, representing companies which had risks on the vessel, who suggested to Mr. Bliss that it might be well for him to communicate with the Insurance Company of North America, also an insurer upon this vessel, to have them send their tug to her help. Mr. Bliss agreed to this, and the insurance company was communicated with by telephone, and requested by Chubb, in the presence of and in behalf of Bliss, to send the tug. Two telegrams were sent by a clerk of the insurance company to Capt. Gibbons of the North America. The first was as follows: "Steamer Venezuela ashore Brigantine Shoals. Wire when you leave for her assistance. Large interests. Ins. of North America." The second was as follows: "Don't delay getting to Brigantine. Our interests are heavy. Platt."

The North America reached the Venezuela on the morning of February 6th, and her captain showed the two telegrams to Capt. Chambers, of the Venezuela, who made no arrangement with him. Subsequently Capt. Chittenden, and Capt. Townsend of the Tamesi, and president of the Gulf Wrecking Company made the agreement which was found by the district court, and under which the three salvors subsequently worked together during the continuance of the services. Townsend had the right to contract in Gibbons' behalf. It is manifest that, as between the three, the Merritt Company had, by mutual understanding, the precedence. It took the responsible management; it directed all the movements of the vessels; it was in charge and control of the enterprise. Although the North America originally was sent to the Venezuela at the instance of Mr. Bliss, and, as the telegrams show, for the protection of the insurance company, and went as a salvor, she did not take part upon her arrival as an independent salvor, but as subordinate to, and an assistant of, and under the control of, the Merritt Company. Her owners and those of the Tamesi are entitled to salvage, but the position of each during the services was far inferior to that of the Merritt Company. In the language of the district judge:

"The conduct of the work itself was in plain conformity with this view. Capt. Chittenden directed everything,—the examination of the ground by

soundings; the determination in which direction it was best to move; the location of the anchor and the purchases, and the arrangement of the cables; the unloading of part of the cargo, and the methods and times of hauling on the ship. In all these things the other vessels took no part. As respects the direction in which to move, they expressed a contrary opinion; but the speedy success of Capt. Chittenden's plan fully justified his judgment and skill."

The strength of the efforts of these two appellants has been expended in an attempt to satisfy this court that the Venezuela was pulled from the beach by the North America; that the cable of the Merritt Company was anchored in the wrong direction from the steamship, and was of no avail; and, therefore, that the amount of their respective decrees should be materially changed. Whether the conclusions of the district judge upon the testimony before him were right or not, it is claimed that the new testimony establishes beyond question the truth of the allegations of the fifth article of the libel of the insurance company and Gulf Wrecking Company. The oral testimony is, as usual, conflicting. The number of witnesses on the side of the two libelants who have appealed largely predominates, and, if questions of fact were to be decided by the length of the respective lists of witnesses, the appellants would be successful; but in this case, as in almost every other, a known surrounding state of facts and circumstances controls and determines the weight to be given to imperfect memories. The vessel was headed to the southeast. It was properly determined that she must go off bow foremost, for that was the nearest way to the deepest water. The manifest purpose was to lay the anchor in the deepest water, which was in fact southeast by south from the ship. Capt. Chittenden's experience told him, what is in accordance with truth, that the steady and continuous pull of a taut and firmly anchored large cable has a much more important and beneficial effect in working off a vessel stranded upon smooth sand than has the necessarily interrupted and less uniform pull by a tug. He had been in the wrecking business for 31 or 32 years, and had long been a superintendent in wrecking operations for the Merritt Company. He intended to put the anchor and cable where their power would be most useful, and not where they would be useless. The beneficial position would be south southeast of the vessel in deep water. The position in which the majority of the libelants' witnesses say it was laid, in a south-westerly direction from the vessel, and nearly six points on her starboard bow, would be a useless position. An attempt to prove that Chittenden put the anchor at that point is an attempt to prove the highly improbable; and it is not strange that the memory of witnesses, both honest and intelligent, who suggest such a theory, turns out to have been at fault. The captain and the mate of the Venezuela each orally testifies that the anchor was laid south southwest from the ship. The latter entered in the log which he daily kept that it was laid south southeast, and each swore accordingly in the protest which was made from the log, although the attention of the mate was called to that particular point by the question of the scrivener in regard to the

true character of the initials in the log. It is of course possible that the mate made a mistake, or a slip of the pen, in entering "S. S. E." in the log, as he now says that he did; but the probabilities are that he was then correct, and that his memory is now imperfect. It would be wearisome to recount the testimony of the different witnesses, and all the details which occurred, but it is sufficient to say that the attempt to prove an allegation which the surrounding circumstances show was one most unlikely to be true, and which is not credible, has failed, as has also the attempt to show that the cable was not taut, and did not accomplish its legitimate work. The theory upon which the district judge divided the sum of \$40,000 was a correct one, and is sustained by the facts stated in his opinion, which are as follows:

"The outfit provided by the Merritt Co. for the work consisted of 6 vessels and 76 men, including Lovett and Wyman, dispatched on the 6th. The outfit of the other libelants was 2 vessels and 29 men. The value of the vessels and materials of the former was about \$65,000; of the latter, about \$40,000; but of the latter the North America, only worth \$25,000, was used in hauling off the ship, the Tamesi being employed as a lighter only, and towed with her own cables by the Buckley. The whole time occupied both at the shoals and in going and returning, was for the vessels of the Merritt Co. equal to a little over 13 days, including also going back for the cables and anchor that were slipped when the Venezuela went ashore. The time of the Tamesi and North America, including going and returning, was about 4 days. The expenditures of the Merritt Co. were about \$3,333; those of the other two vessels, so far as proved, about \$100. The hauling force applied to the Venezuela by the Merritt Co. with their cable and the tug Buckley was about three times that of the North America. Taking all these elements together, the means employed in getting off the ship stands in favor of the Merritt Co. as against the North America about in the ratio of from 2 or 3 to 1, so that, if the two occupied the same status as independent salvors, the Merritt Co. should receive about $2\frac{1}{2}$ or 3 parts to the North America's one. But, as the North America came in merely as a subordinate and temporary helper to the Merritt Co., one half the share of an independent salvor, or from one seventh to one eighth, will, I think, be a fair adjustment of the North America's compensation as between themselves."

Five thousand dollars were awarded to the North America, \$1,500 were allowed to the Tamesi and \$33,500 to the Merritt Company, and the decrees are affirmed, with costs to the appellees in the appeal of the insurance company and the Gulf Wrecking Company, and without costs in this court in the appeal of the Venezuela.

THE LURLINE.

HAWKINS v. THE LURLINE.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

MARITIME LIENS—REPAIRS OF VESSEL—EVIDENCE.

Libelant sought to enforce a lien on a yacht for alleged repairs and other charges amounting to \$376.27, and when an itemized bill was demanded increased his account more than \$100. When the truthfulness of his charges was denied, he made no attempt to verify them, and when on the stand did not explain them, nor deny the testimony of a witness

impeaching a part of his account. *Held*, that a decree for libelant must be modified so as to allow him only such part of the account as defendant had offered to pay before suit.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by John P. Hawkins against the steam yacht Lurline to enforce a lien for repairs. William B. Wetmore, claimant. From a decree for libelant, claimant appeals. Modified and affirmed.

John Murray Mitchell, for appellant.

Geo. A. Black, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The libelant, John P. Hawkins, a shipwright at City Island, in the state of New York, filed a lien on June 13, 1890, under the statute of that state, against the steam yacht Lurline, owned by the claimant, William B. Wetmore, for the sum of \$476.27, the amount alleged to be due from said owner for the value of work and material furnished and services rendered to the yacht. Upon a libel brought to foreclose this lien the district court for the southern district of New York adjudged that the libelant should recover against the yacht the sum of \$376.27, with interest from June 13, 1890, and costs. From that decree this appeal was taken by the claimant.

In the latter part of September, or the early part of October, 1889, the claimant took his yacht to Hawkins' shipyard for repairs, and to be kept through the winter. Neither the amount nor the cost of the repairs was then ascertained, but it was definitely agreed between the claimant and Hawkins that, if the repair bill was over \$500 or \$600, nothing should be charged for wintering, but if the bill was not over \$500 a charge might be made. Ross, the captain of the yacht, remained in the claimant's service until December, and gave instructions to Hawkins as to the nature of the repairs. During the rest of the winter, and until about April 25, 1890, the claimant had no one in charge of the yacht. He was in the west most of the winter, returned to New York several times, saw the boat, and immediately after April 11, 1890, paid the libelant his bill for labor and material to that date, amounting to \$2,647.83. At this time the libelant told the claimant that there might be a bill of \$50 or \$60 more for additional work. Mr. Bell, the claimant's new sailing master, took charge of the boat on April 25, 1890. She was launched within two weeks, and went on her trial trip for a few hours, returning to City Point. From April 25th to May 16th a bulkhead was put up in the engine room, the engine-room companion way was made and fitted, the saloon floor was laid, the bottom and the forecastle were painted, and some jobbing work was done. The bill, in addition to the \$100 for wintering, is for work and materials from April 11th to May 16th, which consist of 25 days' joiner work, 21 days' "carpentering,"

20 days' painting, 6½ days' calking, 16 days' labor, and materials amounting to \$82.77. The libelant presented bills, not itemized by days, to the claimant, dated May 17 and July 29, 1890, each for \$376.27. The claimant requested an itemized bill, which was sent August 8th, and was for \$483.45. In this bill a charge of \$100 was added for wintering the yacht, and \$7.18 were added in the labor and material account. The claimant replied, on August 12th:

"I have made a most careful examination of the work which was done by you since April 12, and find that you have charged me for a large amount of work which I cannot allow, as I find that it was never done for the boat. The amount of these excessive charges is \$191.30."

He also objected to the \$100 charge as unauthorized, and offered to pay \$192.15 in settlement of the account. The answer to the libel was in accordance with the letter of August 12th, and furthermore alleged that the work was done in an unworkmanlike manner, and that the libelant failed to put in limber chains, which had been ordered,—a failure and neglect which resulted in great trouble to the claimant, and in an expense of \$300, which sum the claimant sought to recoup against any sum of money due to the libelant. He was thus clearly informed, both before and after the suit was commenced, that the amount of the work which was done after April 11th was an important feature in the case. His only testimony upon this subject, in chief, was in the answer to a general question: "Did you do all the work mentioned in the bill of particulars?" "I did." Upon cross-examination he testified that he was aboard the boat every day during the course of the repairs, and that he could not swear anything positively from his own knowledge, only that the work was done, but the number of days he could not swear to without refreshing his memory by the books. In reply to the question, "Can you swear to any of these items which are on this last bill rendered, of your own knowledge, which are specified in this lien?" he said, "I would have to refer to my books to tell by." In reply to the question, "You can't swear without reference to the books?" he said, "No." The question had no reference to the \$100 item. He further said that he based his knowledge that the work was done, and that the material charged was correct, from the books; and in reply to the question, "Without your books, you can't swear to anything in this matter?" he said, "I can swear that the work was done, and material furnished; but to what extent, exactly, I couldn't swear to." He further testified that every night he put in the time book the time, and the men's names who did the work.

Bell, in behalf of the claimant, gave evidence that after April 25th but a small amount of work was done in his presence on the yacht, and that during the last eight or ten days there was nothing for the libelant to do upon the woodwork. In reply the libelant testified nothing in regard to the amount of the work, labor, and material after April 11th. He did say that he superintended the work on the vessel from the time she started until she was finished. It is to be presumed, though the books were not placed

in evidence by the libelant, that they corresponded with the bill of particulars, because the claimant's counsel examined them, but the question upon that part of the case was whether the books and the bill were truthful. It is a singular fact that, when the libelant was expressly notified that the amount of the work and the truthfulness of the bill were at issue, he made no substantial attempt to verify either, or to refresh his recollection as to the extent of the work. If the leading facts had gone out of his memory, they could have been ascertained and stated. He professed in his letter of July 29th to know what had been done, and to be able to explain it; but upon the trial he was silent, except as to the charge for calking, which amounted to \$22.75, and that work was done upon the spars. He remained silent after Bell's testimony. This absence of memory, and of an attempt to refresh his memory, or to prove anything with accuracy, either by his own or by independent testimony, are significant that he could not sustain his bill. The \$100 item was rejected by the district court, and is only of importance here because it shows the willingness of the libelant to make an untruthful charge. The facts discredit the truthfulness of the books, and as the confidence which in general is not only due, but is given, to the honesty of entries upon shop books of labor furnished and goods sold, which were made contemporaneously with the transactions, and in the ordinary course of business, does not exist in this case, there is nothing from which the amount due the libelant can be ascertained, but the claimant's admission that \$192.15 were due.

In regard to recoupment, considerable testimony was given in the district court that limber chains were not furnished, in accordance with the claimant's order; that he was subjected to a large expense in overhauling the boat to supply the omission. We concur with the district court that no sufficient foundation is laid for this claim of damages. It is undoubtedly true that the claimant gave instructions that they were to be put in, but we are satisfied that the libelant did not understand that he was to do this work; otherwise, it would have been done, and charged for.

Nothing can be allowed by way of reduction for damages for unworkmanlike painting in the forecastle, because neither the amount of that part of the painting bill, nor the amount of the damage, appears in the testimony.

The decree of the district court is modified so that a decree should be entered for the libelant for \$192.15, with interest from June 13, 1890, without costs in the district court. Costs are to be allowed to the claimant in this court.

THE HARRY AND FRED.

KING v. THE HARRY AND FRED.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

TUGS AND TOWS—TOWING OVER BAR—GROUNDING—DUTY OF TUG—KNOWLEDGE OF TOW.

A tugboat, in undertaking to tow a boat over a bar, the conditions of which are unknown to the tow, is bound to ascertain her draught, and not attempt to tow her if the water is insufficient. But when a tow is taken as usual in a long course of dealing, the requirements of which as to draught are well known to the tow, and the master of the tug has no reason to suppose that the tow is loaded deeper than allowed, and takes her in the best water, and the tow, in consequence of her unusual draught, grounds, the tug is not liable. 49 Fed. Rep. 681, affirmed.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Suit against a tug to recover for grounding tow. The libel was dismissed, (49 Fed. Rep. 681,) and libellant appeals. Affirmed.

Jas. Parker, for appellant.

Mark Ash, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the opinion of Judge Brown, who decided this cause in the court below. The decree is affirmed, with costs of the appeal.

THE PARTHIAN.

GOULD v. BOSTON & PHILADELPHIA STEAMSHIP CO.

(Circuit Court of Appeals, First Circuit. April 13, 1893.)

No. 15.

1. COLLISION—FOG—WANT OF PROPER FOG HORN.

The owners of a sailing vessel cannot substitute for the fog horn which she is required by the sailing regulations to carry an instrument blown by steam, and in their opinion more efficient than the fog horn. 48 Fed. Rep. 175, affirmed.

2. SAME—DUTY OF STEAMER—FAILURE TO SLACKEN SPEED.

The P., a steamer, while going through a dense fog, maintained a speed of 12 knots until she heard the signal of an approaching vessel, on which she slowed to half speed, and kept up that rate when the vessels were coming nearer and nearer, and did not slacken or reverse until the vessel appeared out of the fog. Held, that the P. was in fault in the collision which occurred. 48 Fed. Rep. 175, reversed.

3. SAME—SIGNALS—RULE 19.

A steamship is authorized to use the signals prescribed in sailing rule 19 only to communicate with a vessel which she has in sight, and not with a vessel which is invisible because of fog.

Appeal from the District Court of the United States for the District of Massachusetts.

In Admiralty. Libel by Moses M. Gould against the Boston & Philadelphia Steamship Company for damages resulting from a collision between the steamship Parthian and the schooner Florence about 55 miles southeast from Sandy Hook. There was a decree dismissing the libel, (48 Fed. Rep. 175,) and libellant appeals. Reversed.

At the time of the collision the weather was foggy, and the wind light, blowing in a direction between W. N. W. and N. N. W. The fault charged by the Florence against the Parthian was that she did not change her course, as she should have done, upon hearing the fog signal of the schooner, and that she was going at an improper rate of speed in a fog. The faults charged against the schooner by the Parthian were that she did not have a proper fog horn; that she did not give with it the signals required by law to be given by a sailing vessel in a fog; that she used, for giving signals in a fog, an instrument, the sound of which resembled that of a steamship's whistle, and the effect of which was to mislead the Parthian, causing her to change her course in the belief that a steamship was approaching, in consequence of which the collision occurred. The instrument used by the schooner in place of the required fog horn was a horn blown by steam furnished by a donkey engine.

The sailing regulations referred to in the opinion of the court are as follows, (23 St. p. 441:) "Art. 19. In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, namely: One short blast to mean, 'I am directing my course to star-board;' two short blasts to mean, 'I am directing my course to port;' three short blasts to mean, 'I am going full speed astern.' The use of these signals is optional, but if they are used the course of the ship must be in accordance with the signals made."

A. A. Strout and Eugene P. Carver, (Edward E. Blodgett, on the brief,) for appellant.

Lewis S. Dabney and Frederic Cunningham, for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

WEBB, District Judge. Attention to the positive statutory regulations for the prevention of collisions will dispose of the contention that the fog horn used on board the schooner Florence complied with them:

"Article 1. In the following rules, every steamship which is under sail, and not under steam, is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam."

Having established this definition of the various kinds of vessels, the regulations proceed to impose duties on each class for observance under various conditions and circumstances. For clear weather, and by daylight, the management of the ship is prescribed. Specific directions for lights at night are added. When, by day or by night, on account of "fog, mist, or falling snow," neither vessels nor their lights can be seen far, recourse is had to sound signals. And as the information conveyed by mere inarticulate sounds is, at best, imperfect and indefinite, it is important that the signals be arranged, so far as may be, to have definite significance. The means to accomplish this are diversity of in-

struments producing the sounds, varying durations of signals, the frequency of repetition, and the number of distinct sounds to complete a signal.

A steamship must be equipped "with a *steam whistle, or other efficient steam sound signal*, so placed that the sound may not be intercepted by any obstructions, and with an *efficient fog horn, to be sounded by a bellows or other mechanical means*, and also with an efficient bell."

It will soon be evident that these various sound-producing implements cannot be interchanged for convenience, or at caprice. Each has a specific use, and to that use it must be confined.

"A sailing ship shall be provided with a similar *fog horn and bell*."

When the vessel is under way, one appliance must be resorted to for making a sound signal, and this must not be the same for a steamship when under sail, and when under steam. In the one case, she is to be considered a steamship, and must use her steam whistle or other steam sound signal. In the other, she is a sailing ship, and must announce her presence by the means appropriate to a sailing ship, namely, by a fog horn sounded by a bellows, or other mechanical means. A sailing ship, whether a steamer for the time being only under sail, or a vessel having only sails as her means of propulsion, must give her signals by a fog horn, and is not permitted to make use of any steam whistle, or other steam sound signal reserved for the exclusive use of steamships. Both kinds of vessels, when not under way, shall make their signals by a bell.

Thus it is plain that the statute requires a steamer to be provided with three kinds of apparatus, because she is liable to be rated in three classes,—a steamship under way, a sailing ship under way, and a vessel not under way. The sound instruments of a sailing ship are for like reason reduced to two kinds; the two belonging to the two conditions in which she is liable to be,—under way, or not under way. As the statute is, it is not the province of the court to consider whether, practically, there is a distinguishable difference between the sound that is emitted by a steam sound signal, and that made by a fog horn operated upon by a blast of atmospheric air. Neither have the owners or masters of vessels the right to disregard the requirement of the regulations prescribed by law, and to substitute one instrument or one signal for another.

"In a fog, all vessels must do all that is required of them by law or usage." "Actual safety is dependent on a strict performance by each of all their respective duties." The *Eleanora*, 17 Blatchf. 102. The schooner *Florence* was not provided with the means for giving sound signals prescribed by the act of congress, and for that was in fault. Her owners cannot be permitted to say she had something better. Nor can it be held that this fault on the part of the schooner did not contribute, and could not have contributed, to the collision. All the witnesses from those aboard the *Parthian*, passengers and officers and crew, testify that the signal of the schooner was taken to be that of a steamship.

Nor is this the only statute regulation violated by the schooner, whereby the distinction between the sound signals of a steamship, and those of a sailing ship, was defeated. Rule 12 expressly requires the steamship to make "prolonged blasts," and the sailing ship to make "blasts." There is only one reasonable construction of this rule, in regard to the length of the sounds to be produced,—one vessel must give long, and the other short, sounds, that their characters may be distinguished. Of the witnesses on the part of the schooner, Capt. Gould, Mr. Buckler, the mate, and Doyle, who was at the wheel, testify that long blasts were made on their steam fog horn. The mate says that at first he ordered the man tending the fog horn to blow a long blast, and then, fearing the seamen would become excited, he took the lanyard himself, and blew long blasts. Capt. Crowell, second mate Crowell, Huston, the lookout, and Morse, a passenger from the Parthian, describe the schooner's blasts as long. No witness on either side describes them differently. This confirmed the opinion, based on the nature of the sounds, that a steamship was approaching, and in that belief the officers of the Parthian directed her movements.

Furthermore, notwithstanding the denial by the libellant's witnesses, the preponderance of evidence is that once, at least, the schooner replied to the steamer's indication that she would direct her course to port with two short blasts. This reply was misleading, and without excuse. It meant either the approach of a vessel under steam, or of a sailing vessel on the port tack, when in fact it was given by a sailing vessel on her starboard tack. It did actually mislead, and influenced the action of the steamship. With the conclusion of the district judge, that fault on the part of the schooner contributed to the collision, we concur.

But we cannot agree with his opinion that "the disaster happened solely through the fault of those in charge of the Florence, in making fog signals by means of an instrument not sanctioned by the sailing rules." The fog, though of short duration, was very dense while it lasted. No one pretends that a vessel could be seen more than two or three lengths of the steamer. The Parthian had maintained her full speed, of about 12 knots, notwithstanding this short range of vision. In this she violated the 13th sailing rule, which required a moderate speed, and she took all the risk of the consequences. While proceeding at that rate, she was advised by a sound signal of the proximity of another vessel under way. Whether it was a steamship or a sailing ship, the obligation of caution was thereby cast upon her. The 18th sailing rule commanded her, "when approaching another ship so as to involve danger of collision, to slacken her speed, or to stop and reverse, if necessary." That danger of collision was involved, is clear from the statement of the captain of the Parthian:

"I found that we were coming together at an angle like that,—an obtuse angle; and I knew, if we kept on that course, we should collide,—come across each other's path,—surely."

How, and under what conditions, this duty was met, will best be shown by a few extracts from the testimony of Capt. Crowell, master of the Parthian, who may be trusted to have given an account of what was done by him, and under his orders, as favorable as the facts would permit.

"Question 54. How, when you first heard it, [the signal of the Florence,] did it bear from you? Answer. It bore about two and a half points on our port bow, as near as I can say. Q. 55. What did it sound like? A. It sounded like a steam whistle. Q. 56. Now, go on, captain, and tell in your own way—tell slowly and particularly—what occurred after that; what you did, and what you heard, and what orders you gave. A. I blew about four times, and I found that we were coming together at an angle like that,—an obtuse angle; and I knew, if we kept on that course, we should collide,—come across each other's path,—surely." "Q. 67. Now, you say you made up your mind he was crossing your bow at an obtuse angle, and, if you both kept on, that there might be a collision. What did you do? A. I slowed my ship down, and gave two whistles, signifying I wished to go to port. And always, when I can get an answer, I feel safe that we understand each other, and we can pass without any difficulty. But this being one blast,—one blast is merely a fog signal,—and, if you can do that, you are always in safety to do that thing. We often do it." "Q. 73. When you gave the signal with the two whistles, what happened after that? A. I repeated them. Q. 74. Did you get any answer? A. I got one blast from the stranger. On my second blast, I got two. Q. 75. On the second what? A. My two blasts. Q. 76. Your second signal,—the two blasts of the whistle? A. Yes; that I wanted to go to port. Q. 77. Then what did you get? A. I got two from him. Q. 78. What kind of blasts did you get from him? A. Well, they were fairly blown. I understood them that I could go to port. Q. 79. What did you do then? A. I put my wheel to starboard. Q. 80. Up to that time, had you seen him at all? A. No, sir. Q. 81. Had he been coming closer? A. Closer; yes, sir. Q. 82. Then what did you do next? A. I blew two blasts again, and got one in answer. Q. 83. Then what did you do? A. Then I stopped my ship, and reversed the engine; gave the bells to reverse. She then seemed to be very close, and it appeared to me that there was no other way but to stop my ship, which I did. I rang the bells to stop her and back her. Q. 84. Were they obeyed in the engine room? A. Yes, sir; there is no doubt of it." "Q. 87. Then, captain, what followed, after you had stopped and reversed? What next happened? A. The next thing, the schooner was right under our bows, as it were, within a hundred feet of us,—standing across our bows with all her sails set, and very close aboard,—right almost on me." "Q. 107. How fast do you think your ship was going when you struck her? A. I think she might be going five or six knots,—four or five knots. Mr. Carver, libellant's proctor: You said five or six. The Witness: I recall that, and I say four or five. I will say four knots. I think she might be going four knots,—three or four knots; not more than that. Half speed is about six knots. I know she had been reversing, and I had stopped her, and I know it must have detained her very much." "The Court: Does he say he saw the schooner at the time he reversed? The Witness: Just reversed; and the schooner, about the same time I stopped her and reversed her, and about the same time, she appeared right over my bow. Q. 118, by the Court: Did you give the order to reverse before you saw her, or after? A. Before. Q. 119. Just before? A. Just before. We were right close onto her. There was no distance, scarcely."

From cross-examination:

"x-Q. 156. How far distant should you judge the schooner was when you first heard her horn? A. She might have been a mile and a half or two miles off; I couldn't tell, of course. x-Q. 157. And the direction in which they were going was about like that, wasn't it? A. It was, I suppose, at an obtuse angle. x-Q. 158. What did you do then with your helm? A. When I saw we were crossing each other's track, I deemed it safe to slow my ship down to half

speed, and I blew two whistles." "x-Q. 160. When you found that these two vessels were going, or supposed that they were going, in about that direction, what did you do with your helm? A. I kept my course till I slowed my ship, and gave two blasts, and got the answer, and then I put my wheel to starboard." "x-Q. 223. Half speed is a little better than six knots, isn't it? A. I suppose it is about six or seven knots. I presume that is the calculation." "x-Q. 247. Suppose that your steamer was going ahead at half speed, and you wanted to stop her. A. Yes. x-Q. 248. And you rang full speed astern. A. Yes. x-Q. 249. How far do you think your steamer would go ahead through the water before she came to a standstill? A. Going ahead at half speed? x-Q. 250. Yes. A. Well, I suppose she would go about eight hundred feet, perhaps." "x-Q. 266. Now, you said on your direct examination that this sound, when you first heard it, bore about two and a half points on the port bow. That is correct, isn't it? A. That is correct. x-Q. 267. And you also said on your direct examination that the relative bearing remained about the same? A. About the same; yes, sir. x-Q. 268. There isn't any doubt about that, is there? A. No, sir; I don't think there is. That is my own judgment. It seemed as if she was coming right down, and we were crossing each other's track. It seemed as if we were bound to. x-Q. 269. How many times did you blow your whistle before you made the signals you spoke of? A. I think about four times, as near as I can recollect. x-Q. 270. And then you said you made a signal of two whistles? A. I did. x-Q. 271. What kind of a signal was that? A. That was two short whistles, as you might whistle,—one, two,—like that. x-Q. 272. And the next time you whistled, you made two other short whistles, did you? A. Yes, I repeated them. x-Q. 273. After you had made those signals, did you make any other signal before you struck the schooner,—any other fog signal? A. Yes. x-Q. 274. How many? A. Two more. x-Q. 275. And, after you made those two signals, you gave the order for her to stop, didn't you? A. Yes, sir." "x-Q. 277. How long a time do you think it was intervened between those two signals that you made, of two whistles each? A. I suppose about not more than fifteen seconds. I was anxious then to get an answer, and got it, and then I repeated the two, and then I got one from the vessel. Then I stopped." "A. to x-Q. 281. After I had signaled twice, and got an answer from the stranger, I repeated it very quick,—in, say perhaps, fifteen seconds or less, maybe. I can't say exactly. When I got one signal, then I stopped my ship, and rang to back full speed astern." "A. to x-Q. 283. I didn't blow another blast, I think, except the two whistles. When I got the schooner's one whistle, I stopped my ship, and reversed the engine." "x-Q. 286. How long was it, in your opinion, after you made the second signal of two whistles up to the time of the collision? A. I suppose it was not over half a minute. x-Q. 287. and you don't think that during that time you made another fog signal? A. I can't say I did. I don't recollect about that. But the schooner was in sight. When we had reversed our engine the schooner appeared right across our bow, going from the starboard to the port side. x-Q. 288. You reversed the engine immediately after making this last signal? A. Yes, sir. x-Q. 289. Now, captain, after you made the second signal, up to the time of the collision, you could not have got out of the way of any vessel at all, could you? A. I don't believe I could, but it is possible that I might have done it, if I had known it was a sailing vessel."

From these answers we learn that, in a fog so dense that a vessel could be seen only a few hundred feet, a speed of from 10 to 12 knots was maintained until the signal of some vessel approaching, on lines that were understood to involve danger of collision, was heard, and then the steamer was slowed to half speed,—six or seven knots,—assuming that the movement of the ship was at once reduced on the slowing of the engines. This half speed was kept up till within a half a minute, or a little more, of the collision, although the two vessels continued apparently—and, as the result showed, actually—to be nearing each other, on lines that would bring them

together, and at half speed the forward movement of the steamer could not be arrested short of 700 or 800 feet. No order to slacken the speed of six or seven knots, or to stop and reverse, was given till the vessels were so close upon each other that immediately after it was given the schooner appeared out of the fog, crossing the bow of the steamer, with, as the master says, "scarcely any distance between them."

From the moment the steamer entered the fog to the collision, she was in the wrong. Save in the one particular of giving prolonged blasts with her whistle, she wholly failed to observe the requirements of the statute. Even if she had gone at half speed,—which was too fast in that fog, at the place she was,—this collision would not have occurred; much less if her speed had been moderate. *The Eleanor*, 17 Blatchf. 100.

The assumption of Capt. Crowell that he had a right, under the conditions in which he found himself, to use and act upon the signals specified in the nineteenth article of the sailing rules, was not warranted. By that article a steamship under way has permission—only permission—to employ the signals therein named for communication with "a ship which he has in sight." They are not signals allowed in a fog, or other state of the atmosphere, when sight is cut off. Absolute knowledge of the relative positions of the vessel, such as sight only can convey, is a prerequisite to their use. This case well illustrates the great difference between the certain information gained by sight, and conclusions resting on inferences from sound. "There is no such certainty of the exact position of a horn blown in a fog as will justify a steamer in speculating upon the probability of avoiding it by a change of the helm, without taking the additional precaution of stopping until its location is definitely ascertained." *The City of New York*, 147 U. S. 72, 84, 13 Sup. Ct. Rep. 211; *The Lancashire*, Law Rep. [1893,] 47; *The Bolivia*, 49 Fed. Rep. 169, 171, 1 C. C. A. 221; *The Nacoochee*, 137 U. S. 330, 338, 339, 11 Sup. Ct. Rep. 122.

As the Parthian's fault contributed to the disaster, she must bear a portion of the loss, and the damages must be divided between the two vessels. The owners of the cargo, and members of the crew of the schooner, are parties to the libel, and in the final decree their rights will be adjusted. Costs of this appeal must be borne equally by the parties in fault,—the two vessels.

The decree of the district court is reversed, and the case is remanded, with directions to determine the damages, and to enter decrees as may be required to conform to this opinion.

DUFF v. CARRIER.

(Circuit Court of Appeals, Third Circuit. April 19, 1893.)

1. JURISDICTION OF CIRCUIT COURT OF APPEALS—ORDER ALLOWING CLAIM IN BANKRUPTCY.

The circuit court of appeals has jurisdiction of an appeal by an assignee in bankruptcy from an order of the district court allowing the claim of a creditor, under Rev. St. § 4980, giving an appeal in such cases to the circuit court, and Act. Cong. March 3, 1891, transferring the appellate jurisdiction of the circuit court to the circuit court of appeals.

2. SAME—APPEALABLE ORDER.

Such an order is a "final decision," within section 6 of the said act of March 3, 1891.

3. PROVING DEBT IN BANKRUPTCY—EFFECT OF ATTACHMENT—INJUNCTION.

Rev. St. § 5075, requiring an attaching creditor to account for the property seized, and to surrender any lien thus acquired by him before he can prove his debt in bankruptcy, will not bar such creditor's right to participate in the fund, where the attachment was levied within four months next preceding the commencement of the bankruptcy proceedings, and was therefore, by virtue of Rev. St. § 5044, dissolved by operation of law upon the execution of the assignment in bankruptcy; and where the attachment is enjoined upon the petition of a creditor, and the proceedings abandoned by the attaching plaintiff. 51 Fed. Rep. 900, affirmed.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

In Bankruptcy. In the matter of John Carrier and A. F. Baum, bankrupts. An order was made allowing the claim of E. G. Carrier as creditor, (51 Fed. Rep. 900,) and the assignee, Levi Bird Duff, appeals. Affirmed.

Levi Bird Duff, in pro. per.

Lyon, McKee & Sanderson and Thomas B. Alcorn, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

ACHESON, Circuit Judge. This is an appeal by an assignee in bankruptcy from an order of the district court, made September 16, 1892, allowing the claim of an alleged creditor, and directing the payment of a dividend thereon. The question whether this court has jurisdiction of such an appeal has been raised, and is to be considered first. Section 4980, Rev. St. U. S. tit. "Bankruptcy," after providing for appeals in cases in equity and writs of error in cases at law, contains the following provision:

"And any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district."

Section 4 of the act to establish circuit courts of appeals, approved March 3, 1891, is as follows:

"That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts; but all appeals, by writ of error or otherwise, from said district courts, shall only be subject to review in the supreme court of the

United States, or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States, or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same."

Now the fifth section of this act, which provides for appeals from the district courts to the supreme court, and for writs of error therefrom, does not embrace such a case as this. It follows, then, that the order here complained of is reviewable by this court, unless, under the bankrupt law, an appeal by an assignee from the allowance of a claim appertains to the general supervisory jurisdiction of the circuit court over cases and questions arising in the district court sitting in bankruptcy, conferred by section 4986, Rev. St. This is the position here taken by the creditor, the appellee. But the express provision contained in section 4980, authorizing an appeal by the assignee from the allowance of a claim, excludes the inference that such a case comes within the general supervisory jurisdiction given by section 4986. It is, too, worthy of note that the prescribed remedy is contained in a section relating to appeals, in the ordinary sense, in cases in equity, and to writs of error, in suits at law. Moreover, the mode of taking and perfecting such appeal is specially regulated by section 4981, while section 4982 provides that the appeal shall be entered at the term of the circuit court which shall be held within the district next after the expiration of 10 days from the time of claiming the appeal. But the general supervisory jurisdiction given by section 4986 may be exercised in term time or in vacation, summarily, by the circuit court, or by the circuit justice or the circuit judge. In the early case of *Coit v. Robinson*, 19 Wall. 274, the supreme court had occasion to contrast the provisions of the bankrupt law touching the appellate jurisdiction of the circuit court with the clause conferring the general supervisory jurisdiction, and in its opinion the court distinctly declared that an appeal by the assignee from the decision of the district court, allowing the claim of a supposed creditor, belonged to one of "four classes of cases under the bankrupt law," in which "appellate jurisdiction may unquestionably be exercised by the circuit courts." We find nothing to the contrary in any later utterance of that court.

To the argument based upon the supposed incongruity between the method of review contemplated by the courts of appeals act and the course of procedure prescribed by section 4984, Rev. St., it is enough, at present, to say that that section relates to an appeal by a creditor, and does not in terms apply to such a case as the one now before us. Upon a careful consideration of the whole subject, our conclusion is that the appellate jurisdiction of the circuit court in the class of cases to which the present case belongs was abolished by the act of March 3, 1891, and such appellate jurisdiction was transferred to the circuit courts of appeals.

It is, indeed, here further contended that the order of the district court was not a "final decision," within the meaning of section 6 of the act of March 3, 1891, but the order was a finality for all prac-

tical purposes, and, as under the old system it would have been reviewable by the circuit court, so under the existing law it falls within the appellate jurisdiction of this court.

We pass, then, to the consideration of the merits of the controversy. The first assignment of error goes to the supposed insufficiency of the proof of the consideration of the debt alleged to be due to the appellee, and the third assignment relates to the delay in offering the proof. We have carefully examined the record, and are of opinion that neither of these assignments is well founded. After a thorough investigation of the claim, the register in bankruptcy held the proof to be sufficient, and we think rightly. The evidence in support of the claim is entirely satisfactory to us, and the court below did not err in overruling the assignee's first objection to the proof. The delay of the creditor in tendering the proof was satisfactorily explained. He, like most of his fellow creditors, postponed making proof, because until recently there was no fund for distribution, nor expectation of any. There was no undue delay by the appellee after the assignee filed his account, and a meeting of creditors to declare a dividend was called.

But the appellant earnestly contends (and this is the subject-matter of the second assignment) that the appellee was debarred by section 5075, Rev. St., from proving his debt, because, prior to the adjudication in bankruptcy, he obtained a lien upon property, in the state of Michigan, of the bankrupt John Carrier, by an attachment, and that the value of the attached property was never ascertained by agreement, or by a sale under the direction of the court, nor was the property released and delivered up to the assignee. It, however, appears that the attachment was made within four months next preceding the commencement of the bankruptcy proceedings, and, therefore, by virtue of section 5044, it was dissolved, by operation of law, upon the execution of the assignment in bankruptcy. Furthermore, very shortly after the attachment was issued, the district court, (the court below,) upon the petition of Andrew F. Baum, a creditor of John Carrier, and upon the allegation that the attachment was void, issued a writ of injunction against the attaching creditor, restraining him from interfering, by execution, levy, sale, or otherwise, with the property or estate of John Carrier, the bankrupt. The injunction was promptly served on the attaching creditor, and was obeyed by him; and he never realized anything from his attachment. Upon this state of facts the court below held that the attaching creditor was not debarred from proving his debt. In that conclusion we entirely concur. It is idle to suggest that the injunction was procured by a person who had no title to and no authority over the attached property. An assignee not having yet been chosen, it was, we think, competent for the court to act at the instance of a creditor. But even if irregular, the injunction bound the appellee, and was respected by him. Never having been dissolved by the court, it continued to be operative after the appointment of the assignee. Moreover, we agree with the learned judge below, that the case does not come within the purview of section 5075. With the adjudication and assignment in bankruptcy the attachment fell,

and the title to the property passed to the assignee unincumbered by any lien arising therefrom. We discover nothing whatever in the evidence which should deprive the appellee of the dividend awarded to him. The order of the court below is affirmed.

EDWARDS v. BATES COUNTY.

(Circuit Court, W. D. Missouri, W. D. April 24, 1893.)

1. **CIRCUIT COURTS—JURISDICTION—MATTER IN DISPUTE—SIMULATED CLAIM.**
 In November, 1889, H. commenced suit in the circuit court against a county on two bonds for \$1,000, and the interest coupons for the period 1880 to 1886. On demurrer it was held that the court had no jurisdiction, as the amount involved did not exceed \$2,000, exclusive of interest and costs. Afterwards, but before dismissal of this cause, E. commenced suit on the same coupons, and also on coupons which matured prior to 1880. On demurrer to the petition in E.'s suit, it was held that the statute of limitations barred the cause of action on the coupons maturing prior to 1880. Without dismissing that suit, E. commenced a new suit on the same bonds, and all the coupons from 1873 to 1886; and in addition thereto on seven funding bonds of the county for \$100 each, dated October 1, 1885, and not maturing on their face until 1905. By condition in the funding bonds, the county reserved the right to redeem them at any time after five years from their date, and it was provided that, if not presented within 30 days after notice by the county of its election to redeem, the bonds should cease to bear interest, and should be payable on presentment to the county treasurer. Notice to redeem was given, but the plaintiff did not present his bonds for payment within 30 days. *Held*, that it was apparent that suit was brought on the funding bonds solely for the purpose of increasing the amount in suit beyond \$2,000, and, as there was no real controversy between them, the court had no jurisdiction.
2. **RES ADJUDICATA—JUDGMENT ON DEMURRER TO PETITION—STATUTE OF LIMITATIONS.**
 Where judgment for the defendant is given on a demurrer to the petition, in an action on the coupons of county bonds, on the ground that the cause of action on the coupons is barred by the statute of limitations, such judgment is res adjudicata between the parties, in a second suit on the bonds, in which judgment is also demanded for the amount of the coupons.
3. **LIMITATION OF ACTIONS—ACKNOWLEDGMENT OF DEBT—UNACCEPTED OFFER.**
 In an action on the coupons of county bonds, an offer by the county, within the statutory period of limitation, to compromise its bonds at a specified percentage, which was declined by the holders of the bonds in suit, although accepted by the holders of all of its other bonds, is not a promise to pay or an acknowledgment of the debt which will interrupt the running of the statute of limitations.

At Law. Action by James C. Edwards against Bates county on certain of the bonds of the defendant county, and the interest coupons thereof.

Thomas K. Skinker, for plaintiff.
 Gates & Wallace, for defendant.

PHILIPS, District Judge. This is a plea to the jurisdiction of the court. A brief recital of the history of this case will decide it. On November 13, 1889, one Norman De V. Howard, through his attorney, Thomas K. Skinker, Esq., instituted suit in this court (Case

No. 1,575) against the defendant county on two bonds issued by the county on account of Mt. Pleasant township. Said bonds were numbered 33 and 35, for \$1,000 each, with interest coupons thereto attached maturing for the years, respectively, 1880, 1881, 1882, 1883, 1884, 1885, 1886. A demurrer was sustained to this petition, September 1, 1890, on the ground that this court did not have jurisdiction, for the reason that the amount involved did not exceed \$2,000, exclusive of interest and costs. See *Howard v. Bates Co.*, 43 Fed. Rep. 276.

On January 16, 1891, the plaintiff herein, James C. Edwards, by the same attorney, instituted suit in this court (Case No. 1,666) against the defendant on the same coupons which were embraced in the said *Howard* suit, and on other coupons attached to the same bonds, which matured anterior to January 1, 1880. This suit was brought after the demurrer in the *Howard* Case was sustained, and without any dismissal of said suit in favor of *Howard*. On March 2, 1891, said suit of *Howard* was formally dismissed. The defendant demurred to the petition in the said suit of Edwards, (No. 1,666,) which demurrer was by the court sustained as to all of said coupons sued on which matured up to January 1, 1880, for the reason that the cause of action thereon was barred by the statute of limitations.

Without dismissing said case, (No. 1,666,) the plaintiff on October 15, 1891, brought the present suit, (No. 1,758,) in which he includes said bonds numbered 33 and 35, sued on as aforesaid by said *Howard*, and all the coupons thereto attached from 1873 to 1886, inclusive, and in addition thereto seven funding bonds of the defendant county on account of said township for \$100 each, dated October 1, 1885, and not maturing on their face until October 1, 1905.

By a condition indorsed on said funded bonds, the defendant county, on behalf of said township, reserved the right, at its option, to redeem said bonds at any time after five years from the 1st day of October, 1885; with the provision that, in case of the redemption of such bond or bonds before maturity, all interest not then earned or matured should be forfeited. Provision was made in said condition for the giving of notice of such election as to the time and place for the presentation of said bonds for redemption. Among other provisions, said condition contained the following:

"If any bonds be not presented as required in such notice, or within thirty (30) days after the date therein fixed, interest thereon shall cease from said date, but said bond with interest coupons to said date shall be payable upon presentment at the office of the treasurer of Bates county at any time thereafter."

Conformably to this provision, the defendant gave the required notice that it would redeem said bonds at the State Bank, of St. Louis, Mo., on the 1st day of July, 1891, or within 30 days thereafter, and that, if said bonds were not so presented for payment, they would cease to bear interest, and would be paid upon presentment at the office of the treasurer of the defendant county. The defendant had the required money for the redemption of said bonds

at the designated place, and at the time specified, and also had and has kept the requisite money for such special purpose in the county treasury of said county. But the holder of said bonds neither presented the same for redemption at the said bank in St. Louis, nor to the treasurer of the county.

Without the aid of said funded bonds, the plaintiff unquestionably would have no standing in this court, for want of jurisdiction. In *Howard v. Bates Co.*, supra, it was held that the coupons attached to said bonds were for interest inhering to the principal sum, and, as the two bonds 33 and 35 only call for the aggregate principal sum of \$2,000, the said matter in dispute thereon does not exceed \$2,000, exclusive of interest and costs.

It must likewise be conceded that the judgment on the demurrer to plaintiff's prior action, No. 1,666, as to the coupons barred by the statute of limitations, is *res adjudicata* between the same parties. 1 *Herm. Estop.* pars. 107-111, 273, 274; *Bissell v. Spring Val. Tp.*, 124 U. S. 225, 8 Sup. Ct. Rep. 495; *Gould v. Railroad Co.*, 91 U. S. 526; *Louis v. Brown Tp.*, 109 U. S. 162, 3 Sup. Ct. Rep. 92; *Nesbit v. Independent Dist.*, (decided April 18, 1892,) 12 Sup. Ct. Rep. 746; *Price v. Bonfield*, 2 Wyo. 80.

The plaintiff undertakes to save the coupons, from 1875 to 1880, on said bonds 33 and 35, from the statute of limitations, by alleging in his reply an acknowledgment by defendant of the debt within the preceding 10 years. It, perhaps, might be sufficient to say of this that, where the plaintiff relies upon a fact dehors the written instrument, to exempt the action from the operation of the statute of limitations, he should plead it in the petition, as otherwise the petition would be demurrable on its face. *Keeton v. Keeton*, 20 Mo. 530. But waiving this, the fact relied upon is not sufficient. It is that the defendant within the 10 years made an offer to compromise said bonds at a given per cent. This offer was declined by the holders of these two bonds, while all the others accepted the offer. An offer to compromise, unaccepted, cannot be made the basis of a promise to pay, so as to stop the running of the statute of limitations. *Chambers v. Rubey*, 47 Mo. 99. It cannot even be admitted in evidence. *Cook v. Insurance Co.*, 70 Mo. 615; *Smith v. Shell*, 82 Mo. 220; *Railroad Co. v. Farrell*, 76 Mo. 190.

Clearly, therefore, unless the plaintiff has a right to judgment on the bonds 33 and 35, he has no footing in this court. His possession of those bonds, if he holds them, excites grave suspicion, under all the facts and circumstances before the court. When his first suit was brought, the bonds 33 and 35 were presumably in the possession of Howard, or his attorney in said case No. 1,575. Not until after the demurrer was sustained to so many of the coupons in the suit No. 1,666 as brought the amount in dispute below the jurisdiction of this court does he appear claiming ownership of said bonds 33 and 35. The bonds were then past due, and the prior holder of them had been turned out of this court for the want of jurisdiction over them. How this plaintiff obtained them, and for what purpose, are unexplained, except by the records in evidence. When the fact, of which this court will take judicial

cognizance, is recalled, that under existing rulings of the supreme court of the state no action can be maintained on said bonds, for the reason that that court now holds the act of the legislature, under which the bonds were issued, unconstitutional and void, whereas the supreme court of the United States holds that said bonds (when of jurisdictional amount) may be recovered on in this jurisdiction, on the ground that at the time of their issue and going into circulation as commercial paper the validity of said act was affirmed by the supreme court of the state, it at once becomes apparent why the holder of these two bonds is struggling to obtain a standing in this court. It, therefore, becomes the duty of the court to scan this transaction with close scrutiny. The act of March 3, 1887, confers jurisdiction on this court only when "the matter in dispute * * * exceeds the sum or value of \$2,000, exclusive of interest and costs." And by section 5 of the act of 1875, which is continued in force, it is provided that "if, in any suit commenced in the circuit court, it shall appear to the satisfaction of said court, at any time after suit has been brought, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly and collusively made * * * for the purpose of creating a cause cognizable by the said circuit court, said court shall proceed no further therein, but shall dismiss the suit." It is the matter in dispute which controls the question of jurisdiction. Parties cannot make up feigned or simulated matters of controversy to give jurisdiction, nor confer jurisdiction by merely claiming a sum, *eo nomine*, above \$2,000, when in fact the true amount in dispute is less. "It is undoubtedly true that, until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail." *Hilton v. Dickinson*, 108 U. S. 166, 2 Sup. Ct. Rep. 424. In determining this question, the court will look at the whole record. So in *Tintsmen v. Bank*, 100 U. S. 6, it was held that, where the only controversy was as to the liability of the defendant for the difference between what he admitted was due and what the plaintiff claimed, this difference was the amount actually in dispute, and determined the question of jurisdiction. It may be conceded to plaintiff that where it is necessary for the plaintiff to bring the defendant into court, in order to obtain from him an admission as to the amount of plaintiff's claim, although the remainder not admitted may be less than \$2,000, it will invite the jurisdiction of the court. Such was the case of *Fuller v. Insurance Co.*, 37 Fed. Rep. 163. At the time of the institution of this suit there was no matter in dispute between plaintiff and defendant as to the funded bonds. The defendant, in the exercise of the option secured to it by the contract, in the form of a condition indorsed on the bond, had a right to redeem the bonds before their maturity, on giving notice, and providing the funds necessary for redemption at the given time and place.

This the defendant did, and still holds the money in readiness therefor. That act of the defendant stopped the running of interest thereafter; and all the plaintiff had to do to get his money on said bonds was to present them for payment. Can he, therefore, for the mere purpose of making a dispute where none exists, and in order to bring into this court for adjudication said bonds 33 and 35, which are probably the property of some other person, create a jurisdictional dispute? Why should this plaintiff lose the interest on his seven funded bonds from the time of making that deposit for the redemption in 1891, and hire a lawyer, and provoke unnecessary litigation and costs on account thereof, when all he had to do, or now has to do, to obtain payment, was and is to present said funded bonds to the treasurer of the defendant county? If such a state of facts be not sufficient to satisfy the court that the real and only matter in dispute is the bonds 33 and 35, and the interest thereon, it does seem to me it would contradict what Judge Story once said, "One cannot wink so hard as not to see." If the holder of the bonds numbered 33 and 35, under this ruling, finds himself without a remedy, he will at least have learned the lesson of the moral to the fable of the fox, whose greed of appetite cost him his life.

The plea to the jurisdiction is sustained.

FITZGERALD v. BARBOUR.

(Circuit Court of Appeals, Third Circuit. April 25, 1893.)

APPURTENANT EASEMENTS—SUBDIVISION OF LOTS—STREETS—RIGHTS OF ABUTTING OWNER.

An owner of land between the seashore and an avenue subdivided the land, and established one of the lots as a street leading from the avenue to the water, and conveyed another of them to plaintiff's predecessor in title, by deed which recited that the street in question should be kept open and used only as a street for the benefit of those purchasing lots. Afterwards the executors of the owner conveyed certain of the lots in question, together with the street so dedicated, to defendant's predecessor in title, including the right to erect a bath house upon the seashore in front of such street. *Held*, that the interest conveyed by the executors to defendant's predecessor in title was previously impressed with the easement created by the owner's subdivision and deeds, and that defendant had no right to obstruct the same by building a bath house on any part of the street in question.

Appeal from the Circuit Court of the United States for the District of New Jersey.

In Equity. Suit by S. Rebecca Barbour against Mary A. Fitzgerald (formerly Mary A. Lyddy) to restrain the erection of an obstruction upon a street appurtenant to plaintiff's premises. There was a decree for complainant below. 49 Fed. Rep. 896. Defendant appeals. Modified and affirmed.

R. L. Lawrence and J. D. Bedle, (Babbitt & Lawrence, on the brief,) for appellant.

J. S. Applegate, (Applegate & Hope, on the brief,) for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

DALLAS, Circuit Judge. This is an appeal from a final decree in a suit in equity in which the appellee was complainant and the appellant was respondent. In conformity with the prayer of the bill, the appellant was "restrained from erecting or maintaining any bath house or other erection or obstruction in any part of the strip of land called 'Adams Street,' between Ocean avenue and the sea, and that she take down and remove any bath house or other building already erected," etc. The fact that there was erected upon the strip of land called "Adams Street" a structure such as is referred to in the decree, and that it was maintained there by the appellant, was found by the court below upon amply sufficient evidence. The question is as to whether this was rightfully done, or was violative of any right of the appellee. Both parties claim through Benjamin Woolley, who was seised in fee of a tract of land of considerable extent, which he divided into lots for sale. These lots he plotted and numbered on a map upon which lot numbered 18 was laid out as a street called "Adams Avenue," 50 feet in width, extending from Sea Brook (now Ocean) avenue to the sea. Subsequently, in October, 1864, Woolley and wife conveyed, in fee simple, to Edwin Adams, a parcel of the plotted land, described in the deed to Adams as "in corner of a street fifty feet wide, to be kept open and used only as a street for the benefit of those purchasing lots, and is called 'Adams Avenue.'" This parcel of land extended from Sea Brook (Ocean) avenue eastwardly to the sea, and was bounded on its southern line by the northern side of said Adams avenue. The appellee now owns in fee simple, and is in possession of, the easterly one half of the last-mentioned parcel of land, under title sufficiently deduced from Edwin Adams. The title set up by the appellant is derived through L. B. Brown, to whom, by deed made by Woolley's executors after his death, and in pursuance of direction contained in his will, there was conveyed the right, title, interest, and estate which Woolley had in certain lands, including lot No. 18, which was, in fact, the same strip of land as in Woolley's deed to Adams was called "Adams Avenue." Thereupon Brown filed in the office of the clerk of the county a map showing the land so conveyed to him, upon which the strip called "Adams Avenue" is marked "Lot No. 18." The appellant is seised in fee simple of two lots, (9 and 12 on the Brown map) by virtue of a series of conveyances, all of which, beginning with the deed from Brown, purport to grant, as appurtenant to the lots conveyed, "the right to erect a bath house" upon the shore of the ocean "in front of said fifty feet."

From this brief reference to the title shown by the respective parties it is apparent that any estate or right in or upon the strip of land called "Adams Avenue," which Brown acquired, and transmitted, through mesne conveyances, to the appellant, was, and remains, subject to the easement which Woolley had previously impressed thereon; and that the appellee is entitled to the enjoyment

of that easement, as the successor in title of Adams, grantee of Woolley. This incorporeal hereditament, appurtenant to the appellee's land in common with the other lots plotted and numbered by Woolley, is expressly defined in the grant as "a street fifty feet wide, to be kept open and used only as a street;" and, if an easement thus described could be viewed as a way merely, yet the erection in question would be a wrongful obstruction of it. It may be that it does not completely close the street, but, as the court below rightly found, it is within its limits, and, while the appellee is entitled to the enjoyment of the entire width, the appellant has no right whatever to use any part of it as he has done. But the appellee is entitled to something more than a mere right of passage upon Adams avenue. She is entitled to have that private street "kept open and used only as a street," because, as the purchaser of her lot, she became entitled to all the advantages which attached to it. She is entitled to the light and air and to the more open outlook which the position of her lot upon this street secures to her. No doubt these considerations enhanced the value of the lot, and presumably they increased the price which was paid for it. At least it is beyond question that the appellee has perfect title to support her claim that Adams avenue shall be kept open and be used only as a street, and that the appellant, who has invaded her right, is not in position to question the manner of her enjoyment of it. *Story v. Railroad Co.*, 90 N. Y. 122.

The appellant adduced some evidence to show that the appellee is herself responsible for the presence within the limits of Adams avenue of certain alleged barriers in the nature of fences, which, it is alleged, interfere with the appellant's asserted right of way over that avenue; and it is insisted that the appellee, if at all entitled, should not have been granted relief without requiring her to remove those barriers. The principle of equity thus invoked is not questioned, but the point is not referred to in the opinion of the learned judge of the court below, and the position of the appellant in this regard is not so clearly sustained by the evidence as to call for amendment of the decree in this suit. It is possible that the appellant might be able to make out, in an independent proceeding, a case for relief against the appellee for the quite separate and distinct cause which has been set up here; and, to preclude the possibility of inference that the present decree concludes her in that respect, it will be modified as is stated below. We, however, intimate no opinion upon any question which may arise or be involved in any future proceeding.

The decree of the court below is now modified by adding thereto, at the end thereof, the following:

"This decree is without prejudice to any right of the defendant to proceed as she may be advised against the plaintiff for any alleged interference by her with any right claimed by the defendant in or upon the said Adams avenue, by the erection or maintenance thereon by the plaintiff of any fence or other obstruction."

As thus modified, the decree of the court below is affirmed.

RAINEY v. HERBERT et al.

(Circuit Court of Appeals, Third Circuit. April 25, 1893.)

1. INJUNCTION AGAINST NUISANCE—JURISDICTIONAL AMOUNT—VALUE OF PROHIBITED ERECTION.

In a suit in a federal court to enjoin a nuisance in the erection of coke ovens, if the amount of damage which will accrue to the plaintiff be not sufficient to give the court jurisdiction, the court will nevertheless have jurisdiction if the value of the prohibited erection equal the jurisdictional amount. *Railroad Co. v. Ward*, 2 Black, 485, followed.

2. SAME—UNAUTHORIZED RELIEF.

Upon a bill to restrain the erection of coke ovens on F. street in front of or near complainants' premises, and for general relief, the court has no authority to restrain the operation of ovens elsewhere on defendant's property "so near the premises of the said complainants as to injure the same by reason of flames, heat, gases, or smoke emitted therefrom."

3. SAME—PARTIES—LIFE TENANTS.

In a suit to restrain a nuisance the defendant cannot complain of the admission of life tenants as parties plaintiff with the remainder-men.

4. DEDICATION—DESCRIPTION IN DEED.

An owner of land laid it out in lots and streets, and conveyed to D. (whose title passed to plaintiffs) two of the lots, describing them by reference to the plan and as abutting on a street, and then conveyed the tract as a whole to defendant, by a deed which recited the previous deed to D., and excepted the land thereby conveyed. *Held* that, by the conveyance to D., the street called for as a boundary was irrevocably dedicated as a public way for the use of the owners of the two lots, and that defendant was affected with notice thereof, and could not interfere with plaintiffs' use of the street. 54 Fed. Rep. 248, modified and affirmed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

In Equity. Bill by George W. and Thomas W. Herbert and others against W. J. Rainey to enjoin the erection and maintenance of a nuisance. In the court below there was a decree for complainants, the opinion by Judge Acheson (which is partially adopted by the circuit court of appeals) being reported in 54 Fed. Rep. 248. Defendant appeals. Modified and affirmed.

Samuel Dickson and C. C. Dickey, (Shiras & Dickey, of counsel,) for appellant.

Edward Campbell, (J. M. Garrison, on the brief,) for appellees.

Before DALLAS, Circuit Judge, and WALES and BUTLER, District Judges.

DALLAS, Circuit Judge. This is an appeal from a decree for an injunction restraining the erection of certain coke ovens. The jurisdiction of the circuit court was dependent upon the amount involved in the controversy. There was some conflict of testimony as to the amount of the damage which would result to the complainants from the construction and operation of the ovens, but the court below found that the averment that it would exceed \$2,000 was supported by abundant evidence; and, if the matter in dispute were simply and solely the threatened injury to the plaintiffs, this finding of fact might be accepted as in itself conclusive; but, if this

were otherwise, the want of a sufficient amount of damage having been alleged and proved to give the federal courts jurisdiction, would not defeat the remedy, as the prohibition of the contemplated erection of the ovens was the matter of controversy, and the value of that object (admittedly in excess of the jurisdictional amount) must govern. *Railroad Co. v. Ward*, 2 Black, 485, 492. Consequently the first assignment of error has not been maintained.

The opinion of the court below presents the law and the facts relating to the erection and operation of coke ovens "in or upon Front street, in the village of Sedgwick," in a manner entirely satisfactory. It is therefore adopted by this court as correctly disposing of the several questions which are raised by the assignments of error from the second to the sixth, inclusive. The decree, however, goes further, and is, we think, too comprehensive. It not only restrains the placing of ovens upon Front street, but also forbids their operation on the defendant's own property "so near the premises of the said complainants as to injure the same by reason of flames, heat, gases, or smoke emitted therefrom." The only prayer for special relief was for "a preliminary injunction, hereafter to be made perpetual, restraining the respondent from locating, erecting, and operating said coke ovens, or any of them, upon the said street in front of or near the said premises belonging to your orators as aforesaid." The particular relief which was awarded by that portion of the decree now under consideration was not prayed in the bill, nor did it even suggest that such relief would be asked upon the hearing. There was, it is true, a prayer for general relief; but it is a familiar rule of equity pleading that under such a prayer the court will afford a complainant such relief only as is agreeable to the case made by his bill, and the case made by the bill upon this record is wholly confined to the distinct subject of the proposed erection and operation of coke ovens upon Front street. The bill will not bear any other construction. Its language is perfectly clear. The gravamen of the complaint is that coke ovens "upon the said Front street, of the said town of Sedgwick, will be a permanent and continual trespass, * * * and a permanent obstruction;" and although it is added that a nuisance from smoke, etc., will result, this, too, is averred with respect, only, to ovens upon the street. From beginning to end, not a word is said about nuisance to arise from the operation of ovens elsewhere; the special prayer does not relate to any such nuisance; and, as we have said, the general prayer cannot be applied to it. This branch of the case was disposed of by the learned judge below in a single paragraph of the opinion which he filed, from which it does not appear that his attention had been directed to the restricted character of the bill; but we, with that fact in view, are constrained to hold that, in so far as ovens not upon the street were included in the terms of the decree, it was improvidently made. *English v. Foxall*, 2 Pet. 595, 611; *Hobson v. McArthur*, 16 Pet. 182, 195; *Savory v. Dyer*, Amb. 70; *Wright v. Atkyns*, 1 Ves. & B. 313.

If, however, a nuisance, independently of the encroachment upon Front street, had been duly alleged, it would not necessarily follow

that the complainants would have been entitled to an injunction based upon that allegation. We will not enter upon an extended discussion of this aspect of the matter, because it is not necessary that we should do so, but we deem it proper to suggest, with reference to any possibly contemplated further proceedings, that, while it is generally true that annoyances which substantially detract from the ordinary comfort of life may be enjoined, yet equity will never interpose where a due regard for all the attendant circumstances should impel a chancellor to withhold his hand. In *Robb v. Carnegie Bros. & Co.*, 145 Pa. St. 324, 22 Atl. Rep. 649, it is said that the operation of coke ovens at an appropriate place will not be enjoined; and in *Huckenstine's Appeal*, 70 Pa. St. 102, an injunction against brick burning was, in view of the surrounding circumstances, refused. There are numerous other judicial decisions of the same import, but in these two cases the principle to which we desire to direct attention is sufficiently exemplified. The seventh assignment of error is sustained.

The eighth and twelfth assignments of error are to the allowance of an amendment by which Henry Herbert and Margaret Herbert were made parties plaintiff, and to the imposition of the costs upon the defendant below. They are not supported. No wrong was done the defendant by admitting the life tenants as joint complainants with the remainder-men, or by the manner of their admission; and the costs of the proceeding were not increased because this was done, or by reason of the time at which it was done. No further amendment of the bill became requisite, or was made, in consequence of the addition of these parties, and the evidence which had been previously taken was as pertinent after their addition as it was before.

The remaining assignments do not require separate consideration. They are not sustained. The decree of the circuit court is now modified by striking therefrom the second paragraph thereof, viz.: "Second, from operating any coke ovens so near the premises of the said complainants as to injure the same by flames, heat, gases, or smoke emitted therefrom;" and, as thus modified, the decree is affirmed. And it is further ordered that one half of the costs of this appeal shall be paid by the appellant, and one half thereof by the appellees.

CLYDE et al. v. RICHMOND & D. R. CO. et al.

In re BROWN et al.

(Circuit Court, E. D. Virginia. April 26, 1893.)

RAILROAD COMPANIES—RECEIVERS—RIGHT OF BONDHOLDERS TO INTERVENE.

Where, in a foreclosure suit, a receiver is appointed for the property of a railroad company which owns or controls a large number of other roads constructed and operated under separate charters, the fact that a single trust company is trustee under 12 different mortgages or trust instruments executed by several corporations in the system is not of itself sufficient ground for allowing a committee representing bondholders under the said trusts to become a party plaintiff in the suit, in the absence of any-

thing showing negligence on the part of the trustee in protecting their interests, or that there is any conflict between the various interests represented by the trustee.

In Equity. Bill by William P. Clyde and others against the Richmond & Danville Railroad Company and others for the appointment of receivers and the administration of the property and assets of the railroad company. On petition by J. Wilcox Brown and others to be made parties complainant in said suit. Dismissed.

Richard M. Venable, Barton & Wilmer, Frank P. Clark, and Joseph Packard, Jr., for petitioners.

A. H. Joline, Henry Crawford, and Hugh L. Bond, Jr., for defendants.

GOFF, Circuit Judge. On the 16th day of August, 1892, this court, on the petition of William P. Clyde and others, appointed Frederic W. Huidekoper and Reuben Foster receivers of all and singular the property and assets of the Richmond & Danville Railroad Company, as fully described in the bill, to have and to hold the same, as the officers of, and under the orders and directions of, the court. They duly qualified as such receivers, and are now in possession of the "Richmond & Danville system of railroads," and all the property connected therewith. The Richmond & Danville Railroad Company was authorized under its original charter, and the amendments thereto, (under legislation by the state of Virginia,) not only to locate, construct, and operate the line of railroad between Richmond and Danville, in Virginia, but also to acquire the control of other railroads and transportation lines in that state and elsewhere, by purchase or lease, and to own the stock and bonds thereof and guaranty the same. Its own charter line is of about 150 miles of road. Its authorized and outstanding capital stock is \$5,000,000. It has by purchase or acquisition of stock, or by written leases or operating contracts, obtained possession and control of 26 other railways, built under different charters, and owned by various corporations, among them the Georgia Pacific Railroad Company and the Columbia & Greenville Railroad Company. The lines of railways comprising the Danville system are situated in the states of Virginia, North Carolina, South Carolina, Georgia, Alabama, and Mississippi, and are operated under the direction of one set of general officers. The total mileage of the system is 3,320 miles. The aggregate outstanding capital stock of the lines of the system amounts to \$43,482,950. The bonded debts of such roads, and the rental obligations which the Danville Company has assumed, and is liable for in consequence of its control of the same, amount to \$71,178,126. A further statement of the financial condition of the Danville system and of the Richmond & West Point Terminal Railway & Warehouse Company (one of the defendants to this suit) is not deemed necessary in connection with the matter now under consideration. Complainants pray, among other things, that the court will administer the railroad,—the assets and property of the Richmond & Danville Company,—and that it will marshal all the prop-

erty held by the said system, ascertain the respective liens and priorities existing upon each separate road, and the amount due upon each and every of the mortgages or other trusts, and enforce the rights, liens, and equities of each and all of the stockholders and creditors of said companies, as the same may be found and decreed. It is set forth in the bill that the Central Trust Company of New York is the trustee in the two deeds of trust executed by the terminal company February 1, 1887, and March 1, 1889, in and by which a great portion of the stock and bonds held by the terminal company, including the stocks and bonds of the Danville system held by said company, were conveyed to secure certain bonds issued by the terminal company. It is also stated that the said Central Trust Company is the trustee in "over twelve of the trust deeds" executed by the Danville Company and divers of the roads in its system.

On December 19, 1892, J. Wilcox Brown, William H. Blackford, Frederick M. Colston, Skipwith Wilmer, John Gill, John A. Whitridge, John B. Ramsay, Frank P. Clark, Richard M. Venable, and John M. Nelson filed their petition in this cause, asking permission to intervene, to be made parties complainant, and to make and file such pleadings as they should think necessary and proper in order to protect their interests. The petition alleges that the petitioners have been chosen by the holders of a large number of the bonds issued by railroad companies which form a part of the Richmond & Danville system to represent them in any litigation, and especially to represent them in this suit, and in any foreclosure proceedings on any of the mortgages or trust deeds executed by the Richmond & Danville Railroad Company, or any of the companies forming a part of that system. Petitioners allege that bonds amounting in the aggregate to more than a million of dollars have been deposited with them as such committee, the same being "second mortgage bonds of the Georgia Pacific Railroad Company," "second mortgage bonds of the Columbia & Greenville Railroad Company," and "mortgage bonds of other of the roads constituting the said Richmond & Danville Railroad system." They also allege that besides the large amount of bonds held by them as such committee, under agreement with said bondholders, they are each and every one of them owners in their own right of such bonds in various amounts. They charge that it is necessary, for the purpose of protecting the interests represented by them, that they should be allowed to intervene in this suit, and have an opportunity to be heard herein. The Central Trust Company has been made a party to this suit, and has filed an affidavit in the nature of an answer to the petition now under consideration, in which it is stated that said company has duly presented to the master to whom this cause has been heretofore referred proof of claim of all the bonds and mortgages with which it is concerned, and with which petitioners are concerned as bondholders. It also states that it has no such conflicting interests, as such trustee, as will disqualify it from representing all its bondholders.

The petitioners do not allege that the trustee has acted in bad faith, or that it has in any manner failed or refused to properly rep-

resent their interests. They claim that, for the protection of the interests represented by them, they should be allowed to intervene; but they do not show that such interests are not now honestly protected in the manner provided by the bondholders themselves. They ask that they be made parties, but they assign no valid reason why it should be done. The argument is made that the trusts represented by the Central Trust Company are conflicting, and that said company cannot faithfully represent at one and the same time such opposing interests. The petitioners offer no proof to sustain this assertion, and they present no instance of unfairness and no circumstance indicating fraud on the part of the trustee. Petitioners represent the same bondholders and the same interests that the Central Trust Company does, and, if such interests are so variant and antagonistic as to render it improper for that company to act as trustee, then it must follow that the petitioners themselves, for the same reason, would also be incapacitated to act.

All the various interests created by the different trusts, mortgages, and liens will be considered by and reported upon by the master, and then have the scrutiny of counsel, and the protection of the court. It will not be presumed that the trustee will be unfaithful to the trusts confided to it, and it will be time enough to consider the question of making the bondholders or their committees parties for their own protection when the trustee fails to promptly and faithfully discharge its duties. It will not do to permit bondholders in such proceedings as this, to become parties in their individual capacity, or by committees, without showing why their interests will not be properly guarded by the trustee selected when the trust was executed, and then fully authorized to represent them. It would produce great trouble, cause endless confusion, and needlessly incumber the record, to permit the holders of bonds and coupons secured by mortgages to make themselves parties in foreclosure proceedings without assigning cause. The holders of bonds, coupons, and stocks are constantly changing, and, if they are proper and necessary parties to such litigation, it will be difficult to mature such cases for hearing; and in many instances, particularly in the courts of the United States, the jurisdiction of the court might fail or be questioned when the transfer of ownership was made.

I think the rule is now well established that the individual bondholder and the separate beneficiary will not be made parties to suits relating to the mortgage or trust deed unless it is alleged and shown that the trustee is incompetent, or for some reason cannot faithfully represent the *cestui que trust*. The following cases will be found of interest upon this question: *Skiddy v. Railroad Co.*, 3 Hughes, 320; *Wetmore v. Railroad Co.*, 1 McCrary 466, 3 Fed. Rep. 177; *Railroad Co. v. Howard*, 7 Wall. 392; *Richter v. Jerome*, 123 U. S. 233, 8 Sup. Ct. Rep. 106; *Shaw v. Railroad Co.*, 5 Gray, 162; *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep. 182; *Van Vechten v. Terry*, 2 Johns. Ch. 197; *Kerrison v. Stewart*, 93 U. S. 155; *Richards v. Railroad Co.*, 1 Hughes, 28; also, *Jones, Corp. Bonds*, § 398; 2 Fost. Fed. Pr. 87.

Other questions were argued by counsel for petitioners, but, as

the matters to which they apply are not set forth in the petition, they cannot now be considered. The difficulties anticipated by petitioners, relative to conflicting interests and priorities of liens, may in fact never arise, and certainly cannot be passed upon by the court until they are properly raised by the pleadings. It follows from the conclusions I have reached that the prayer of petitioners to be made parties complainants in this suit must be denied, and their petition be dismissed. I will enter an order to that effect.

TASKER et al. v. CRANE CO.

(Circuit Court, N. D. Illinois. May 2, 1893.)

1. SALE—TEST—CONSTRUCTION OF CONTRACT.

Where a contract for the manufacture and sale of gas pipes provides that the pipes when laid shall be tested with reasonable promptness, without indicating the nature of the test to be used, the proper mode of testing is that which is usual and customary in the trade with respect to such pipes.

2. SAME—REASONABLE TIME.

A delay of several months before testing the pipes after they are laid is not reasonable promptness.

At Law. Assumpsit by Morris Tasker & Co. against the Crane Company for goods sold and delivered. Judgment for plaintiffs.

Albert B. Force, for plaintiffs.

Williams, Holt & Wheeler, for defendant.

JENKINS, Circuit Judge. The plaintiffs, on the 12th of July, 1890, contracted to furnish and deliver to defendant 20 miles of 8-inch standard nominal weight line pipe, made from soft iron free from blisters and other imperfections, and guarantied to stand a working line pressure of 1,000 pounds to the square inch when proved and tested in line, and proved tight in the line, which working test was to be made with reasonable promptness. The pipe was intended to be used in the construction of the gas line from the interior of Indiana to the city of Chicago, to be constructed by the Columbus Company, and was to be delivered not later than September 15, 1890, at railway stations to be designated by the Crane Company, and was so, in fact, delivered prior to that date. There was a subsequent parol agreement for the delivery of a certain quantity of 6-inch iron line pipe and 4-inch iron line pipe, touching which no question was made. In August, during the progress of delivery, the plaintiffs were notified that certain pipe arrived in a bad condition, and by their direction the pipe was laid aside, and, after that, returned, and accounted for by the plaintiffs; and the defendant was then instructed that it should not use one length of the pipe unless it was in perfect condition, but should return it. The pipe of a number of other manufacturers was likewise used in the construction of the line, and all the pipe appears to have been laid indiscriminately, without regard to whether it was manufactured by one party or another. It was so laid to suit the convenience of the con-

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struction company, and according to the receipt of the pipe. In September some sort of an air test was made by the construction company in the presence of an officer of the Crane Company, of some miles of the pipe in line, and defects and leakage were found. But whether that leakage occurred in the pipe of the plaintiffs or in the pipe furnished by other manufacturers is not fully disclosed. In 1891 further air tests were made, and leakage then found, which was subsequently remedied by the construction company by the removal of the collars of the joints, and the substitution of another and different collar. Of these tests, or their result, no notice was given to the plaintiffs, and they had no knowledge that any such tests had been made until a time subsequent to the commencement of this action. All the pipe manufactured by them was subjected at the manufactory to a hydraulic test of 1,200 pounds to the square inch, and the pipe found to be perfect.

Whether such pipe, when laid in line, will prove sufficiently tight for the purposes for which it was intended, depends upon various considerations,—the strength of the pipe and of the joints and the threads, the character of the joint or collar, and the uniformity of the taper to the thread on the pipe and in the collar, and also upon whether the pipes are properly jointed and screwed together, the cleanliness of the threads when the pipes are united, and upon whether the surface upon which they are laid is even. At the time that the defendant forwarded to the plaintiffs the contract for execution, it desired that the plaintiffs should adopt the extra heavy coupling as made by the National Tube-Works Company for their standard or line work. It informed the plaintiffs that it had requested the tube-works company to forward to the plaintiffs a sample of this coupling, and requested the plaintiffs strictly to observe the gauge, eight threads to the inch, with five eighths of an inch taper, etc. This sample was received, and the couplings were made in strict conformity with the sample.

The defendant claims that it is entitled to offset against the amount due the plaintiffs for the pipe the expenses incurred in removing these collars and the substitution of other collars, such as were designed by the construction company, and which were used eventually in the construction of the line. I am of opinion that this offset ought not to be allowed. I am by no means satisfied that the leakage found can be attributed to any defect in the pipe or the threads. In view of the fact that certain defective pipes were found, and of the positive instruction of the plaintiffs to return all defective pipe, and to permit none to be laid, and that no further complaint of defective pipe was preferred, it is very cogent to my mind that there was no such defective pipe of the plaintiffs' manufacture found. If the leakage occurred by reason of the peculiarity of the collar used, it need only be observed that the collar was in exact accordance with the sample which the defendant furnished and desired to be used. It may be said also, with respect to the tests applied, that it is very peculiar that not only was no notice given to the plaintiffs when the tests were to be made, nor were they even notified of the result of the tests until long after this litigation had ensued.

The contract does not indicate the character of the test that was to be used. The proper construction, therefore, to be given the contract is that the parties intended that test which was usual and customary in the trade, with respect to pipe to be laid for the purpose of the conveyance of gas. The evidence satisfies me that the usual and customary test was the hydraulic test, and that this pipe came up to the standard required by the contract under such test. Where different manufactures of pipe are used, it may be difficult to prove which make fails to come up to the required standard, but this burden of proof is upon the defendant, and it has failed to satisfy me that the defect can be justly attributable to the plaintiffs' pipes. The severe test applied in 1891 was also not made with reasonable promptness within the provisions of the contract. Upon the whole, there must be a judgment for the plaintiffs for the amount which the parties have stipulated to be due if no offset should be granted, namely, in the sum of \$8,890.71, and judgment for that amount is to be entered for the plaintiffs as of the 29th of April, 1893.

CARROLL-PORTER BOILER & TANK CO. v. COLUMBUS MACH. CO.

(Circuit Court of Appeals, Third Circuit. May 5, 1893.)

1. SALES—BREACH OF WARRANTY—DAMAGES—EVIDENCE.

Where the defense in an action for the contract price of a machine which cannot be bought in the market is breach of warranty, evidence to show the loss by reason of such breach of an actual contract by the purchaser with a third person, and the difference between what it would have cost to execute the contract, and the price agreed to be paid for so doing, is admissible.

2. SAME—LOST CONTRACT—MEASURE OF DAMAGES.

The measure of damages in such case is the difference between what it would have cost to fulfill the contract, and what the purchaser of the machine would have received if he had not been prevented from so doing.

3. SAME—CONTRACT COMPLETED ELSEWHERE—MEASURE OF DAMAGES.

Where the purchaser was unable to fulfill a contract because of defects in the machine, and was obliged to send the work elsewhere to be completed, the measure of damages was the difference between what it would have cost the purchaser to complete the work required by the contract if the machine had conformed to warranty, and what he was compelled to pay, and did pay, to others for doing or completing that work.

4. SAME—DAMAGES—ADVERTISING—MISCELLANEOUS LOSSES.

Expenditures made in advertising, and losses incurred in the general or miscellaneous business of the purchasers, cannot be allowed as damages for breach of the warranty, as the relation between such expenditure and the breach is too remote and uncertain.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

At Law. Suit by the Columbus Machine Company against the Carroll-Porter Boiler & Tank Company for the purchase price of a machine. Defendant claimed, by way of set-off, damages for breach of warranty. There was judgment on a verdict for plaintiff. Defendant brings error. Reversed.

George Shiras, 3d, for plaintiff in error.

Edwin W. Smith, for defendant in error.

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

DALLAS, Circuit Judge. The defendants sold to the plaintiffs a machine for rolling and bending sheets of iron. The letter which embodied the contract of sale contained this language:

"This machine will have a capacity of bending a sheet 5-16 inches thick, and full width, to a sheet 1¼ inches thick and 6' wide. Will roll to a dia. of 24 feet on light stock. The machine is guaranteed first-class, as is also materials and workmanship."

The machine was delivered, and this action was brought for recovery of the contract price. The case turned upon the defense that the machine was not of the warranted capacity, and that damages had resulted, which were claimed by way of set-off. The only matter for consideration here is the rule of damages, and that subject is presented by four assignments of error to the rejection of as many separate offers of evidence. If the measure generally applicable where a warranty such as this has been broken were appropriate to the circumstances of this case, there could be no doubt of the correctness of all the rulings complained of; for it is well settled that ordinarily the sum recoverable is the difference between the price contracted to be paid for the article as warranted, and the market price of like articles at the time of the breach. Where, however, as in the present case, the article is one which could not be bought in the market, that standard cannot be resorted to; and some other, which shall be fairly compensatory to the vendee, and not unjust to the vendor, must, of necessity, be adopted.

By the first offer it was proposed to show the loss, by reason of the breach of warranty, of an actual contract of the plaintiffs with a third person, and the difference between what it would have cost the plaintiffs to execute that contract, and the price agreed to be paid them for doing so. The objection which was and is interposed to this offer is that it assumed that loss of profits is a subject of damage. We agree that this assumption was involved, but not that it rendered the offer inadmissible. *Railroad Co. v. Howard*, 13 How. 307; *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. Rep. 81. It is a mistake to suppose that, where a vendee is unable to supply himself in the market, he is wholly debarred from showing in any way such damages as he may actually have sustained as a natural and proximate consequence of the vendor's failure to deliver at the time, or of the quality, agreed, or, as the same rule is sometimes expressed, such damages as the vendee has in fact suffered, and which may reasonably be presumed to have been contemplated by the vendor when the contract was made. Where an article is purchased which enters into the product of the vendee's manufacture, and by reason of the vendor's failure to deliver the vendee is obliged to substitute an inferior article, the case presented is substantially the same as if the inferior article had been wrongfully delivered by

the vendor; and such a case was *McHose v. Fulmer*, 73 Pa. St. 365, in which the supreme court of Pennsylvania held that the vendee was entitled to compensation for the loss of a contract for the sale of his product, which had resulted from the use of the inferior article in its composition. The article there in question was not purchasable in the market, and the court, per Sharswood, J., said:

"In such a case the true measure is the actual loss which the vendee sustains in his own manufacture by having to use an inferior article, or not receiving the advance on his contract price upon any contracts which he had himself made in reliance upon the fulfillment of the contract by the vendor."

There is no difference in principle between that case and the present one. There the article purchased was for use as an ingredient in the manufacture of the product which was the subject of the contract of which the vendee was deprived. Here the article involved was the mechanism relied upon for the construction of the thing sold, and by reason of the insufficiency of that mechanism the performance by the vendees of their dependent contract was rendered wholly impossible. The result in each case was the same, —a contract lost to the vendees by reason of the default of the vendors. The defendants were aware of the fact that a machine such as they had undertaken to supply could not be procured in the market. That the plaintiffs, who purchased this one for use in their business, would make contracts involving its operation, was a contingency which the defendants must have anticipated; and that the loss of such contracts would result from breach of the warranty was a consequence so direct and natural that they must be presumed to have contemplated it. This is the view of the matter which was taken by the court which decided the very similar case of *McHose v. Fulmer*, and we think it is the only reasonable one. The intent of the law is to award such damages as will compensate the injured party for the injury sustained; and if these plaintiffs could have obtained another machine with which to fulfill their contracts, that intent might have been accomplished in this instance by applying the ordinary measure of damages; but, as that measure was inapplicable, they were entitled to the substitution of an appropriate one, and that which they set up was just and reasonable, and precisely adapted to the special facts of the particular case. They had lost a contract, and they claimed the difference between what it would have cost them to fulfill it, and what they would have received if they had not been prevented from doing so; and "nothing short of this will do justice, because nothing short of it will give the plaintiffs the benefits they could have enjoyed if they had not been deprived of their rights." To the list of authorities furnished by Mr. Justice Bradley in *U. S. v. Behan*, supra, there may be added, as also pertinent to the general subject, *Borries v. Hutchinson*, 18 C. B. (N. S.) 445; *Hydraulic Co. v. McHaffie*, 4 Q. B. Div. 670; *Hinckley v. Steel Co.*, 121 U. S. 264, 7 Sup. Ct. Rep. 875; *White v. Miller*, 71 N. Y. 118; *Wakeman v. Manufacturing Co.*, 101 N. Y. 205, 4 N. E. Rep. 264; *Beeman v. Banta*, 118 N. Y. 538, 23 N. E. Rep. 887; *Bank v. Reese*, 26 Pa. St. 143; and *Culin v. Glass Works*, 108 Pa. St. 220.

The principles which have been discussed with especial reference to the first offer, are also applicable to the second and third offers; for by each of them, as by the preceding one, it was proposed to show that an actual contract had been lost to the plaintiffs because of the defectiveness of the machine. But the method indicated for the ascertainment of the amount of the resultant damage was not the same. The claim asserted by the second and third offers was for the difference, in each instance, between what it would have cost the plaintiffs to do or to complete the work required by the dependent contract if the machine had conformed to warranty, and what they were compelled to pay, and did pay, to others for doing or completing that work. Assuming, in accordance with what has already been said, that the subject of damage was an admissible one, the measure suggested was certainly correct. For performance of the plaintiffs' contract the use of a sufficient machine was essential. They were therefore compelled either to abandon their contract, or to acquire the use of a machine by some means. It not being possible to purchase, they would have been justified in hiring. But as they could not, in either way, bring a machine to the work, they were compelled to take the work to a machine; and they now ask allowance, not for the entire sum which they had to pay, but only the difference between that sum, and what it would have cost them to do the work themselves. This, practically, amounts to a claim for money paid for hire of a machine, and for the profit which, presumably, was charged by those who did the work; but the defendants have no right to object to any part of this disbursement, for it was all rendered necessary by their breach of contract.

The fourth offer differed materially from the others. By it evidence was offered to show, not actual contracts made in reliance upon the warranty, but expenditures made for advertising, and losses incurred, in the general or miscellaneous business of the plaintiffs. The relation of such expenditures and losses to the breach is too remote, vague, and uncertain to admit of their allowance. As was said in *White v. Miller*, 71 N. Y. 118-133:

"Gains prevented, as well as losses sustained, may be recovered for a breach of contract, where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach. But mere contingent or speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are rejected, and the jury will not be allowed to consider them."

This distinction is referred to in many other cases, and especially in *Railroad Co. v. Howard*, 13 How. 307, and *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. Rep. 81. In *Railroad Co. v. Howard* it is thus stated:

"Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market are referred to, and not the difference between the agreed price of something contracted for, and its ascertainable value or cost."

The 1st, 2d, and 3d assignments of error are sustained. The 4th is not. The judgment of the circuit court is reversed.

ROYAL INS. CO. v. WIGHT et al.

(Circuit Court of Appeals, Third Circuit. April 25, 1893.)

INSURANCE—ACTION ON POLICY—AFFIDAVIT OF DEFENSE—NOTICE OF CANCELLATION.

In an action on a fire insurance policy an affidavit of defense setting up cancellation of the policy, and notice thereof to the representatives of the insured, was adjudged insufficient on the ground that notice of cancellation served on the brokers who procured the insurance was invalid. *Held* error, the policy having provided for notice of cancellation to the insured or his representatives, and the affidavit of defense having alleged the giving of notice to the brokers in question, and that they were the agents and representatives of the plaintiffs in all matters respecting the insurance. 53 Fed. Rep. 340, reversed. *Grace v. Insurance Co.*, 3 Sup. Ct. Rep. 207, 109 U. S. 278, distinguished.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

At Law. Action by Charles Wight and George E. Lackey, doing business as Wight & Lackey, against the Royal Insurance Company, to recover on a policy of insurance. The affidavit of defense set up a cancellation of the policy, and notice thereof to the brokers who procured the policy as representatives of the insured. There was a judgment for plaintiffs, (53 Fed. Rep. 340,) and defendant brings error. Reversed.

Morton P. Henry, for plaintiff in error.

Wm. Wilkins Carr, for defendants in error.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

ACHESON, Circuit Judge. In making absolute the rule for judgment for want of a sufficient affidavit of defense, the court below acted upon the supposed binding authority of *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207. But there the question of agency arose upon these words of the contract:

"The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any person other than the assured, who may have procured the insurance to be taken by the company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance."

The court held that this clause imported nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in matters immediately connected with the procurement of the policy; that his employment was not thereby extended beyond the procurement of the insurance; and that his agency ceased upon the execution of the policy; and, therefore, that subsequent notice to him of the termination of the insurance by the company was not notice to the insured. But this decision by no means rules the case disclosed by the record now before us.

The policy here in suit provides that, when from any cause the company shall desire to terminate the insurance, "it shall be lawful

for the company or its agents so to do by notice to the insured or his representatives, and to require this policy to be given up for the purpose of being canceled, provided that in any such case the company shall refund to the insured a ratable proportion, for the unexpired time thereof, of the premium received for the insurance." Now the affidavit of defense, after setting forth the giving of notice by the defendant company of the termination of the insurance to Charles Tredick & Co., who, as the plaintiffs' brokers, had effected the insurance at Philadelphia, and the particulars of that notice, contains the following averment:

"That the insured plaintiffs did not reside in Philadelphia, and their residence was not made known to the defendant until after the fire, and that in this transaction Charles Tredick & Company were the agents and representatives of the plaintiffs in Philadelphia in all matters relating to this insurance."

There are other statements in the affidavit in respect to the agency of Charles Tredick & Co., which perhaps are open to the objection of being equivocal, or in the nature of legal conclusions; but the averment above quoted (which seems to have been overlooked by the court below) is an independent and positive affirmation of fact, and upon a rule for judgment was to be accepted as true. But if Charles Tredick & Co. were indeed the agents and representatives of the plaintiffs "in all matters relating to this insurance," then, by the very terms of the policy, notice to them of the termination of the insurance was as effectual as notice to the plaintiffs themselves.

The defendants in error, however, insist that the judgment may be sustained on the ground that the affidavit of defense was fatally defective, in that a tender back of a proportional part of the premium of insurance was not averred. But the court below distinctly declined to pass on the question whether an actual tender was necessary to a valid cancellation, and most certainly, in the face of the statements contained in the affidavit, the point could not properly be ruled against the defendant. In our opinion the rule for judgment for want of a sufficient affidavit of defense should have been discharged.

The judgment is reversed, and the record is remanded to the circuit court for further proceedings.

HALLAM v. POST PUB. CO.

(Circuit Court, S. D. Ohio, W. D. April 25, 1893.)

No. 4,573.

1. LIBEL—INTENT OF WRITER—INSTRUCTIONS.

In an action by a candidate for a party nomination to congress for a libel charging him with the transfer, by bargain and sale, of his supporters, to the successful candidate, want of actual intent to vilify is not a justification; and an instruction requested by the defendant, that plaintiff must satisfy the jury by a preponderance of proof that, by the article complained of, the defendant intended to charge the plaintiff with the transfer of his supporters by bargain and sale, is properly refused, the only question being what was the fair and reasonable construction of the language used.

2. SAME—CANDIDATE FOR OFFICE—REPUTATION FOR INTEGRITY—EVIDENCE.

In such action, defendant introduced testimony tending to prove that plaintiff's reputation for integrity in politics was bad, directing the inquiry specially to his reputation "as to the mode in which he conducted politics," and "as to selling out." In rebuttal, plaintiff introduced evidence that his reputation for integrity, "in politics and otherwise," was good. *Held*, that the testimony offered by the plaintiff in rebuttal was properly received, and that it was not error to refuse to confine it within the limits of the testimony for defendant, i. e. to the reputation of the plaintiff in politics, in the particulars brought out in the defense.

3. SAME—PRIVILEGE—CONDUCT OF PUBLIC MEN.

In America, as in England, the defense of privilege is confined to comment and criticism of the acts of public men, as they actually happened, and does not extend to false assertions of fact.

4. SAME—CANDIDATE FOR NOMINATION TO OFFICE—PRIVILEGE.

The privilege of commenting on and criticising the acts of public men does not justify the publication in a newspaper of an article which falsely asserts that a candidate for a party nomination to congress "sold out" and transferred his supporters to a rival candidate, and when the truth of the facts stated in the article is in issue the jury is properly instructed that the facts which gave rise to the comments must be proved substantially as alleged; that it is no defense that the writer, when he wrote, honestly believed in the truth of the charges, if the charges were made recklessly, unreasonably, and without any foundation in fact; and that, in so far as the publication fell within the limits of criticism and comment, it was privileged, but in so far as it went beyond that the defense of privilege failed.

At Law. Action by Theodore F. Hallam against the Post Publishing Company for damages for a libelous publication. Verdict for the plaintiff for \$2,500. On motion for a new trial. Denied.

Wilby & Wald and W. H. Jackson, for plaintiff.
Bateman & Harper, for defendant.

SAGE, District Judge. The plaintiff's action is for the recovery of damages for libel by reason of the publication by the defendant of the following article in the Cincinnati Evening Post of the 14th of October 1892:

Berry Paid Expenses of Theo. Hallam in the Sixth (Ky.) District Contest for the Nomination of a Democrat for Congress.

The Berry-Hallam congressional fight in the sixth Kentucky district is still on. That is to say, Banquo's ghost bobs up now and then, to the annoyance of the congressional nominee, Berry, and the mortification of the defeated candidate, Theo. F. Hallam.

The Boone County Recorder delivers a broadside at the Kenton county delegates, and naively asks: "Why don't they come out, and tell the truth about what induced them to go to Berry? The world knows."

Yes, the world knows, and you might say Mars and the other planets know it also.

Proprietor Roth, of the St. Nicholas Hotel, has an inside "cinch" on this information.

Every one knows Colonel Berry. He is a monopolist, corporation controller, millionaire speculator, political wire puller, first-class hustler, and a pretty good sort of fellow.

Hallam is a successful lawyer at Covington, but legal eminence there does not mean the fat incomes that are its synonyms on this side of the Ohio. Hallam is one of the "bhoys," loves ward politics for the fun, if not the emoluments, and is about as poor as a church mouse. In fact, he owes several hundred dollars for taxes.

The two counties, Kenton and Campbell, threw out their hooks for the congressional nomination. Kenton swore by Hallam, while Campbell vowed that the political friend and chum of Carlisle, Cassius M. Clay, Jr., and Charles J. Helm, their own millionaire and boss, Albert S. Berry, should be the nominee.

The fight waxed hot. The convention was held at Warsaw, commencing on September 27th, and ending September 30th.

The Kenton boys prepared for the fray. The principal preparations consisted in engaging the steamer Henrietta to carry the delegates to Warsaw, and the carte blanche orders to Mr. Roth, of the St. Nicholas hostelry, to fill her up from truck to keelson with the best the cellar and the larder of the house afforded.

As one delegate remarked:

"Why, the champagne flowed off the decks so much that even the Henrietta was swimming in it."

"Hallam and his crew did all the feasting and the drinking. The Campbell men were not in it."

But the bill was made out to Colonel A. S. Berry. Here is the bill:

"St. Nicholas. Edward N. Roth. Cincinnati, Oct. 10, 1892. Colonel A. S. Berry, per Theodore F. Hallam, to the St. Nicholas Hotel Company, Dr.: For meals, service, wine, and cigars served on board steamer Henrietta, \$865.15."

Then, again: At Warsaw the battle raged four days. On the last day Colonel Berry and Lawyer Hallam were seen to go arm in arm to the rear of the courthouse where the convention was held. They had a quiet and confidential chat.

At its conclusion, Hallam called his warriors about him, and spoke to them in whispers.

Immediately thereafter the whole Kenton county delegation cast its vote for Colonel Berry, and he received the nomination.

Is Colonel Berry carrying out all and every of the promises he made? Ah, there's the rub.

Mr. Roth, of the St. Nicholas, has sent a bill of \$865.15 to Colonel A. S. Berry.

That bill is for "dry" and wet provisions ordered by Hallam, and disposed of by Hallam's supporters.

Such generosity on the part of the victor to the vanquished is truly touching.

The jury returned a verdict for \$2,500 in favor of the plaintiff, and the case is now before the court on defendant's motion for new trial. The first reason urged is that the court refused a special charge requested on behalf of the defendant,—that, to entitle plaintiff to recover, he must satisfy the jury by a preponderance of proof, in support of the innuendo set forth in the petition, that by the article complained of the defendant intended to charge the plaintiff with the transfer, by bargain and sale, of his supporters to Berry. The charge was properly refused because the question was not what the defendant "intended,"—that was immaterial,—but what was the fair and reasonable construction of the language used,—what meaning it conveyed. Want of actual intent to vilify is no excuse for a libel. *Curtis v. Mussey*, 6 Gray, 265. Upon the trial the defendant offered evidence tending to prove that rumors of a "sell out" by the plaintiff to Berry were rife after the final ballot by which Berry was nominated, and that those rumors came to the knowledge of defendant's reporters who attended the convention, and through them to defendant's managing editor, before publication of the alleged libel. In rebuttal, testimony was admitted tending to prove the prevalence of rumors at the same time and place that the transfer of Hallam's support to Berry was made to defeat the scheme of the outlying counties of the district to nominate one or another

of their candidates,—as they had done on previous occasions,—by reason of the continued antagonism of the delegates from Kenton (Hallam's county) and Campbell, (Berry's county.) This, it is claimed, was not competent in rebuttal, because it did not tend to prove that rumors of the sort testified to by witnesses on behalf of the defendant were not in circulation. The testimony relating to rumors which was offered on behalf of the defendant was admitted without objection, under the defense of privilege, as tending to show probable cause and good faith, and as proper evidence in mitigation of damages. In rebuttal the plaintiff introduced, not only the evidence of other rumors, as above, but also that the rumor of a "sell out" were limited, while the other rumors were general. The jury was charged that, if the defendant relied upon rumors in justification of his comments upon the conduct of the plaintiff, it was bound to take into account the rumors on both sides,—those that the reporters heard, and those that, by a fair and proper exercise of their opportunities, they might have heard on both sides. In this view the evidence in rebuttal was competent, as tending to negative the defense of good faith.

The defendant introduced testimony tending to prove that plaintiff's reputation for integrity in politics was bad, counsel directing the inquiry specially to his reputation "as to the mode in which he conducted politics," and "as to selling out." No objection was made, and the testimony went in. In rebuttal, plaintiff introduced evidence of witnesses that his reputation for integrity, "in politics and otherwise," was good. It is objected that that was too broad; that the proof in response should have been confined within the limits of the testimony for defendant,—that is, to the reputation of the plaintiff in politics in the particulars brought out in defense. Testimony as to reputation, in such a case as this, is competent on several grounds. The weight of authority is that evidence of general bad reputation is admissible in mitigation of damages, and that evidence of bad reputation as to that phase of character involved in the case is competent, not to establish any facts in issue, but to explain conduct, and to enable the jury to better weigh evidence upon doubtful questions of fact bearing upon the character of the defendant. Where the reputation to be inquired of relates to the phase or trait of character involved, it is not reputation of having on previous occasions been guilty of acts of the same sort as those charged that is competent, but reputation as to the characteristic displayed in the acts charged. Upon a trial for theft the defendant may go into testimony as to his general reputation for honesty, but the prosecution would not be allowed to prove in rebuttal that the defendant was generally reputed to have been theretofore guilty of like thefts. It would be confined to testimony of his general reputation for honesty or for thieving. The law does not recognize one standard of integrity in politics, and another in private life. In this case it is a question of reputation for integrity, to be tried by a fixed standard of universal application, and gauged by the meaning of the word. It is for injury to that reputation that the plaintiff claims damages, and he had the right, in re-

buttal, to show what it was. The cases cited for the defendant do not conflict with this view. In *Gilchrist v. McKee*, 4 Watts, 380, it was held that the character of a female witness for veracity may not be impeached by evidence of her general reputation as to chastity. That decision is in line with the conclusions above stated. The court rightly said that if character for veracity was involved an inquiry into anything else was illegitimate. In *Conroe v. Conroe*, 47 Pa. St. 198, where unchastity had been imputed to the plaintiff, who sued for slander, the court below excluded evidence to prove that the general character of the plaintiff for chastity was bad, and ruled that only evidence of general reputation—that is, as a whole—was receivable. The supreme court reversed the judgment. The ruling in *Drown v. Allen*, 91 Pa. St. 393, another slander case, was that in an action for slander the defendant might show in mitigation of damages the general bad character of the plaintiff “for the particular thing with which he was charged.” The charge was that he was a thief. The question which the court below overruled was, “What is the general reputation of the plaintiff as to being a thief?” The question allowed was as to the general reputation of the plaintiff for honesty. The supreme court reversed these rulings, holding that a man might be dishonest without being a thief, although he could not be a thief without being dishonest, but still the reputation ruled competent was the general one of being a thief. *Moyer v. Moyer*, 49 Pa. St. 210, was an action for defamation, the plaintiff claiming that he had been charged with perjury. It was held that it was error to exclude evidence that plaintiff’s general reputation for truth and veracity in the neighborhood where he lived was bad. In *Duval v. Davy*, 32 Ohio St. 604, unchastity had been alleged, and it was held that evidence of the plaintiff’s bad reputation for chastity was competent. All these cases—and the books abound in like cases—are in harmony with the views above expressed. The question always is, what trait of character is involved? The case of *Sanford v. Rowley*, 52 N. W. Rep. 1119, decided by the supreme court of Michigan October 4, 1892, is specially relied upon. That was an action for libel. The language complained of charged perjury upon the plaintiff below, and political treachery, with specifications undoubtedly libelous. The court said that the language was libelous per se. The defendant himself testified that the plaintiff’s general reputation for integrity was bad. The supreme court held that testimony competent. Defendant was asked concerning the plaintiff’s reputation for political integrity, but that question was not answered. The supreme court said that the question was a proper one, and that the defendant, under a plea of justification, had a right to give in evidence the political reputation of the plaintiff, and evidence that the plaintiff was generally regarded in the community where he lived as a person who in political matters was unworthy of belief, but that it would necessarily follow, if this were shown, that the plaintiff’s general reputation for truth was bad; “for it can hardly be conceived that a person whose general reputation for truth is bad, in a political sense, has a good reputation for truth and

veracity in other matters." It is only applying the converse of the rule thus stated to hold that general reputation for integrity, not confining the inquiry to matters political, is competent in rebuttal of testimony attacking reputation for integrity in politics; and when the inquiry in rebuttal is, as it was in this case, as to the reputation for integrity in and out of politics, there can be no doubt of its competency.

The next proposition upon which the motion for new trial rests is that whether the publication is privileged is a question for the judge alone, (citing *Odger, Sland. & L.* 183,) and that it was error to leave it to the jury. In the charge, after a reference to the two classes of privileged communications,—those absolutely and those conditionally privileged,—the jury were told that every citizen has a right to comment freely upon the public affairs of the country by calling in question the acts of its officers, because the right to make such comment is inherent in our system of government, but that defamatory words spoken or published of an officer as an individual are not privileged on the ground that they relate to a matter of public interest, and are spoken and published in good faith. It was added that the same rules apply to candidates for nomination to public offices; that the right of comment belongs alike to every citizen, whether editor or individual; and that, if it were otherwise,—if we had not the right to express freely our opinions upon such matters, in order to protect ourselves against political corruption and abuses,—our rights as citizens would be so curtailed as to be in imminent danger of destruction. Then the court, after stating the distinction between criticism and defamation, instructed the jury that, when the defense of privilege is relied upon, it is for the court to say whether the article complained of is of the class of articles deemed privileged, and for the jury to determine whether it is within the limits of the privilege. The charge then proceeds:

"I will try to make this a little more plain. In the discharge of the duties devolved upon me, I have to say to you that in my opinion this article does fall within the class of privileged publications. Understand me. I am by no means saying that it is, as published, a privileged communication. That depends upon whether the limitations which I have already expressed have been observed. When I say that it falls within the class of privileged communications,—those that are conditionally privileged,—I mean that it relates to matters of public concern, which every citizen, every editor, has the right to criticize and comment upon. When I say that it is left to you to determine whether the article itself is privileged, or within the limits, I mean to be understood it is for you to determine whether the defendant has kept within the limits of criticism, or has gone beyond."

The attention of the jury was then directed to the publication, and to the claim for the plaintiff that it was false, malicious, and libelous, and to the claim for the defendant that there was no statement of fact that was not true, and no criticism not warranted by the facts; and it was left to the jury to decide, upon the evidence and upon the charge, what constitutes malice, and what is libelous, between those claims. The questions in dispute were largely questions of fact, and the court had no right to do anything else than leave them to the jury.

The jury were charged just before the adjournment of the court for the day, and by consent allowed to separate until the next morning. Then, before entering upon the consideration of the case, they were, in the presence of counsel, instructed upon one or two points not referred to in the general charge,—which was altogether oral,—and given a special charge which had been requested, but overlooked. The jury were instructed that comment on well-known or admitted facts was a very different thing from the assertion of unsubstantiated facts for comment, and that no one had a right to invent or suspect facts, and make them the basis of comments, however fair and bona fide; that the distinction between comment or criticism and allegations of fact could not be too clearly borne in mind; that the facts which gave rise to the comments must be proved substantially as alleged, and that it would be no defense that the writer, when he wrote, honestly believed in the truth of the charges, if the charges were made recklessly, unreasonably, and without any foundation in fact; also, that in so far as the publication sued upon fell within the limits of criticism and comment, it was privileged; in so far as it went beyond that, the defense of privilege failed.

It is objected that the law does not sustain the charge, and that it was inconsistent with the general charge. In the general charge the instruction was that if the jury come to the conclusion that the publication complained of was a fair, bona fide criticism, the defendant having reason to believe the facts as published, and the deductions warranted by the facts "as you find them, you would be justified in concluding that it was a privileged publication. If not, the article is a libel, if it tends to affect the reputation and standing of the plaintiff." Reasonable belief in the truth of the facts commented upon is as essential to fair comment as that the deduction be warranted by the facts, but the instruction was that the deductions were to be warranted by the facts as found by the jury. This is perfectly consistent with the subsequent instruction. It is to be borne in mind that these instructions were given after the plaintiff had introduced evidence tending to prove that the facts alleged were false, and by the defendant that they were true. But it was contended for the defendant that the privilege covers not only comments, but also statements of fact, and that the American rule is, by reason of the difference in government and institution, broader than the English rule. The English rule, as stated by Cockburn, C. J., in *Seymour v. Butterworth*, 3 Post. & F. 377, is that if a writer asserts that a member of parliament had bargained to sell his vote upon a corrupt contract, or that a member would not have voted or spoken as he did but for a corrupt understanding that he should receive a reward, such would not be excusable as fair comment. See, also, *Davis v. Shepstone*, L. R. 11 App. Cas. 187, where *Herschell, L. C.*, notes the distinction between comment or criticism and allegations of fact, and limits the privilege to the comment or criticism. See, also, *Ogden, Sland. & L. *33 et seq.*, under the title "Criticism." The American rule, according to the weight of authority, is substantially the same. In *Smith v. Tribune Co.*, 4 Biss. 477,

the rule is stated to be that a public journal has no right to make specific charges against a public man unless they are actually true, and mere honesty of motive is not a sufficient defense. Judge Drummond said that if the rule were otherwise every public man would be at the mercy of every journalist, and they could launch charges against him with impunity. So it has been held that the privilege of fairly canvassing the acts or conduct of public men does not include or imply a license to vilify or defame them. *Snyder v. Fulton*, 34 Md. 128; *Palmer v. Concord*, 48 N. H. 211. The supreme court of Massachusetts in *Curtis v. Mussey*, 6 Gray, 273, held that published charges against a public officer, of corrupt and improper motives, were not privileged, and that without a plea of justification there was no complete defense and legal bar to the action. In *Hamilton v. Eno*, 81 N. Y. 126, Chief Justice Folger, announcing the opinion of the court, said that the truth concerning a public officer might be published in good faith, but for what was false and aspersive the publisher was liable, however good his motives. In *Seely v. Blair*, (decided in 1833,) *Wright*, (Ohio,) 358, 683,—one of the early cases,—the supreme court of Ohio held that nobody has a right to slander, or utter falsehoods of, a public officer, or of a candidate for office; and in *Publishing Co. v. Moloney*, (decided January 31, 1893,) 33 N. E. Rep. 921, the same court said that the defense of privilege must be pleaded, (which has not been done in this case,) and, recognizing the right of free and full comment and criticism on the official conduct of a public officer, denied the doctrine that the press is privileged to speak as freely of the private character of the person holding the office as of his official conduct and character. The court says:

"In our opinion a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property."

The defendant in the case now before this court was the plaintiff in error in that case, represented by the same counsel, who apparently argued the same points, and presented the same authorities, as here. The court cited with approval *Seely v. Blair*, *supra*, and held that "while it is the right of the press, as it is of individuals, to freely criticise and comment upon the official action and conduct of a public officer, false and defamatory words spoken or published of him, as an individual, are not privileged on the ground that they related to a matter of public interest, and were spoken or published in good faith."

Counsel cite *Atkinson v. Free Press*, 46 Mich. 341, 9 N. W. Rep. 501, but their references are to the dissenting opinion of Judge Cooley. The decision of the court is against their contention. *Miner v. Tribune Co.*, 49 Mich. 358, 13 N. W. Rep. 773, is not in point. The acts of the police justice which were the subject of comment were not in dispute, and the supreme court held that the comments were privileged. *Palmer v. Concord*, 48 N. H. 211, hereinbefore cited, does hold that if the publication is made from good motives, and for justifiable ends, a belief—founded on rea-

sonable grounds—of its truth is a good defense. The action was under a statute, upon the case, by the proprietor of a newspaper, for the destruction of his printing establishment by a mob. Illegal or improper conduct causing the destruction was made by the statute a defense, and it was claimed that the publication of articles alleged to have been libelous was the cause. The supreme court said that the 1st, 4th, and 5th articles—the only ones that contained any statements of facts—were *prima facie* libelous, and that their publication must be regarded as “illegal conduct” unless justified or excused by facts sufficient to constitute a defense to an indictment for libel. The holding that a belief, founded upon reasonable grounds, of the facts was included in the privilege is against the weight of authority. In *Briggs v. Garrett*, 111 Pa. St. 404, 417, 2 Atl. Rep. 513, Chief Justice Paxson called attention to the fact that the defendant made no charge of corruption in office against the plaintiff; that all he said (at a public meeting held pending the candidacy of the plaintiff for re-election) was that some one else, giving his name, had made such a charge in writing, and with that the defendant handed the writing to the secretary of the meeting to be read, and it was read. The court cited *Hamilton v. Eno*, *supra*, and several other cases, to the point that to falsely accuse a public officer of a crime is not privileged, and said that how widely what the defendant did differed from originating a false charge was plain to the dullest apprehension. The case is thus clearly distinguished from the case at bar. In *Ex parte Steinman*, 95 Pa. St. 220, 236, Chief Justice Sharswood said that the article complained of meant to charge, and did charge, that the judge had decided the case wrongfully from motives of political partisanship, and that it was a gross libel on its face. I am not able to recognize in that case an authority in favor of the defendant in this case. The case of *Press Co. v. Stewart*, 119 Pa. St. 584, 602, 603, 14 Atl. Rep. 51, is also cited for the defendant. In that case the court held that the article was not a libel, but, at most a harmless bit of pleasantry in which the reporter had succeeded in making himself somewhat ridiculous. The defendant pleaded the truth in justification, and the court held that it was error to refuse to instruct the jury that if they believed that the article was a fair and true account of the interview, the verdict must be for the defendant; belonging, as it did, in the opinion of the court, to the class of conditionally privileged articles. The court also held that no presumption of malice arose from the mere fact of publication, and that malice in fact must be proven before the plaintiff could recover. There is nothing in that case in conflict with the views expressed in this opinion.

The motion for new trial will be overruled.

NATIONAL BANK OF COMMERCE OF KANSAS CITY v. ATKINSON.

(Circuit Court, D. Kansas. April 11, 1893.)

No. 6,850.

1. NATIONAL BANKS—ULTRA VIRES—ACCOMMODATION INDORSERS.

A national bank cannot loan its credit or become an accommodation indorser.

2. SAME—POWERS OF PRESIDENT—EXECUTION OF NOTE.

The president of a national bank has no power inherent in his office to bind the bank by the execution of a note in its name, but power to do so may be conferred on him by the board of directors, either expressly, by resolution to that effect, or by subsequent ratification, or by acquiescence in transactions of a similar nature, of which the directors have notice.

3. SAME—ACCOMMODATION INDORSEMENT.

An English mortgage company, by its resident directors, E. & C., made a draft on its home office in London for £5,000, payable to the order of the resident manager, and applied to the Bank of Commerce to cash the same. The bank agreed to cash it if the indorsement of the First National Bank was obtained. The cashier of the latter bank indorsed the draft. The draft, less discount, was credited by the Bank of Commerce to the First National Bank, and a credit to the mortgage company was made on the books of the First National Bank. A similar draft for £3,000, was negotiated in the same manner. Both of these drafts were paid. A second draft for £5,000 was drawn, and was indorsed by the cashier of the First National Bank in the same manner, but no entry of the draft or of the indorsement was made in the books of the bank. This draft was taken by one of the officers of the mortgage company to the Bank of Commerce. A second draft for £3,000 was also drawn and indorsed by the cashier, and delivered to the Bank of Commerce. The London office refused to pay the draft, as drawn without authority. On receipt of notice of refusal to pay the second draft for £5,000 the Bank of Commerce notified the officers of the mortgage company that it had been protested. E. called on that bank, and, being informed that the draft must be taken up, gave a note for the amount. E. was chairman of the resident board of directors and also president of the First National Bank. The note was drawn up in the office of the Bank of Commerce, and signed by the mortgage company by E., chairman, and indorsed by him as an individual, and also by the First National Bank by E., as president. The note was executed and indorsed by him without the knowledge of the other officers of the First National Bank, and without authority from it. When the second draft for £3,000 was returned, a similar note was given for it. These notes were renewed at maturity in a single note, which was further renewed. All the notes were executed and indorsed as the first note had been. *Held* that, under the circumstances, and upon the evidence, the First National Bank was not liable, having never received any consideration for the indorsement, which was only an accommodation indorsement, made by the president without authority.

At Law. Action by the National Bank of Commerce of Kansas City, Mo., against W. T. Atkinson, receiver of the First National Bank of Kansas City, Kan., upon certain promissory notes and a certificate of deposit.

Elijah Robinson, for plaintiff.

Ady, Peters & Nicholson, for defendant.

RINER, District Judge. This is an action at law. The petition contains four separate causes of action. The first cause of action is upon a promissory note for the sum of \$38,959, with interest,
v.55f.no.4—30

dated at Kansas City, Mo., October 22, 1890. The second cause of action is upon a promissory note for the sum of \$7,500, with interest, dated at Kansas City, Mo., October 20, 1890. The third cause of action is upon a promissory note for the sum of \$5,000, dated at Kansas City, Mo., July 11, 1891. The fourth cause of action is upon a certificate of deposit for the sum of \$15,000, dated at Kansas City, Kan., April 28, 1891. The notes described in the first and second causes of action are signed by the English & American Mortgage Company, Limited, by Eli H. Chandler and D. R. Emmons, directors, and indorsed by Eli H. Chandler, D. R. Emmons, and the First National Bank of Kansas City, Kan., by D. R. Emmons, president. The note described in the third cause of action is signed by the First National Bank of Kansas City, Kan., by I. D. Wilson, president, and indorsed by I. D. Wilson and Benjamin Schnierle. The certificate of deposit described in the fourth cause of action was issued by the First National Bank of Kansas City, Kan., and signed by Benjamin Schnierle, cashier, and payable to I. D. Wilson, and, before maturity, was by him indorsed, sold, and transferred for value to the plaintiff, who is now the legal owner and holder thereof. The real controversy in the case relates to the first and second causes of action, the defendant admitting the execution of the note and certificate of deposit set up in the third and fourth causes of action, insisting merely that the collaterals deposited therewith shall be returned, or it be credited therewith, before the claim can be audited and allowed as a claim against the bank. The facts shown by the record, so far as they relate to the first and second causes of action set up in the petition, are as follows: On August 3, 1889, the English & American Mortgage Company, a corporation, with headquarters at London, Eng., and a branch office at Kansas City, Kan., through D. R. Emmons, the chairman of its board of directors, and Eli H. Chandler, a director and the manager of the mortgage company, applied to the plaintiff, the National Bank of Commerce of Kansas City, Mo., to cash a draft upon the London office for £5,000 sterling. The draft was drawn by Emmons and Chandler, the directors of the English & American Mortgage Company, Limited, payable to the order of Eli H. Chandler, manager. At the time they applied to have this draft cashed they were informed by the officers of the Bank of Commerce that if they would obtain the indorsement of the First National Bank of Kansas City, Kan., upon the draft the same would be discounted, and the draft was thereupon taken to William Albright, cashier of the First National Bank of Kansas City, Kan., who, after the same had been indorsed by Eli H. Chandler, manager, indorsed upon the back of the draft the following words: "Pay to the order of the National Bank of Commerce, Kansas City, Mo., for account of First National Bank of Kansas City, Kansas. William Albright, Cashier." Chandler then took the draft, and returned to Kansas City, Mo., and delivered the draft so indorsed to the National Bank of Commerce, and was informed by the officers of that bank that he could now have the money. Thereupon the amount of the draft, less the discount charged by the National Bank of Commerce, was credited to the First National

Bank of Kansas City, Kan., for account of the English & American Mortgage Company, and a memorandum of the account given to Chandler, who then returned to Kansas City, Kan., and gave the memorandum to the cashier of the First National Bank of Kansas City, Kan., and the amount was entered upon the books of the First National Bank as a remittance to the National Bank of Commerce. The draft, after being delivered to the National Bank of Commerce by Chandler, was indorsed by that bank to Brown Bros. & Co., of New York city, and by Brown Bros. & Co. was indorsed to the London & Westminster Bank, and forwarded to London, and was presented to the London office of the English & American Mortgage Company, and was accepted. The acceptance, which is written upon the face of the draft, is in the following words: "Accepted. Payable at the Capital and County's Bank, L. D. The English and American Mortgage Co., Limited. M. M. Moore, S. H. Green, Directors. George W. Dawson, Secretary." On the 13th of August 1889, a draft for £3,000 sterling was drawn by Eli H. Chandler and Edmund T. Brown, directors of the English & American Mortgage Company, Limited, payable to the order of Eli H. Chandler, manager, upon which draft the same indorsement was made by William Albright, cashier of the First National Bank of Kansas City, Kan., as was made upon the first draft for £5,000 sterling. This draft also was taken by Chandler to the National Bank of Commerce, and the amount, less the discount, was credited up to the First National Bank of Kansas City, Kan., and by the Bank of Commerce indorsed as follows: "Pay Kountze Bros. or order, account National Bank of Commerce, Kansas City, Mo. H. C. Switzgable, A. C." This draft was forwarded to London, presented at the office of the English & American Mortgage Company, Limited, at that place, and accepted. The acceptance, written across the face of the draft, is as follows: "Accepted. Payable at the Capital and County's Bank, L. D. Threadneedle St., London, England, August 28, 1889. M. M. Moore, S. H. Green, Directors. George W. Dawson, Secretary." This transaction was entered upon the books of the First National Bank of Kansas City, Kan., as a remittance to the National Bank of Commerce, taking the same course which had been taken with the first £5,000 draft.

The amount entered upon the books of the First National Bank of Kansas City, Kan., as the credit given by the National Bank of Commerce to the first draft, dated August 3d, was the sum of \$24,030, which was all the money the English & American Mortgage Company had to its credit on that day in the First National Bank of Kansas City, Kan. August 4th the mortgage company checked out \$5,514.03; August 6th, \$931.88; August 7th, \$1,040.50; August 8th, \$2,509.59; August 9th, \$2,004; and August 10th, \$2,924.02,—making a total checked out by the mortgage company from the 4th to the 10th day of August, inclusive, of \$23,823.99. August 13th the amount to the credit of the mortgage company in the First National Bank of Kansas City, Kan., after having received the credit from the Bank of Commerce for the £3,000 draft, was \$14,396. On that day the mortgage company checked out \$1,326.85; August

14th, \$1,977.37; August 15th, \$3,790; August 16th, \$3,377.95; August 17th, \$1,108.42; August 19th, \$2,988.61; August 20th, \$534; August 21st, \$1,185.25; and August 22d, \$641.66,—making a total checked out from the 13th to the 22d of August, inclusive, of \$16,234.35. October 1, 1889, D. R. Emmons and Eli H. Chandler, directors of the English & American Mortgage Company, drew a draft for £5,000 sterling, payable to the order of Eli H. Chandler, upon the English & American Mortgage Company, Limited, 6 Lombard St., London, which draft was indorsed by Chandler, and also by William Albright, cashier of the First National Bank of Kansas City, Kan., and delivered to the Bank of Commerce, and by that bank sent to Kountze Bros., and by them forwarded to the Union Bank of London. This draft was taken by one of the officers of the mortgage company to the National Bank of Commerce, the officer of the mortgage company who delivered the draft having first obtained the indorsement of the cashier of the First National Bank of Kansas City, Kan., but no entry of this draft or the action of the cashier was ever made upon the books of the First National Bank of Kansas City, Kan. This draft was protested on the 3d of December, 1889, at the request of the Union Bank of London. The protest shows that it was presented at the office of the mortgage company in London, and payment demanded. That payment was refused, the refusal being in the following words: "Refused to pay. Drawn without authority." October 11, 1889, D. R. Emmons and Eli H. Chandler, directors of the English & American Mortgage Company, London, drew a draft for £3,000 sterling, payable to the order of Eli H. Chandler, manager, drawn upon the English & American Mortgage Company, Limited, which draft was also indorsed by Chandler and by William Albright, cashier of the First National Bank of Kansas City, Kan., and delivered to the National Bank of Commerce, and by that bank forwarded through its New York correspondent to London. It was presented for payment at the office of the mortgage company in London on the 13th of December, and payment refused. The refusal indorsed upon the draft is as follows: "No authority to draw. No orders. George W. Dawson, Secretary." And upon the same day the draft was protested for nonpayment. December 9th the National Bank of Commerce, having received notice of the protest of the second draft for £5,000 sterling, dated October 1, 1889, notified the officers of the mortgage company that the draft had been protested. Chandler, in whose favor the draft had been drawn, was absent, and Emmons, the chairman of the board of directors of the mortgage company, upon receiving notice, called at the office of the National Bank of Commerce of Kansas City, Mo., where he was informed that the draft must be taken up. At this time the mortgage company was indebted to the Bank of Commerce, on a previous loan, in the sum of \$5,000, and Emmons, chairman of the board of directors of the mortgage company, was indebted to the Bank of Commerce, on his individual account, in the sum of \$5,000. Emmons, not being able to take up the draft, thereupon gave a note for the sum of \$34,334. This note was drawn up in the office of the Bank of

Commerce, and signed by the English & American Mortgage Company, Limited, by Emmons, chairman, and indorsed by him as an individual, and also by the First National Bank of Kansas City, Kan., by Emmons, as president. This note was executed and indorsed by Emmons without the knowledge of any of the officers of the First National Bank of Kansas City, Kan., except Emmons, and without any authority from that bank. This note became due on the 12th of January, 1890, at which time the interest was paid, and the note extended to January 25th, and on the 4th of February, 1890, was stamped on the face thereof "Paid" by the Bank of Commerce. After the second draft for £3,000 sterling, dated October 11, 1889, and protested December 13, 1889, had been returned to the Bank of Commerce, the mortgage company was notified of the same by the bank, and the officers of the mortgage company then gave the note of the company for \$14,611. Some time in the latter part of January or the first part of February, 1890, the officers of the mortgage company gave a note to the Bank of Commerce for the sum of \$48,959, which note was a renewal of the \$34,347 note and of the \$14,611 note; the two last-mentioned notes being included in one note. The note for \$48,959 was renewed April 17, 1890, and again on May 5th, for the same amount. June 7th this note was taken up, and two renewal notes given in lieu thereof,—one for \$38,959, and one for \$8,500; a payment of \$1,500 having been made by the mortgage company on that date. Subsequently another payment of \$1,000 was made and applied upon the note for \$8,500. July 10, 1890, a renewal note for the sum of \$38,959, and another for the sum of \$7,500, due in 30 days, were executed. These notes were again renewed September 19, 1890. The two notes last mentioned are the notes described in the first and second causes of action for which suit was brought. These notes were all executed by the officers of the mortgage company, in the office of the Bank of Commerce of Kansas City, Mo., and indorsed by Emmons and Chandler as individuals and by the First National Bank of Kansas City, Kan., by D. R. Emmons, president. The only connection that the First National Bank of Kansas City, Kan., had with any of the notes was that of Emmons, who was president of the First National Bank of Kansas City, Kan., and also chairman of the board of directors of the English & American Mortgage Company. None of the transactions in relation to the second series of drafts or any of these notes appear upon the books of the First National Bank of Kansas City, Kan., nor did any of the officers or directors of the First National Bank of Kansas City, Kan., except Emmons, the president, know of the existence or giving of the notes or any renewals thereof. The First National Bank of Kansas City, Kan., received no interest or discount upon the first series of drafts, or any benefit therefrom, unless the fact that the first draft, credited to it on the 4th of August, 1889, and checked out between that date and the 10th of August, 1889, and the second draft, credited to it August 13, 1889, and all checked out between that date and the 22d of August, 1889, can be considered a benefit. When the second series of drafts were returned, the National Bank of Com-

merce demanded of the mortgage company collaterals, which were delivered to it, and which were mortgages upon various properties, and amounting in the aggregate, upon their face, to the sum of \$24,283.50.

December 9, 1889,—at the time the note for \$34,347.50 was given,—the First National Bank of Kansas City, Kan., had a credit on the books of the National Bank of Commerce of Kansas City, Mo., of \$97,898.64; on December 7, 1889, they had a credit of \$35,403.93; on the 10th of December, 1889, \$103,226.83; on the 11th day of December, 1889, \$73,894.33; on the 12th day of December, 1889, \$38,311; on the 14th of December, 1889, \$43,293.51; on the 17th of December, 1889, \$41,495.54; on the 18th of December, 1889, \$121,549.27; on the 19th of December, 1889, \$123,565.76; on the 20th of December, 1889, \$93,586.93; on January 1, 1890, \$62,174.35; on January 18, 1890, \$69,613; on January 20, 1890, \$70,004.67; on January 21, 1890, \$64,792.95; on January 23, 1890, \$64,502.28; on January 24, 1890, \$56,521.91. The First National had borrowed money of the National Bank of Commerce on the 8th of January, 1889, when it secured a loan of \$100,000. On the 2d of February, 1889, it secured two loans of \$5,000 each. On the 11th of February, 1889, the amount remaining due of the first \$100,000 loan, to wit, \$73,000, was evidenced by a renewal note. On March 16, 1889, two loans were obtained from the Bank of Commerce, one for \$5,000 and one for \$10,000. On April 6, 1889, another loan was obtained for \$5,000. On April 18, 1889, two notes were given for \$25,000 each. These were renewals of what remained of the first \$100,000 loan. The First National Bank of Kansas City had, as shown by the evidence, prior to the 3d day of August, 1889, nine different transactions in regard to loans and renewals of loans obtained by it from the National Bank of Commerce. At least five of these nine transactions were renewals of former loans. Whenever a loan was secured from the National Bank of Commerce by the First National Bank of Kansas City, Kan., its officers were required to put up as collateral to secure such loans an equal amount of commercial paper. The capital stock of the First National at the time these loans were obtained from the National Bank of Commerce was \$100,000. The banking house of the First National Bank of Kansas City, Kan., is distant about two miles from the banking house of the National Bank of Commerce in Kansas City, Mo. When the loan of \$100,000 was obtained from the National Bank of Commerce it was obtained by D. R. Emmons, as president of the First National of Kansas City, and William Albright, as cashier, and it was necessary and urgent that the loan be obtained at once; that said loan was obtained without authority from the board of directors, but was afterwards ratified by the board of directors of the First National Bank by resolution. D. R. Emmons was the vice president for a portion of the year 1889, and president for the remaining portion of 1889, and during the year 1890, and up to February, 1891. William Albright was the cashier during 1889 and 1890 and up to February, 1891. I. D. Wilson and Benjamin Schnierle were president and cashier, respectively, from February, 1891, until

July 16, 1891, when the First National of Kansas City, Kan., closed its doors and passed into the hands of the comptroller of the currency. D. R. Emmons was indebted in a large sum as an individual to the National Bank of Commerce of Kansas City, Mo., and had prior to February, 1891, deposited as collateral with said National Bank of Commerce of Kansas City, Mo., \$20,000 worth of his stock in the First National Bank of Kansas City, Kan. At the time he ceased to be president, in February, 1891, or a short time prior thereto, this \$20,000 of stock was sold and transferred to I. D. Wilson. Eli H. Chandler, the manager of the English & American Mortgage Company, Limited, had no interest whatever, either as stockholder or officer, or in any other manner, in the First National Bank of Kansas City, Kan., and had no connection with it.

For convenience I will first dispose of the second cause of action. I think the defendant has established by a clear preponderance of the evidence that this note was given to the Bank of Commerce for the personal indebtedness of the English & American Mortgage Company and D. R. Emmons. The testimony shows that the mortgage company was indebted to the Bank of Commerce in the sum of \$5,000, and that Emmons was also indebted to the Bank of Commerce in the sum of \$5,000; that this indebtedness of Emmons and the mortgage company was, at the request of the Bank of Commerce, included originally in one note for \$10,000; that subsequently there was paid at one time \$1,500; at another time \$1,000; that one renewal was taken for \$8,500 and another for \$7,500, which is the note described in the second cause of action. This being an indebtedness with which the First National Bank had nothing whatever to do, and no interest in, it is clear that the plaintiff is not entitled to recover upon the second cause of action.

As to the first cause of action, I think the testimony shows beyond all question that the note, therein described, represents the two drafts of £5,000 and £3,000 respectively, and that the slight difference between the note and the aggregate of the two drafts must be due to the fact that it was for unpaid interest, and included in the note. It is contended by the plaintiff that the National Bank of Commerce rediscounted these drafts for the First National Bank, and placed the money to the credit of that bank; in other words, that it loaned money to the First National Bank to discount the drafts, and that the Bank of Commerce then rediscounted them, and forwarded them for collection. The defendant contends—First. That Albright had no authority to place the indorsement of the First National Bank upon these drafts, or either of them, and that Emmons, the president, had no authority whatever to place the indorsement of the First National Bank upon the first note, which was given after the drafts were protested, or any note representing these drafts. Second. That the indorsement, at most, was a loaning of the bank's credit, or, in other words, an accommodation indorsement, which the bank had no power to make. There is no doubt but what the law is that a national bank cannot loan its credit or become an accommodation indorser. On that question the decisions are uniform. It is also true that the president of a bank has no power inherent in

his office to bind the bank by the execution of a note in its name, yet the power to do so may be conferred upon him by the board of directors, either expressly, by resolution to that effect, by subsequent ratification, or by acquiescence in transactions of a similar nature, and of which the directors have knowledge. In other words, I think it must be held that banks are liable for the acts of their officers, especially executive officers and general agents, within the general scope and apparent sphere of their duties; but that they are not liable for the acts of their officers done without special authority, in cases which are not within the general scope and sphere of their duties as such officers. The responsibility of a bank (in the absence of express authority to do a particular act) is limited to the acts of its officers and agents, performed in the discharge of their ordinary duties in the usual course of business and within the sphere and scope of such duties. Acts within the ordinary sphere and scope of their business are presumed to be by authority, and within the knowledge of the directors. That there was no express authority given by the board of directors, by resolution or otherwise, either to Albright, the cashier, or to Emmons, the president, to indorse the drafts and notes is conceded. Neither was there any formal ratification of their action by the directors or officers of the bank. Indeed, none of them had any knowledge whatever of the transactions except Emmons and Albright. This brings us to the inquiry, did the bank retain and enjoy the proceeds of these transactions, and thereby become liable, by reason of its indorsement appearing upon these papers? The testimony shows that Emmons and Chandler, chairman and manager, respectively, of the English & American Mortgage Company, first applied to the Bank of Commerce, the plaintiff, to discount or cash the £5,000 draft, which the bank at first declined to do, but subsequently did after the indorsement of the First National Bank had been obtained. As to the arrangement made between Dr. Woods, the president of the Bank of Commerce, and Emmons and Chandler, representatives of the mortgage company, at the time of the application to cash the first draft, the testimony is conflicting. Dr. Woods' testimony is to the effect that he declined to discount the drafts for the mortgage company, but stated that he would do so for the First National Bank, for the reason that that bank was a customer of the Bank of Commerce; while both Emmons and Chandler swear positively that Dr. Woods stated that he would discount the draft if they would procure the indorsement of the First National Bank. They further testify that thereupon they returned to Kansas City, Kan.; that Emmons took the draft, handed it to Albright, the cashier, and requested him to place the indorsement of the bank upon it, which he did; that thereupon Emmons gave the draft to Chandler, who returned to Kansas City, Mo., and delivered it to the Bank of Commerce. As to the conversation which took place between Chandler and the officers of the Bank of Commerce when he returned the draft the testimony is also conflicting, he stating that the officer of the bank with whom he did the business (which was either Mr. White or Switzgable) asked him if he wanted the money, and that he stated to them that he did not, but

that the money should be placed to the credit of the First National Bank for the account of the mortgage company, which was done; but Mr. White and Mr. Switzgable deny that they asked Mr. Chandler if he wanted the money, and state that they placed the money to the credit of the First National Bank without inquiry. Be this as it may, the fact is, as shown by the record, that the money was placed to the credit of the First National Bank for account of the English & American Mortgage Company. Mr. Albright's testimony tends to corroborate the testimony of Emmons and Chandler that the only thing required by the Bank of Commerce was the indorsement of the First National Bank. He states that when the drafts were presented to him with the request that he place the indorsement of the bank upon them he asked the person presenting the drafts, "Where are you going to get the money?" and that he replied that he could get it at the National Bank of Commerce, provided he could get the indorsement of the First National Bank of Kansas City, Kan., on them, and that he, Albright, then indorsed them. In his cross-examination he says:

"I am not positive about the second draft,—that is, referring to the draft for \$5,000 as being the first draft. Those drafts, and especially the first one, were brought in, and I was asked to sign it, upon the statement that the National Bank of Commerce would take them if the First National would indorse them."

It is shown by the record beyond all question that the First National Bank never received any benefit whatever by way of discount or otherwise out of the transaction in relation to these drafts, or either of them. While counsel for the plaintiff, in his brief, refers constantly to the discount by the Bank of Commerce as a rediscount, yet there is not a scintilla of evidence tending to show any rediscount. On the other hand, the evidence shows that the only discount upon these drafts was the discount made by the Bank of Commerce after the drafts had been returned to it by Emmons and Chandler with the indorsement of the First National Bank upon them, and that they placed the full amount, less the discount charged by them, to the credit of the First National Bank for account of the English & American Mortgage Company, and that it was all checked out by that company within a very few days after being so credited. To strengthen the position of Dr. Woods that he did not ask Emmons and Chandler to get the indorsement of the First National Bank, but, on the contrary, said that he stated that he would give the accommodation to the First National Bank, his counsel asked him the following questions:

"Question. You were in business before you were connected with the National Bank of Commerce? Answer. Yes, sir. Q. You knew whether a national bank was authorized to loan its credit to any one else? A. I had a taste of it once in a lawsuit, and I know they can't do it."

Dr. Woods' answer is very skillful, but his knowledge of the law, as it seems to me, does not tend to strengthen his testimony. His answer is that he once had a taste of it in a lawsuit, and he knew they could not do it, but he wholly fails to state whether the lawsuit to which he refers occurred before or after the time these drafts

were given; and the effect of the last part of his answer is that at the time he was testifying he knew they could not do it. He does not say what knowledge he had upon the question when these drafts were drawn in 1889. The evidence shows also that Dr. Woods was quite familiar with the business of the First National Bank and of Mr. Emmons, its president, and he must have known that the business in relation to these drafts was not conducted in the usual course between his bank and the First National. The record shows that prior to that time there had been nine transactions or loans made to the First National Bank by the Bank of Commerce, five of which were renewals; that in every instance when the Bank of Commerce loaned money to the First National Bank it required collateral to the amount of the loan. Nothing of that sort was required at the time these drafts were cashed. The indorsement of the First National Bank was procured at his suggestion. The First National Bank never received any benefit from discounts or otherwise on these drafts. The renewal drafts and the notes were not placed upon the books of the First National Bank. When the drafts were protested the First National Bank was not notified of the protest, but, on the contrary, the mortgage company only received notice of their dishonor. The notes were all indorsed in the office of the Bank of Commerce by Emmons, president, and away from the place of business of the First National, and no mention of them was made upon its books. The directors of the bank did not know of their existence, and could not have ascertained their existence from an examination of the books or accounts of the bank. Such a transaction, it seems to me, cannot be said to be in the usual course of business, or within the implied powers of the president of a bank. My attention is especially called to the case of *People's Bank v. National Bank*, 101 U. S. 181. That was a case upon a guaranty. The papers passed through the bank in the regular course of business. The bank received the benefit of the transaction, and the officer of the bank was acting strictly within the scope of his authority as an officer of the bank. The facts in that case are different from the facts in the case at bar, and the decision, in my judgment, does not aid the plaintiff.

The Exchange Bank of Kansas City, Kan., was consolidated with the First National Bank of Kansas City, Kan., in February, 1891. I allude to this fact for one purpose only. The evidence shows that Dr. Woods took an active part in bringing about this consolidation; and Mr. Wilson states that Dr. Woods said to him prior to the consolidation that the First National owed the Bank of Commerce \$15,000, and that the Exchange Bank, with which Mr. Wilson was connected, owed its correspondent \$15,000, and that that would put the banks upon an equal footing, so far as indebtedness was concerned. Dr. Woods most emphatically denies that he ever made such a statement, but admits that he did not inform Mr. Wilson of this indebtedness of the First National on these notes arising through this draft transaction, for the reason, as he states: "I wasn't making Mr. Wilson's side of the trade at all. I am free to say that I thought the consolidation would strengthen the bank, and possibly protect

our debt." Mr. Emmons testifies that at the time of the consolidation Dr. Woods requested him not to mention this indebtedness to Mr. Wilson. This statement is also denied by Dr. Woods, but the fact remains that here was a note of \$38,000, the existence of which was not shown by the books of the First National Bank, or known to any of its directors. It was only known to the officers of the Bank of Commerce and Emmons. And the question now is, can the plaintiff, under all the circumstances of this case, compel the stockholders of this bank to go down in their pockets and raise the funds necessary to liquidate this indebtedness, for which the bank never received one cent of benefit? My own view is that it cannot. The transaction, so far as the First National Bank is concerned, was a loaning of its credit, and the indorsement an accommodation indorsement, which it had no right to give. In indorsing the name of the bank on the drafts Albright exceeded his authority as cashier, and in indorsing the name of the bank upon these notes Emmons, as president of the bank, was not acting within the general scope and sphere of his duties as president of the bank; that he had no authority, either express or implied, to make the indorsement, and the bank is not liable.

As to the third and fourth causes of action, plaintiff is entitled to recover the amount claimed, less the amount which it has collected upon the collateral held by it, after deducting the costs of collection.

A judgment will be entered in favor of the defendant upon the first and second causes of action, and in favor of the plaintiff upon the third and fourth causes of action, subject to the credit above mentioned. Each side will be allowed 60 days to prepare and present a bill of exceptions for allowance.

UNITED STATES v. DELANY.

(Circuit Court, D. South Carolina. April 11, 1893.)

POST OFFICE—STEALING AND SECRETING LETTERS.

Rev. St. § 5467, defines and punishes two crimes against the United States: (1) Secreting, embezzling, and destroying letters containing anything of value; (2) stealing the contents of letters of the same character. U. S. v. Lacher, 10 Sup. Ct. Rep. 625, 134 U. S. 624, followed. U. S. v. Gruver, 35 Fed. Rep. 59, distinguished.

At Law. Indictment against St. Cyprian Delany for offenses against the postal laws. A verdict of guilty was rendered. Heard on motion in arrest of judgment. Denied.

S. J. Lee, for the motion.

B. A. Hagood and E. F. Cochran, Asst. U. S. Attys., opposed.

SIMONTON, District Judge. The defendant, a letter carrier in the service of the United States, was charged with violating section 5467, Rev. St. U. S., and was found guilty on 11 counts of the indictment under this section, charging him with secreting, em-

bezzling, and destroying the contents of certain letters which had come into his hands as such letter carrier, containing matter of value. He was also convicted, under section 3892, Rev. St. U. S., for unlawfully retaining, delaying, and opening a letter not containing an article of value. He now moves in arrest of judgment on the 11 counts above mentioned, because section 5467, Rev. St., by a casus ommissus, has failed to provide a punishment for embezzling, secreting, and destroying a letter, and only punishes the felonious stealing of a letter with valuable contents.

This question was at one time disputed in the circuit and district courts of the United States. See *U. S. v. Long*, 10 Fed. Rep. 879; *U. S. v. Atkinson*, 34 Fed. Rep. 316; *U. S. v. Falkenhainer*, 21 Fed. Rep. 624; *U. S. v. Wight*, 38 Fed. Rep. 106. This section of the Revised Statutes was discussed in this court in *U. S. v. Gruver*, 35 Fed. Rep. 59, but in that case the indictment had omitted to charge that the defendant did steal or take the contents of the letter intrusted to him, and for that reason the motion in arrest of judgment was granted. All doubt, however, has been set at rest by the decision of the supreme court of the United States in *U. S. v. Lacher*, 134 U. S. 624, 10 Sup. Ct. Rep. 625, in which this precise question was made and discussed; and the court held that this section 5467 creates and punishes two classes of offenses,—one relating to the embezzlement of letters, and the other to the stealing of their contents,—and shows the difference between the offenses created and punished by sections 3891 and 5467. The first section creates and punishes the offense of unlawfully detaining, delaying, or opening a letter, and of secreting, embezzling, and destroying a letter, although it does not contain anything of value. The latter section (5467) creates and punishes the crime when such action relates to a letter containing an article of value, and the punishment is provided accordingly.

The motion in arrest of judgment is denied.

In re SMITH, Surveyor of Customs.

(Circuit Court, S. D. Ohio, W. D. April 14, 1893.)

No. 4,488.

CUSTOMS DUTIES—BAR BOTTLES—EVIDENCE.

Hollow, translucent vessels, molded from glass, and etched with fluoric acid, representing female figures, the head separable from the body, and fitting closely on a narrow neck, so as to form a stopper, of the capacity of $7\frac{1}{2}$ and $18\frac{1}{4}$ fluid ounces, respectively, and used as bar bottles, are dutiable as "bottles," under Act Cong. Oct. 1, 1890, (Supp. Rev. St. U. S. [2d Ed.] p. 817,) par. 103, and not as "pressed glassware," under paragraph 105; nor are they dutiable under paragraph 106, which does not include "etched" glassware in its enumeration of ornamental glassware.

At Law. Appeal by the surveyor of customs from decision of the board of general appraisers. Affirmed.

John W. Herron, for appellant.
Wright & Wright, for appellee.

SAGE, District Judge. This case is before the court upon the application of the surveyor and acting collector of customs, Cincinnati, Ohio, for a review of the decision of the board of general appraisers, rendered the 22d of October, 1891, in the matter of the protest of Mihalovitch, Fletcher & Co. against the decision of the surveyor of customs at Cincinnati, Ohio, as to the rate and amount of duties chargeable on certain fancy flint glass bottles imported per Lady Palmer, July 7, 1891.

The merchandise in question was classified as "flint-glass ware," under paragraph 105, Act October 1, 1890, (2d Ed., Supp. Rev. St. U. S. p. 817,) and duty was assessed upon it at 60 per cent. ad valorem. It appears from the opinion of the general appraisers that the claim of the importers was that the articles were bottles, subject to duty under the provisions of paragraph 103. The general appraisers, upon an examination of samples of the articles, found that they were hollow vessels molded from flint glass, translucent, and of two designs,—one, of the capacity of less than one pint, and more than one quarter of one pint, representing a scantily-attired female, standing erect, the head separable from the body, and fitting closely on a narrow neck attached thereto, thus forming a cover or stopper therefor; the other, of the capacity of more than one pint, representing a woman clothed, and in a sitting position. This article was accompanied by a small bamboo rocking chair, in which the figure was to be placed. The rocking chair was separately invoiced and rated for duty. The head of this figure also formed a stopper therefor. The appraisers, upon an inspection of these articles, decided that they were designed for holding liquids, and that they were flint-glass bottles of the capacity of $7\frac{1}{2}$ and $18\frac{1}{2}$ fluid ounces, respectively, dutiable under the appropriate provisions of paragraph 103. They therefore sustained the protest. The surveyor of customs prays for the reversal of the decision of the board of general appraisers, and that the assessment of 60 per cent. ad valorem, under paragraph 105, be affirmed.

No testimony was presented, either to the surveyor of customs at Cincinnati, or to the general appraisers. Upon the hearing before this court, witnesses were, by consent, examined; and the United States appraiser at Cincinnati, who was for many years before entering upon the duties of his office a wholesale druggist, testifies that the commercial designation of the articles in question is glassware, or bar ornaments, and that they were not, as a matter of fact, used for holding liquor. Upon an inspection of the articles it appears that the neck of the body of each, upon which the head may be fitted, is a hollow cylinder, in which a cork may be inserted as a stopper, and that it does not differ in shape from the neck of a bottle. A dealer in glassware and bottles, of 30 years' experience, testified that he had dealt in bottles of similar character, and that they were called "bar bottles;" that he had seen them filled with liquor, but that they were not suitable for carrying about. A druggist of 56 years' experience testified that he did not know the trade designation, but that in his opinion they were not bottles. A wholesale dealer in glassware testified that he had always regarded articles such as those in question as bar ornaments, not as bottles. These were

the witnesses examined on behalf of the surveyor. Mihalovitch, of the firm of Mihalovitch, Fletcher & Co., testified that he had been a dealer in liquors about 20 years; that the order in this case was for bottles, from Germany; that the commercial designation of the articles in question was "fancy bottles;" and that his firm had been in the habit of filling and shipping them from Cincinnati all over the United States. Another wholesale dealer testified that they were known to the trade as "fancy bottles," and had long been known as such; and that among his earliest recollections was that of seeing one representing Napoleon Bonaparte. The testimony, so far as it is an expression of the opinion of the witnesses whether the articles are bottles or ornaments, is hardly competent. It is competent to prove what is the commercial designation, known to the trade, of the merchandise in question. But that is quite different from the expression of an opinion by a witness that the article falls within or without the class claimed, because that is a question for the jury or for the court. *Greenleaf v. Goodrich*, 101 U. S. 278; *Wills v. Russell*, 100 U. S. 621; *Recknagel v. Murphy*, 102 U. S. 197. The weight of the testimony of these witnesses is in favor of the conclusion reached by the general appraisers.

The application for review makes the claim that a duty of 60 per centum ad valorem should be assessed under the following provisions of paragraph 105: "Flint and lime pressed glassware, not cut, engraved, painted, etched, decorated, colored, printed, stained, silvered, or gilded." But these articles are not pressed glassware; they are molded, which brings them within an express provision of paragraph 103. The claim was made upon the hearing that, if they did not come within the provisions of paragraph 105, they did fall within the provisions of paragraph 106, which includes "all articles of glass, cut, engraved, painted, colored, printed, stained, decorated, silvered, or gilded, not including plate glass silvered or looking-glass plates." But it appears from the testimony of the United States appraiser as well as for an inspection of the articles, that they are etched,—the appraiser testifies,—by the use of fluoric acid. They are therefore expressly excluded from the operation of paragraph 106, which does not mention etched glass. The application, whether it be considered upon the testimony, or upon the construction of the paragraphs referred to, must be denied, and the entry will be accordingly.

EDISON ELECTRIC LIGHT CO. et al. v. EQUITABLE LIFE ASSUR.
SOC. OF UNITED STATES.

(Circuit Court, S. D. New York. May 8, 1893.)

1. PATENTS—ACTION FOR INFRINGEMENT—PLEADING.

In a suit in equity for infringement of a patent the defense of laches may be presented by a plea.

2. SAME—LACHES.

A patentee cannot maintain an action for infringement against a mere user who, in common with the public generally, has used the patented device openly for a period of 11 years, with the full knowledge of the patentee, and without objection by him.

In Equity. Bill by the Edison Electric Light Company and others against the Equitable Life Assurance Society of the United States. Defendant filed a plea alleging laches and acquiescence in defendant's alleged infringement for 11 years. Plea sustained.

Eugene H. Lewis, for complainants.

Leonard E. Curtis, for defendant.

COXE, District Judge. The defendant asks by the plea to have the bill dismissed on the ground of laches. No authority for this practice in an infringement suit is cited by counsel. There is no doubt, however, that the defense of the statute of limitations may be presented by plea. 2 Daniell, Ch. Pl. & Pr. 728; Story, Eq. Pl. § 757. It has also been held that a party, who for 40 years had been in peaceable possession of premises sought to be recovered, could present the question of laches by a plea. *Blewitt v. Thomas*, 2 Ves. Jr. 669. So in an action for rent, the defense of 26 years' undisturbed possession was interposed by plea and sustained. *Baldwin v. Peach*, 1 Younge & C. 453; Story, Eq. Pl. § 814; *Coop. Eq. Pl.* 288. In *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350, it was held that the defense of laches might be asserted by a demurrer although it could also be presented by plea or answer. On the other hand, the trend of modern decisions is against trying causes piecemeal and in favor of relegating defenses which go to the merits to the domain of the answer. *Rhode Island v. Massachusetts*, 14 Pet. 210, 257; *Sharp v. Reissner*, 9 Fed. Rep. 445; *Korn v. Wiebusch*, 33 Fed. Rep. 50; *Bailey v. Le Roy*, 2 Edw. Ch. 514. In *Walker on Patents* the author, at section 597, says:

"A plea is not appropriate for such a defense, [laches,] because, if the bill shows delay and is silent about excuses therefor, the method of a plea would be to state that there is no such excuse, and because, by taking issue on such plea, and proving an excuse, the complainant could cut off all other defenses, and win the cause."

It will be observed that the learned author does not pronounce the plea an improper pleading, but only inappropriate and unwise. Although no exact precedent has been found the court is entirely clear, after an extended examination of analogous cases, that this plea was properly filed.

By setting it down for argument the complainants have admitted the facts therein alleged to be true. Briefly stated these facts are that third parties have openly infringed the patents for 11 years with the knowledge of the complainants and their predecessors; that the defendant is not a maker and seller, but only a user of the alleged infringing articles, and has, as the complainants well knew, been using such articles openly and notoriously for the last 11 years as a part of the apparatus for lighting its building in New York city; that although continuously within the jurisdiction of this court and abundantly able to respond in damages the complainants have never given any notice to the defendant or asserted any claim under either of the letters patent mentioned in the bill. The question, then, is this: Can a patentee maintain an equity action of in-

fringement against a mere user who has used the patented structure openly for a period of 11 years with the full knowledge of the patentee and without objection from him? It is thought that this question must be answered in the negative. *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. Rep. 418; *Galliher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. Rep. 873; *Foster v. Railroad Co.*, 146 U. S. 88, 13 Sup. Ct. Rep. 28; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350; 3 Rob. Pat. § 1194; *Coats v. Merrick Thread Co.*, 13 Sup. Ct. Rep. 966; and cases cited in *Kittle v. Hall*, 29 Fed. Rep. 508. The bill alleges that the defendant has been infringing "ever since the 27th day of December, A. D. 1881." In *Brush Electric Co. v. Ball Electric Light Co.*, 43 Fed. Rep. 899, this court had a similar allegation under consideration, and, by implication, decided that a bill which alleged a continuous infringement for 10 years without excuse, was bad on demurrer. The bill in that case was saved, however, because the word "since" was construed to mean not "ever since," but "subsequently to" the date of the patent.

The case at bar differs in many respects from the cases cited in support of the bill chiefly because it is affirmatively established by the allegations of the plea that the patents were plundered openly and continuously by the public without complaint by the owners of the patent, and that the defendant's alleged infringement was well known to them during 11 years and was acquiesced in without even a notice to desist. The fact, too, that the defendant is only a user would seem to dispose of the doctrine applicable to a multiplicity of suits as well as other grounds of equitable cognizance. It must be conceded within all the authorities that, upon the admitted facts here, an accounting and a preliminary injunction are out of the question, and it is difficult to imagine upon what theory a permanent injunction can issue. The theory of the rule is that as the defendant has used these fixtures for 11 years with the permission of the complainants they cannot now complain of their use. If the defendant were making and selling new fixtures and thus interfering with the complainants' business the rule might be different, but it would seem that the rights of the parties are fixed and determined as to the structures which the defendant has used so long with the complainants' implied consent. In other words, the complainants can only be injured to the extent of their license fee, and the right to recover this has been lost by their own negligence. The doctrine of *McLean v. Fleming*, 96 U. S. 245, and *Menendez v. Holt*, 128 U. S. 514, 523, 9 Sup. Ct. Rep. 143, is invoked by the complainants. Although both these cases relate to trade-marks no reason is perceived why the principle there enunciated should not be applicable to patent causes, but it is thought that it is not applicable to the facts in hand for reasons already given.

It was stated at the argument that there was ample excuse for the delay in bringing the action, and that one object in setting the plea down for argument was to have a precedent established by a determination of the question whether a complainant should be required to allege his excuses for delay in the bill or reply to the allegations of the answer setting up the defense of laches. The court

is of the opinion that, even if the complainants are right upon the proposition that the bill in its present form can be sustained for a portion of the relief prayed for, it is much wiser and safer to amend the bill by setting up all the facts upon which they rely. Where the delay appears upon the face of the bill the excuse should appear also. In *Badger v. Badger*, 2 Wall. 87, the court says that the complainant in a suit in equity "should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent fraudulently to keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiry whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

It is thought, therefore, that the plea must be allowed, but with leave to the complainants to amend their bill within 20 days.

SMITH v. STEWART et al.

(Circuit Court, E. D. Pennsylvania. April 24, 1893.)

No. 11.

1. DESIGN PATENTS—NOVELTY AND INVENTION—NEW APPEARANCE.

The invention and novelty required in the case of design patents is very small and of low order, and differs from the novelty and invention required for mechanical patents. All that the statute requires in the case of designs is the production of a new and pleasing design which may add value to the object for which it was intended.

2. SAME—MASONIC DESIGN FOR DECORATING RUGS.

Design patent No. 18,703, granted October 23, 1888, to William T. Smith, for a masonic design for decorating rugs, consisting of the selection of certain masonic symbols, and the grouping thereof in an orderly and tasteful manner, so as to form what many would consider an attractive panel, large enough to cover the face of the rug, involves novelty and invention, and is valid.

3. SAME—INVENTOR—CONCEPTION OF IDEA—ADJUSTMENT OF DETAILS BY DRAUGHTSMAN.

An allegation that a design was invented by the patentee's draughtsman, and not by the patentee, is not sustained where it appears that the patentee conceived the idea and manner of carrying it out, although the draughtsman applied the idea and made the drawing.

4. SAME—INFRINGEMENT—RUGS.

Design patent No. 18,703, for a design for decorating rugs consisting of a panel, on which certain masonic symbols are arranged, with a border of oak leaves, is infringed by the manufacture of rugs which follow the patented design literally, except the border, the distinguishing and dominating feature of the patented design being the panel.

5. SAME—INFRINGEMENT—AMOUNT RECOVERABLE.

In a suit for infringing a design patent for rugs, it appeared that the defendants had copied the plaintiff's design; that the rugs manufactured by the plaintiff were marked as the statute requires; and that from the one copied the mark had been removed. One of the defendants testified that he was not aware of the patent, and that he inquired of the designer of the copy about it, and was told that there was no patent. At that time the patent had not issued, but had been applied for. The defendants

knew that the design was the complainant's, and that he alone was using it. They also knew that the designer of the copy could not obtain rugs from the complainant. *Held*, that it was the duty of the defendants, before manufacturing, to inquire of the complainant as to the existence of the patent, and that complainant was entitled to judgment for \$250, under the act of congress of February 4, 1887, entitling the owner of a design patent to recover that sum.

In Equity. Bill by William T. Smith against John Stewart and others for the infringement of design patent No. 18,703. Decree for complainant.

Joseph C. Fraley, for complainant.

Hector T. Fenton, for defendants.

BUTLER, District Judge. The suit is to recover damages for infringement of design patent No. 18,703, granted the complainant October 23, 1888. The defenses are, substantially, want of novelty and invention; failure to mark the rugs as required by law; and noninfringement. As respects the third—alleged failure to mark—no room exists for doubt; the proofs show compliance with the statute.

If the question what constitutes novelty, and invention, in the sense of the statute here involved, was now raised for the first time, I might possibly agree with the defendants. It has, however, been raised many times heretofore; and while the decisions are substantially harmonious, the expressions of commissioners and judges regarding it are not. I have examined the cases, but do not propose to discuss them. The application of expressions found in a few of them would, I think, overturn a majority of design patents granted, and many of those which have been sustained by the courts. It would seem absurd to say that the designs covered by these patents, generally, exhibit the exercise of "inventive genius," as the term is commonly applied to mechanical inventions. Turning, for example, to the spoon and fork handle design in the hotly-contested case of *Gorham Co. v. White*, 14 Wall. 511, nothing more is found than the skillful use of common scroll work, exhibiting little, if anything, more than good taste; and yet the question of novelty and invention was not even raised; the same may be said of the designs involved in a majority of reported cases. Some of the rules applied to mechanical patents are wholly inapplicable to those for designs. As said by the supreme court in *Gorham Co. v. White*: "To speak of the invention as a combination * * * or to treat it as such is to overlook its peculiarities." Such designs generally, if not uniformly, contain nothing new except the appearance presented to the eye, by arrangement of previously existing material; such as lines, scrolls, flowers, leaves, birds, and the like. The combination, where several separate objects are employed, need not be, and cannot be, such as this term signifies when applied to machinery—"the parts coacting to produce a new and useful result" in the sense there contemplated. The object sought in a design is a new effect upon the eye alone—a new appearance; and the several parts need not have any other connection than is necessary to accomplish

this result. As the supreme court said in the case just cited: "It is the appearance simply, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law of design patents deems worthy of recompense. This appearance may be the result of peculiarity of configuration, of one element alone, or of several conjointly; but, in whatever way produced," it is the new appearance only which the law regards. The invention in a majority of patented designs is very small, and of a low order. All the statute, as commonly interpreted, requires is the production of a new and pleasing design, which may add value to the object for which it is intended. The invention consists in the conception and production of this, however simple it may be. As said in *Robinson on Patents*: (page 293) "The essence of a design resides in the idea of that configuration or ornamentation which constitutes the new appearance given." And again, as said in *Untermeyer v. Freund*, 37 Fed. Rep. 342: "If a design presents a different impression upon the eye from anything which preceded it, if it proves to be pleasing and popular, if it creates a demand for the article to which it is applied, though it be simple and does not show a wide departure from other designs, it will be protected." See *Simpson v. Davis*, 20 Blatchf. 413, 12 Fed. Rep. 144. See, also, in this connection, *Wood v. Dolby*, 7 Fed. Rep. 475, where a design which consisted of a bird upon a twig, with various unconnected accessories, was held to be new and patentable, although bird designs, of slightly different appearance, were found to be old.

In the case before us the object sought was a masonic design for decorating rugs, by means of which they might be made popular with members and friends of that and similar orders. He therefore selected certain masonic symbols, and grouped them in an orderly and tasteful manner so as to form what many would consider an attractive panel, large enough to cover the face of the rug. He succeeded in his object; the rug became popular, and met with active demand. The invention consisted in the conception of this design and carrying it into practical effect.

The allegation that the invention was made by the patentee's draughtsman is not sustained. The patentee conceived the idea and the manner of carrying it out. It was not necessary that he should do the drawing. *Sparkman v. Higgins*, 1 Blatchf. 206.

Did the defendants infringe? They copied the rug literally, except the border. In the printed drawings which accompany the patent the border is so imperfect that the peculiar character of its figures cannot be ascertained. The rug copied was manufactured under the patent with an oak-leaf border, which the proofs show corresponds with the photograph of the original design deposited in the patent office. I do not, however, deem this important. The distinguishing and dominating feature of the design is the panel. A common observer would not discover any difference between the plaintiffs' and defendants' rugs, granting that the borders are dissimilar. As said in *Gorham Co. v. White*, this is the test. The difference between the spoon and fork handles there involved, was more likely to be seen than the difference between these rugs, and

yet the defendant was held to have infringed. The complainant must therefore have a decree. But for what? In *Schofield v. Dunlop*, 42 Fed. Rep. 323, this court said the provision of the statute of February 4, 1887, (Stat. U. S. 1885-87, c. 105,) entitling the owner of a design patent infringed to recover \$250, applies only where the infringement is willful—that the sum is a penalty inflicted for such infringement. What was thus said, however, was unnecessary to a decision of the case; and should therefore have been omitted. There was no evidence to repel the presumption that the defendant was aware of the patent. The subject was discussed at length by counsel, and the court was thus led to speak of it. Whether the view expressed was well founded need not be considered here. It appears from the report of *Pirkl v. Smith*, 42 Fed. Rep. 410, decided about the same time in New York, that the court there expressed a different view. The question, however, was not involved there either; and the decisions in the two cases are harmonious. In the latter, as in the former, the presumption that the patented articles were marked, and that the respondent had therefore implied notice, existed. In neither was there proof that he had not. The court, in the New York case, says the defendant “denies” notice; but this means simply that the answer denies it; not that the proofs do. As before stated, this case does not call for a decision of the question. The defendants cannot be regarded as innocent or unwitting infringers. The proofs show that the rugs were marked as the statute requires. From the one copied the mark had been removed. A member of the defendant firm testifies that he was unaware of the patent, and inquired of McElroy, who designed the copies, about it, and was told there was no patent. At that time the patent had not issued; but an application was pending, and it did issue before any of the rugs were delivered, and before a large part of them were made. The defendants knew, as is admitted, that the design was the complainant’s, and that he alone was using it. They evidently suspected, at least, that they could not properly use it. The conversation with McElroy indicates this. They had sufficient knowledge, therefore, to put them on inquiry. What McElroy said was insufficient to excuse them. Inquiry of Mr. Smith, or of others who might be expected to know, would have removed all doubt. McElroy was not disinterested; he was unable to obtain the rug from Smith, as he told Stewart, and therefore sought his aid. Under the circumstances, it was the defendants’ duty to make further inquiry. The inference is justifiable that they desired the employment, and chose to take the risk. The plaintiff must therefore have a decree for the sum named.

CONSOLIDATED ELECTRIC STORAGE CO. et al. v. ACCUMULATOR CO.

(Circuit Court of Appeals, Third Circuit. April 25, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

In a suit for the infringement of a patent, which had been upheld by the circuit court of another circuit in a prior suit, it was shown that the defendant company was the successor of the defendant in the prior suit, having the same president, operating the same plant, and doing the same business. Before the hearing of the motion for preliminary injunction, defendant had completed its proofs as to the expiration of a Spanish patent, alleged to be for the same device as that sued on, claiming that such expiration avoided the latter. It appeared that the prior suit had been opened to admit this defense, but the court, after the hearing, refused to suspend the injunction. *Held*, that it was within the discretion of the court in the present suit to grant the preliminary injunction, and require complainant to give bond to indemnify defendant in case the suit were determined in his favor. 53 Fed. Rep. 796, affirmed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit by the Accumulator Company for infringement of a patent. Complainant's motion for a preliminary injunction was granted below, (53 Fed. Rep. 796,) and defendants appeal. Affirmed.

Wm. H. Kenyon and C. E. Mitchell, for appellants.

Frederic H. Betts, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

ACHESON, Circuit Judge. This being an appeal from an interlocutory decree granting a provisional injunction, the only question properly before us for determination is whether or not the legal discretionary power of the court below was fairly exercised under all the circumstances. It would be altogether premature for us to pass upon the merits of the case, or to consider with a view to a definitive judgment the important and close questions involved in this litigation. The action of the court below complained of was based upon adjudications of the United States circuit court for the southern district of New York. Judge Coxe, in *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. Rep. 117, 39 Fed. Rep. 490, after a protracted litigation, at final hearing sustained the first claim of Faure's patent, (here in suit,) and granted an injunction. In a later suit for the infringement of the patent (*Electrical Accumulator Co. v. New York & H. R. Co.*, 40 Fed. Rep. 328) Judge Lacombe granted a preliminary injunction. Thereafter the Julien Electric Company, which was a New York corporation, ceased to do business, and a New Jersey corporation, the present appellant, (the defendant company below,) was formed; and this new company transferred to New Jersey the plant and business of the New York corporation. William Bracken, who had been president of the Julien Electric Company, and was a codefendant with it in the first

New York suit, became the president of the New Jersey Company, and is a defendant in the present suit. Whether or not legal privity, strictly speaking, exists between the enjoined New York corporation and the New Jersey corporation, the court below has found, and the fact seems to be, that the appellant company is substantially the old concern, with another name, acting under a new corporate organization. Mr. Bracken's affidavit impliedly concedes that since October, 1891, the appellant company has been doing that which Judge Lacombe held to be an infringement of Faure's patent.

In October, 1891, the Julien Electric Company made application to Judge Coxe to dissolve the injunction which had been granted against that company, on the ground that Faure's American patent had terminated on June 27, 1891, by reason of the expiration at that date of a Spanish patent which had been granted to him. While the court opened the case to admit this new defense, the motion to suspend the injunction was denied by Judge Coxe. *Electrical Accumulator Co. v. Julien Electric Co.*, 47 Fed. Rep. 892.

The bill in this case was filed January 7, 1892. Two days later, notice of a motion for a preliminary injunction was given to the defendants. On January 19th there was an order to show cause. The hearing, however, did not take place until December, 1892. In the mean time the proofs respecting the Spanish patent had been completed, except the putting in of the file wrapper and its contents in Faure's American application, but the other proofs were incomplete. On January 20, 1893, the court made its interlocutory decree granting an injunction, but upon condition that the plaintiff give a bond for \$5,000 to secure the defendants against pecuniary damages, if ultimately the decision of the court should be in their favor. The court below regarded the defendants as virtually enjoined by the court of the second circuit, and, without undertaking to express a positive judgment upon the question whether the Spanish and American patents were for the same invention, was of the opinion that the defendants should be held under injunction in this jurisdiction until the rights of the parties should be determined at final hearing. Now, having regard to all the circumstances, we are not prepared to say that this conclusion was unreasonable, or that the granting of an injunction *pendente lite* upon the terms prescribed was an improvident exercise by the court of its legal discretion. True, in view of the fact that the case was nearly ready for final hearing in December, 1892, the court might well have declined then to hear the motion made the previous January. But it is not satisfactorily shown to us that the plaintiff was responsible for that delay, or was guilty of any laches; and whether the motion should be heard at so late a day was peculiarly a matter for the determination of the judge below, who had personal knowledge of the causes for the delay in taking up the application.

We ought here to state that we deny the appellants' motion for leave to file in this court, as part of the proofs, the file wrapper and its contents in Faure's American application. As this evidence was not before the court below, it ought not to be considered here.

Should a like motion be made in the court below, it will doubtless be granted. Upon the case as now presented, and without intending to intimate any opinion upon questions affecting the final rights of the parties, we affirm the interlocutory decree.

JOHNSON RAILROAD SIGNAL CO. v. UNION SWITCH & SIGNAL CO.

(Circuit Court of Appeals, Third Circuit. April 17, 1893.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—WHAT CONSTITUTES SALE.

A railroad company had acquired by license from the patentee the right to make and use patented signals on its lines, and it contracted with defendant, a switch and signal company, to make and erect them for a stipulated compensation, which defendant accordingly did. *Held*, that this was not a sale of the patented device by defendant, and hence it did not constitute infringement. 52 Fed. Rep. 867, reversed.

2. SAME—THREAT TO INFRINGE.

Another railroad company advertised for proposals to furnish materials and do certain work on its line, which included furnishing and erecting such patented signals. Defendant offered to do the work, and furnish everything required except the signals, representing that these could be obtained for about \$500 additional. The railroad company declined this offer, and defendant then proposed to furnish these signals for the additional \$500; but a few days later it withdrew the proposal. *Held*, that this was not such a threat to infringe the patent as to warrant an injunction; for the presumption is that defendant intended to procure the signals by lawful means.

Appeal from the Circuit Court of the United States for the District of New Jersey.

In Equity. Bill by the Union Switch & Signal Company against the Johnson Railroad Signal Company for infringement of a patent. There was a decree for complainant, (52 Fed. Rep. 867,) and defendant appeals. Reversed.

Edwin H. Brown, for appellant.

J. Snowden Bell, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

BUTLER, District Judge. The only questions presented by the assignments of error, requiring consideration, grow out of the charge of infringement, which is based on alleged sales to the Boston & Albany Railroad Company, and an alleged offer to sell to the Old Colony Railroad Company, of Massachusetts. We do not think either allegation is sustained by the proofs.

As respects the first, the facts are that the railroad company, first named, having acquired a right by license to make and use the signals on its lines, contracted with the appellant to make and erect them for a stipulated compensation; and that the latter did make and erect them accordingly. This was not a violation of the appellee's rights. The appellee, however, claims that it was, because the transaction, as it thinks, constituted a sale within the meaning and prohibition of the patent laws. A contract to make

and deliver specified articles for a given sum, is held under the statute of frauds not to constitute a sale, but simply an agreement for materials and labor. *Mixer v. Howarth*, 21 Pick. 205; *Spencer v. Cone*, 1 Metc. (Mass.) 283; *Goddard v. Binney*, 115 Mass. 450. It is unimportant here, however, by what name the transaction is designated. No injury resulted to the appellee. The appellant did for the railroad company, at its instance, only what the latter had a right to do under its license. The suggestion that it could not employ others to make the signals for its use, but must make them itself at its own shops, by its own workmen, is unwarranted by anything found in the license, or elsewhere. As it had a right to make them the appellee is not interested in the place or manner of its exercise. Nor is there any support for the suggestion that the appellee is entitled to a profit on the manufacture. The right to such profit passed with the license, irrespective of the individual who might do the work.

As regards the alleged threat, we find nothing in the proofs to sustain the allegation. It appears that the Old Colony Railroad Company advertised for proposals to furnish materials and do certain work on its line, which included furnishing and erecting these signals. The appellant offered to do the work and furnish everything required except the signals; representing that these could be obtained for about \$500 additional. The railroad company declined the offer thus made; and the appellant then proposed to furnish the signals for the additional sum named. A day or two later, however, it withdrew the proposal. There is nothing in this to justify a belief that the appellant contemplated an infringement of the patent. The only justifiable inference from its offer to furnish the signals is that it intended to procure them from some one authorized to sell, or by other lawful means. But in any view of the transaction it does not show such a threat to infringe, when the bill was filed, as justifies an injunction. There is no evidence that it had the signals on hand for sale, or contemplated having them.

The decree must, therefore, be reversed, with directions to dismiss the bill.

NATIONAL FOLDING BOX & PAPER CO. v. AMERICAN PAPER PAIL
& BOX CO. et al.

(Circuit Court, S. D. New York. May 3, 1893.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PAPER BOXES.

The second claim of letters patent No. 171,866, issued January 4, 1876, to Reuben Ritter, for an improvement in paper boxes, describes a box consisting of a single sheet of paper, and retaining its shape by the interlocking of flaps projecting from the sides into slots at the ends. The slots are perpendicular to the bottom of the box, and made longer than the width of the flaps, so that, when adjusted, the straight edge of the flap engages with the straight edge of the slot, and does not merely hook into the corner of it. In defendant's box, while the projections of the flaps are substantially the same as those of the patent, the slots are at an angle with the vertical corner of the box, instead of parallel with it, but the straight edge of the projection is also altered, so that its locking edge and

the locking edge of the slot are parallel with each other. A transverse slot is added at the upper extremity of the locking slot, but the projection and the slot engage straight edge to straight edge. *Held*, that there is an infringement, notwithstanding the apparent differences. 51 Fed. Rep. 229, 2 C. C. A. 165, followed.

2. SAME—ASSIGNMENT BY CORPORATION—VALIDITY.

An assignment of a patent, signed with the name of a certain corporation "by O. M. Hamilton, Treasurer," sealed with the corporate seal, and duly recorded in the patent office, is *prima facie* valid, and does not leave on one claiming thereunder the burden of showing that the act of the treasurer was authorized by the directors.

In Equity. Suit by the National Folding Box & Paper Company against the American Paper Pail & Box Company and Isador Tahl for infringement of a patent. A preliminary injunction was granted, (48 Fed. Rep. 913,) and the order allowing the same was affirmed by the circuit court of appeals. 51 Fed. Rep. 230, 2 C. C. A. 165. The cause is now on final hearing. Decree for complainant.

Walter D. Edmonds, for complainant.

Michael H. Cardozo and R. Bach McMaster, for defendants.

COXE, District Judge. This is an equity action for infringement, founded upon the second claim of letters patent No. 171,866, granted to Reuben Ritter, January 4, 1876, for an improvement in paper boxes. The patent expired *pendente lite*. The defenses are lack of novelty and invention, noninfringement, and defective title. The patent has been before the courts several times, and every question relating to the merits has been adjudicated by this court. *Box Co. v. Nugent*, 41 Fed. Rep. 139; *American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, (the case at bar on preliminary injunction,) 48 Fed. Rep. 913, affirmed, 51 Fed. Rep. 229, 2 C. C. A. 165. The court is unable to find anything in the record to break the controlling force of these decisions. The records are substantially the same; no new testimony of importance has been introduced and no new defenses have been interposed. The effort to prove that the original suit was collusive has signally failed. The fact that the defendants in that suit, after being defeated, settled their controversy with the then owner of the patent, falls very far short of establishing the proposition that they were in cahoot with the complainant to have the patent sustained. That the defense was genuine is clearly established by the fact that the defendants in this cause have not been able to improve upon it. They rely upon the same proofs that were advanced in the *Nugent Case*.

All of the questions now presented, except the question of title, are *res judicata* in this court. The question regarding the title is as follows: One of the links in the chain of title is an assignment by the Chicopee Company to Theodore Pinkham, assignee. This assignment is signed "Chicopee Folding Box Company, by O. M. Hamilton, Treasurer," and has the seal of the corporation attached. It was duly recorded. The objection taken by the defendants is "that there is no proof that said Hamilton, who executes said purported assignment, was at said time the treasurer of said

company, or that he had power or authority to execute said assignment." It is argued that it was incumbent upon the complainant in the first instance to prove that Hamilton was the treasurer of the company and that his act in signing the name of the corporation was duly authorized by its board of directors. It is unnecessary to refer to the evidence tending to show that the act of the treasurer was duly authorized and that it was made pursuant to the insolvency laws of the commonwealth of Massachusetts, for the reason that it is thought that the assignment itself was *prima facie* sufficient. A contrary ruling would put the owners of patents to a vast amount of needless annoyance and expense. When a certified copy of an assignment which has been duly recorded in the patent office and which is sufficient on its face to pass the title, is introduced in evidence, enough has been done to put the defendant to his proof. The authority must be presumed till the contrary appears. *Bank v. Dandridge*, 12 Wheat. 64; *Academy v. McKechnie*, 90 N. Y. 618, 629; *Jackson v. Campbell*, 5 Wend. 572, 575; *Dederick v. Agricultural Co.*, 26 Fed. Rep. 763; *Parker v. Haworth*, 4 McLean, 370; *Ang. & A. Corp.* § 224.

The complainant is entitled to a decree for an accounting.

EDISON ELECTRIC LIGHT CO. v. WESTINGHOUSE et al.

(Circuit Court, D. New Jersey. April 10, 1893.)

1. PATENTS—ELECTRIC LIGHT—EDISON FEEDER PATENT.

Letters patent No. 264,642, issued to Thomas A. Edison, September 19, 1882, for an "electric distribution and translation system," consist of a combination of two circuits,—the one, a consumption circuit, in the main conductors of which the "drop in tension" is not sufficient to vary, practically, the candle power of the lamps connected therewith; and the other, a feeder circuit, having upon it no translating devices, so that all the harmful "drop in tension" due to distance may be located upon it without affecting the relative candle power of the lamps in the consumption circuit. *Held* that, in view of the prior state of the art, the patent involves a union of distinctive elements, forming a patentable combination, and not merely a collocation or aggregation of elements, which is not patentable.

2. SAME—ANTICIPATION—WERDERMANN BRITISH PATENT.

The invention described in the Edison patent was not anticipated by the invention described in the British letters patent granted June 21, 1878, to Richard Werdermann, for an improvement in apparatus for electric lighting, in which the patentee endeavored to overcome the "drop in tension" by compelling the electrical current to pass over or through an equal length and sectional area of a conductor in going to and returning from each lamp, by so arranging the parallel circuits in which the lights are included that the light which is the first one or the nearest to the source of electricity on a positive conductor is also the first or nearest to the source of electricity on the negative conductor, or by so arranging them that the lamp or light which is first with regard to its position on the positive conductor is last with regard to its connection with the negative conductor.

3. SAME—ANTICIPATION—KHOTINSKY FRENCH PATENT.

The Edison invention was not anticipated by the invention described in the French letters patent issued March 19, 1875, to M. D. Khotinsky, for improvements in electric lighting, consisting—First, of a peculiar arrangement of the conductors of the electrical current, which permits the current to pass into each lamp or light independent of the others, so that the

variation or failure of light in one lamp has no effect upon the others; and, second, the arrangement of the burners of the lamps in such a manner that after the consumption in service of one carbon, or other luminous conductor, the current passes automatically into another luminous conductor, and from that into a third, and, after the consumption of all the luminous conductors provided, the current travels automatically to a spiral or conductor of any form, whose resistance is equal to that of the lamp in connection as described; such letters patent containing an indication that the inventor intended to obviate the "drop in tension" incidental to an extended system of lighting, and not disclosing the law for the proportions of the circuit in regard to the number of lamps connected therewith, nor giving any data by which it might be concluded that the lamps would vary from each other in candle power, which variance would be cured by the invention.

4. SAME—ANTICIPATION—LANE-FOX LETTERS PATENT.

The invention described in the Edison letters patent was not anticipated by the inventions for which two British letters patent were granted to Lane-Fox in 1878, although these inventions were intended to obviate the difficulties due to "drop in tension;" the form adopted being to enlarge the system of conductors as they approach nearer to the central station, forming what is generally known as the "Tree System,"—a system of distribution in which the electrical energy starts from the central station on the largest of the conductors in the system, and divides itself into so many branches as are required to operate the lamps; the branches diminishing in sectional area as the distance from the central station increases; the system being aided by attaching Plante batteries for storing up electricity, and distributing it.

5. SAME — ANTICIPATION — METHODS IN USE FOR DISTRIBUTION OF GAS AND WATER.

The invention described in the Edison letters patent was not anticipated by the prior methods and systems of gas and water distribution for public use; these methods and systems not being such as to form a basis upon which the Edison electric system could have been constructed.

6. SAME — ANTICIPATION — METHODS EMPLOYED IN ELECTROTYPING AND ELECTROPLATING.

The Edison invention was not anticipated by the methods in which electricity had previously been utilized in electrotyping and electroplating.

In Equity. Bill by the Edison Electric Light Company against Westinghouse, Church, Kerr & Co., to restrain an alleged infringement of letters patent. Decree for complainant.

Betts, Atterbury, Hyde & Betts, Frederic H. Betts, Eaton & Lewis, and S. B. Eaton, for complainant.

Kerr & Curtis and Leonard E. Curtis, for defendants.

GREEN, District Judge. The bill of complaint in this cause charges the infringement by the defendants of letters patent No. 264,642, granted Thomas A. Edison, September 19, 1882, for an "electric distribution and translation system." The alleged infringement is charged to be the construction and operation of an "electric light plant" in the city of Trenton, in this state.

Previously to the issuing of the letters patent, and on or about the 21st day of June, 1881, Mr. Edison duly assigned to the complainant all his right, title, and interest in and to the said invention, and any letters patent of the United States which might thereafter be granted to him therefor. The invention which was intended to be secured by the letters patent is declared by Mr. Edison, in the specification, to relate to a method of equalizing the tension

or "pressure" of the current through an entire system of electric lighting, or other translation of electric force, preventing what is ordinarily known as a "drop" in those portions of the system the more remote from the central station.

Six claims were made in the letters patent, but, of these, only the 1st, 2d, and 3d are relied upon by the complainant in this action. They are as follows:

(1) A consumption circuit, in the main conductors of which the drop in tension is not sufficient to vary, practically, the candle power of the lamps connected therewith, in combination with feeding conductors connecting the consumption circuit with the source of electrical energy, and having no translating devices connected therewith,—the drop in tension upon such feeding conductors not affecting the relative candle power of the lamps of the consumption circuit,—substantially as set forth.

(2) A consumption circuit, in the main conductors of which there is a definite, small drop in tension, not sufficient to vary, practically, the candle power of the lamps connected therewith, in combination with feeding conductors connecting the consumption circuit with the source of electrical energy, and having no translating devices connected therewith; the loss upon such feeding conductors being greater than upon the main conductors of the consumption circuit,—substantially as set forth.

(3) The combination of a consumption circuit, in the main conductors of which the drop in tension is not sufficient to vary, practically, the candle power of the lamps connected therewith, with a feeding circuit having no translating devices, and extending from the source of electrical energy to the center of the consumption circuit, substantially as set forth.

The defendants, by their answer filed in this suit, deny infringement, and insist that there is no patentable novelty in the alleged invention; contending that the invention claimed by Mr. Edison had been anticipated by various preceding patents, and had been described in numerous scientific and technical publications, and that the method and system of gas and water supply now customarily in use in large cities were entirely analogous and similar to the scheme devised by Mr. Edison for electrical distribution.

It goes without saying that no problem ever so severely vexed the marvelous ingenuity of invention as that which concerned itself with the safe, economical, and successful distribution of electric light over a large area of territory by subdivision of the current. The problem involved, as apparently unresolvable factors, not only the bringing to perfectibility the devices by which the translating of electrical vibrating force, electrical current, or electrical energy into the illuminating light could be readily and surely accomplished, but, as well, the successful evolution of a method or a process whereby the same current could be thoroughly divided in supply to numerous translating devices, and be rendered so subject to regulation that its operation under all imaginable circumstances should be uniform. In other words, the problem was to devise a system of distribution by which the current of electricity necessary to operate

the lamps in a district or territory of large area could be propelled to all parts of the district, at all times, in such volume, and under such pressure, as to cause all the lamps operated to develop a practically uniform and useful amount of illuminating power. Not more than 10 years have gone by since the most learned and astute scientists on both sides of the Atlantic unitedly declared the utter impossibility of its solution. After the most careful consideration, the most incessant experimentation, the intensest study, electricians and physicists acknowledged their inability to conquer success. At this time, indeed, the obtaining of light from a single lamp, or from a small group of lamps, by transmission of electric current, had been successfully accomplished. Edward Austin King, as far back as 1846, had been granted by the English government letters patent for an invention which consisted in "the application of continuous metallic and carbon conductors, intensely heated by the passage of a current of electricity, to the purposes of illuminating." And ever since, down to the very present, the records of the various departments for the granting of letters patent in almost every nation teem with descriptions of the inventions of those who have devoted their time and exercised their skill in the investigation of the subject of electrical illumination, and who have published in this manner their conclusions to the world.

But the successful production of "light" as the result of the intense heating of a carbon or metallic conductor by a current of electricity accomplished little or nothing towards overcoming those difficulties which were considered insurmountable by learned men, and were regarded as standing directly in the way of successful lighting of large districts by the illuminating power of the electric current. Those difficulties were the economic distribution and the proper division of the electrical current on a scale, and under conditions of convenience, adequate to a system of illumination for domestic purposes, in villages and cities, analogous to that of gas. The chief difficulty arose out of the admitted fact that no method was known at that time by which the electric current necessary to operate the lamps of such low candle power as to be comparable in illuminating power with the light from ordinary gas burners, could be sent to all parts of the territory to be supplied, at all times, in such volume, and under such pressure or tension as to cause all the lamps to develop a useful amount of light, at the same time having the current so regulated and controlled that it would never rise in degree at any lamp so as to injure the lamp itself by excess of power; that the system, practically, should be so arranged that the consumer would be enabled to illuminate or extinguish all the lamps on his premises without sensibly affecting the current of electricity passing by him to other lamps. In other words, the question was, how could there be delivered to all lamps in use, whether few or many, at all times a uniform current of electricity, of intensity severely adequate for the work required to be done?

In the attempt to solve the problem of electric lighting, two systems of arranging the translating devices with reference to the source of the electrical current or energy, and to each other, have

been suggested and tested by practical use. The one is known as the "Series" system; the other, as the "Multiple Arc" system.

In the series system the translating devices or lamps are arranged upon a single conductor wire, along and through or by means of which the electric current is impulsed through its entire length, and to each lamp, causing each lamp to be illuminated successively. As the current in such a system must, of necessity, pass through each intervening lamp between the generator and the end of the circuit to reach the one beyond, it is obvious that to overcome the joint resistance of the conducting wire, and of each lamp, it must be the subject of very great propulsive force. In the multiple arc system, lamps are arranged upon parallel bridges connecting the outgoing with the incoming conductor, and are supplied with electrical current simultaneously. In operating such a system the current sent from the generator, upon reaching the first bridge, itself divides; one part going over the bridge to the first lamp, and the balance surging forward to the second bridge and lamp, where the same action is repeated. In this system each lamp is practically independent of any other in the system, so far as the mere translation of the current into light is concerned. The electrical current which burns illumination into the first lamp has performed entirely its destined work, and in no wise concerns itself with any other lamp in the system. Each lamp is operated by its own proportion of the current. Hence, it follows that the distinctive characteristic of this system is found in the very great quantity of current which is required for successful operation in a large system; for at each lamp the primal electric current is necessarily diminished by that portion which devotes itself to the operation of that lamp.

That these two systems marked a great advance in electrical lighting is very apparent. Yet, when put to the test of use in the lighting of large areas, defects that seemed fatal speedily manifested themselves. Thus, in the series system, there was first the difficulty that—as all the lights were placed upon the one conductor wire, and the same current necessarily passed through each lamp in succession—the initial propulsive force exerted upon it must equal the sum of the resistance of all the lamps in the system. That the electric pressure might be kept within manageable bounds would, of necessity, greatly limit the number of lamps. Another and equally serious defect was caused by the fact that the extinguishment of one lamp by the breaking of the circuit necessarily extinguished all lamps; for the breaking of the circuit at any point severed its continuity, and caused an absolute stoppage of the progress of the current. The putting out of one lamp by destruction of the circuit extinguished all lamps upon the circuit.

The difficulty in the multiple arc system was equally disheartening, looked at from a financial standpoint. As was stated, in such system each lamp depends upon and receives a portion of the whole of the electrical current for its own wants and separate use. The "supply current," so called, must therefore, at the outset, be very large in quantity. Each lamp diminishes the whole by a certain

percentage. To operate, therefore, successfully, a system constructed on this theory, and covering an extensive area, and a very large number of lamps, the conductor wire must be quite equal in size to the sum of all the wires which would pass from the source of electrical energy separately to and from each lamp in the system. In other words, to carry the excessive volume of electrical current required for the supply of the lamps in the multiple arc system over a large area, would necessarily require conductors enormous in size,—in bulk equal to the combined bulk of all the small conductors that would be used in carrying the current to each separate lamp, if separate illumination was attempted. The cost of such enormous conductors, if the area of lighting was extensive, and the lamps very many in number, became simply prohibitory. Financially, the multiple arc system, as a means of extensive electrical lighting, was doomed to failure by this unfortunate necessity.

There remains yet another difficulty inherent in all systems of electric lighting,—in fact, in all systems or methods of transmission of electric energy or current,—which still further complicated the problem which we have been considering, and it arose from what is technically called “drop in tension.” “Drop in tension” means “loss of the propulsive force which measures initially the forward movement of the electrical energy or so-called ‘current’ as it leaves the generator, and seizes upon and follows the conductor.” This “drop in tension” is the necessary resultant of the obstructive operation of the molecules of the conductor to and upon the electrical energy or “potential,” as it is called, as it forces its way through the conducting matter. Whatever the primary force may be that generates these phenomena to which is given the concrete name “electricity,” it makes its presence known through a rapid vibration of the molecules of matter. What the exact character of those vibratory motions is can hardly be stated with scientific precision. It is quite enough to know that they differ in form, in direction of vibration, and in rapidity of movement.

Now, electrical energy can be utilized the more readily by being placed, to a certain extent, in confinement, and thus be compelled to exercise its power within certain defined limits; in other words, through the medium of a conductor, which simply means the substance or matter or thing which usually receives the electrical energy, and whose molecules readily respond to its resultant vibratory movements. Now, scientists declare that such electrical vibratory movements in a conductor depend, not only upon its specific character, but as well upon its size,—that is, its sectional area and length,—and that, the smaller the area in which these vibratory motions are propagated, the greater is the resistance offered. Accepting this as a law of electrical energy, it follows that, the larger the conductor in diameter, the less the resistance to the electrical energy as it passes through it; and, conversely, the smaller and more confined the space in which the vibrations are to be propagated, the greater the resistance to be encountered. In overcoming this resistance the current of electricity—or, more properly, the “electro-motive force or tension”—uses up a certain proportion of

itself, necessarily. This is true whether the resistance to be overcome is that obtruded in its path by the nature and character of the conductor, or arises from the work performed,—that is, the translation of the current into illumination, or other useful purpose. This inevitable loss or waste of tension caused by the self-expenditure of the force in subduing and overcoming the obstructions of the conductor is called “drop.” The longer the wire, the smaller its sectional area; the greater the number of translating devices upon it, the larger the loss or waste. Hence, it would follow that the difficulty arising from these causes in the lighting by electricity of large areas, including a great number of lamps, would be almost prohibitory. The rule which governs the loss or “drop in tension” was given, on the argument, as this:

“With a given expense for conductors of a multiple arc system, the proportion or percentage of drop in tension increases, approximately, directly as the number of lamps and as the square of the distance.”

Thus, twice as many lamps at twice the distance cause eight times the percentage of drop. It is quite apparent, then, that not a very great length of conductor, nor very many lamps, would be necessary speedily to cause a system to be wholly inoperative. The electro-motive force would be unequally used up in its effort to overcome the resistance, resulting in great inequality of action of lamps.

This statement, condensed from briefs of counsel in this case, discloses the problem which in 1880 electricians everywhere were trying to solve. How to light, not only economically, but how to light under any conditions, large areas, by the subdivision of electric force; how to overcome the resistance without the use of conductors so large as to be enormously expensive; how to prevent “drop in tension,” so that its effect upon the lamps in the circuit should relatively be negligible. Only Mr. Edison seems to have found the solution, and by this alleged invention. In the specification forming part of the letters patent in this case, he thus states by what method and means he grappled with the difficulties, and overcame them:

“This invention,” he says, “relates to a method of equalizing the tension or ‘pressure’ of the current through an entire system of electric lighting, or other translation of electric force, preventing what is ordinarily known as ‘drop’ in those portions of the system the more remote from the central station, and also to other features in systems for the utilization of electricity, as hereinafter explained.

“As is well known from patents already granted me, and prior applications pending, I use in my system an electric light formed of a continuing, incandescing conductor, large numbers of which are grouped into one system, supplied and regulated from a central station; main conductors leading from and to the central station; each lamp or translating device being in a derived circuit to the main conductors; the entire system being what is known as a ‘Multiple Arc’ system. From a central station the main conductors may proceed, and it is intended that they should, to a great distance, and supply a large number of translating devices. In such cases there is inevitably a difference in tension between various parts of the circuit, due to the resistance of the main conductors. This may be partially remedied by making the conductors very large near or at the station, gradually decreasing their size on conducting capacity; but such plan only lessens slightly the ratio of fall. To

obviate the difficulty I provide feeding conductors, which extend from the generator or generators to the main conductors of the lamp or consumption circuit or circuits; such feeding conductors not having any translating devices connected therewith, and being connected with the main conductors of the consumption circuit or circuits at the center, ends, or other points on such main conductors. From a central station several sets of such feeding conductors may run; each set feeding into its own lamp or consumption circuit or all the sets feeding into a connected system of lamp or consumption circuits. It will be seen that the drop upon the feeding conductors has no effect upon the relative candle power of the lamps of the system; the relative candle power of the lamps being affected only by the drop upon the main conductors of the consumption circuit or circuits between the end of a set of feeding conductors and points most distant from any feeding conductors. In order to maintain, practically, the same candle power throughout the system, the main conductors of the consumption circuit or circuits should be so proportioned that the drop in tension upon them shall not exceed a definite, small limit,—for example, five per cent. This drop will make a difference of less than a candle power in all the sixteen candle power lamps of the system, which difference is not perceptible to the eye. Upon the feeding conductors, however, any loss can be made. This loss will be varied according to localities, and the relative cost of copper for conducting purposes, and horse power for generation. This loss upon the feeding conductors in large and extended systems will generally be greater than upon the main conductors of the consumption circuit or circuits. It may be, for example, about fifteen per cent.; but circumstances might make it desirable to diminish the loss upon the feeding conductors down even as low as that upon the main conductors of the consumption circuit or circuits, or to increase the loss upon the feeders to more than fifteen per cent. * * *

"When it is desired to use a few lamps near the central station, they may be placed upon a direct circuit therefrom, with resistance at the commencement or home end of the circuit sufficient to then reduce the tension of the current in such circuit so that it shall only be equal to that in the more distant circuits, and one or more of such circuits may be combined with the circuits before described. When large buildings or blocks of buildings, using many lamps, are to be supplied, it may be desirable to lay therefor separate feeders, insulated from each other. Where several central stations are used in a city, each having feeding conductors leading to lamp-circuit conductors of the description before noted, it may be advisable to connect the feeding circuits of all the stations, equalizing the tension or pressure throughout the entire system of the place where the central stations are located."

In other words, Mr. Edison claims that the difficulties before alluded to, inherent in, and apparently prohibitory of, any system or method of lighting large areas of electricity, were surely obviated by his device of transmitting from the generator in a central station the energy or current along and through a conductor upon or in which the only "drop in tension" would be caused by the action of that energy or current in overcoming the resistance offered by the conductor itself, to another and independent conductor, upon which the translating devices should be congregated, and which would supply such a relatively small area, or parcel of a larger area, that the drop in tension suffered between the furthest translating device and the point of connection of the conductor would be negligible.

And this expresses, I think, what Mr. Edison intended should be comprehended in the three "claims" of his patent involved in this suit. To justify this statement it will be necessary to examine briefly the claims themselves. Regarding them in the most general way, they are simply claims for a combination. The combination

consists of two circuits,—the one, a consumption circuit; the other, a feeder circuit. But the consumption circuit is peculiar in its characteristics. It is a consumption circuit in the main conductors of which the drop in tension is not sufficient to vary, practically, the candle power of the lamps connected therewith. And the feeding circuit is equally peculiar, in that it has upon it no translating devices, and is of such nature and character, so far as its construction goes, that the drop in tension upon it shall not affect the relative candle power of the lamps in the consumption circuit. But this statement of the claims would be highly inaccurate, if permitted to stand alone. Other limitations must be regarded. Not only are the circuits, feeding and consumption, unique in their special characteristics, but, as well, are jointly applicable to the lighting by incandescent lamps, in multiple arc, of large areas, of which portions or parcels are very distant or remote from a central station, from which, however, emanates complete control. It is true that these latter limitations are not expressed in terms in the claims under consideration, or in either of them. But, in drafting the claims, Mr. Edison, by the words used, clearly referred to the descriptive phraseology of the specifications of his invention preceding them. This is apparent from his adding to each claim the words, "substantially as set forth." That is, he reads into each claim, and as a material part of it, by the admitted effect of those words which he uses, "substantially as set forth," the distinctive characteristics of the system of lighting by electricity which he had previously described with great particularity in the specifications. Those characteristics are: (1) The use of incandescent lamps; (2) the lighting of a large territory; (3) the unique service of the system of conductors; (4) the proportioning of the conductors for that service; (5) the forcing of the drop in tension to materialize where it was negligible; (6) the absolute equality of pressure on the mains.

It is wholly unnecessary to argue that this must be the effect of the use of these words, "substantially as set forth." They are clearly words of limitation, and they refer back to the descriptive specifications as the source of a qualification of the general statements of the claims, and so relegate the invention, as claimed, to a field within the purview and operation there specifically named. These descriptive limitations are expressed in the specification as follows:

"I use in my system an electric light formed of a continuous, incandescing conductor, large numbers of which are grouped into one system, supplied and regulated from a central station; main conductors leading from and to the central station; each lamp or translating device being in a derived circuit to the main conductors; the entire system being what is known as a 'Multiple Arc' system."

And again he says that his invention relates to—

"A method of equalizing the pressure or tension of the current through an entire system of electric lighting, or other translation of electric force, preventing what is ordinarily known as a 'drop' in those portions of the system the more remote from the central station."

These statements quoted from the specification show that the consumption circuit referred to as one of the elements of the combination stated in the claims is but a part of the whole system, of the specific character described in the specifications, and of which the characteristics are and were expressly intended to be such as stated.

And this construction, I think, is practically admitted to be the true construction of these claims by one of the principal expert witnesses produced by the defendants in support of their contention. I refer to the testimony of Mr. Pope in answer to \times -Q. 87, which is as follows:

"Is it not implied by the patent in suit that the systems of distribution to which the invention relates are only those in which some portions of the system are so remote from the central station that if all parts of the conductor and system of conductors from the central station to the extreme point or points of consumption were utilized for lighting purposes, by having lamps connected therewith, that such lamps would practically vary from each other in relative candle power by reason of excessive drop in tension?"

He says:

"I think it is implied by the patent, upon a fair construction, that the invention relates to a system of distribution in which many of the translating devices are quite remote from the central station, and that the patentee seeks to point out and describe such an arrangement of conductors as will avoid an unequal distribution of tension without incurring an inordinate expense for conductors. There can be no doubt, I think, that it was perfectly well known to electrical engineers long before August, 1880, that it was possible to avoid a variation in candle power in such a system, so far as candle power depended upon the quantity of current passing through a lamp, provided that the conductors might be made large enough to bring about such a result, and the question which presented itself at that time was how to secure these advantages without unnecessary waste of material."

"102 \times -Q. Are not the consumption circuits referred to in the patent circuits which, in extent, approximate the limit beyond which drop in tension is not negligible? A. It would be good engineering practice to make them so, and this is what I think the patent contemplates."

By the use of the words, therefore, referred to in the claims, this adaptability of the circuits—consumption and feeder—to these distinctive objects and purposes is thus indissolubly welded to, and made portion of, the elements of the combination called for and made requisite in the claims under consideration. If this construction of the scope and meaning of the claims be correct, it follows that Mr. Edison not only described, but properly claimed, a system, the general characteristics of which are that—

"It supplies electricity to 'consumers' using 'large numbers' of incandescent lamps in 'multiple arc,' requiring the maintenance of relatively equal difference of potential at their terminals, and so located with reference to each other, and to the station from which they are supplied, that, if supplied at one end of the circuit, the drop in tension between the nearest and most remote end could not be tolerated; that the supply is from a central station, separated from and uncontrolled by the consumers, or they by it; that these large numbers of lamps are connected with one or more 'consumption circuits,' the 'main conductors' of which consist of direct and return wires, so proportioned to the number and distance of such lamps that any fall in tension between the lamps nearest the feeder and those more remote is always negligible; that the lamps are of the kind described and referred to in previous patents and applications of Mr. Edison as giving light by means of a continu-

ous incandescent conductor; that the means of supply and regulation, so as to compensate for the uncontrollable actions of separated consumers, shall be from the central station, and through the feeding conductors, upon which all nonnegligible drop in tension is localized, and which, being free from connections with any lamps except upon the consumption circuit, are so situated with reference to the lamps that any desired drop in tension required by necessary economy in the size of conductors may be made upon them without harmfully affecting any lamps, or disturbing the equality of the candle power throughout the whole system; that the exclusive control over the feeding conductors is insured to the central station by the omission of all direct connections of the feeders with translating devices of any kind."

I quote the above summary from the brief of the complainant, and adopt it, as expressing fairly and justly what Mr. Edison accomplished.

It may be proper at this state of the discussion to consider whether this union of distinctive elements contemplated and described by the claims in suit forms a patentable combination, or amounts to a mere collocation or aggregation. The defendants strenuously insist that it is the latter, only; that the elements are all old, their action independent, their final effect not the result of coercion, and not in any sense novel. If this contention is well founded, these letters patent are worthless, for it is a well-settled principle that a mere aggregation of elements is not patentable.

What, then, is a patentable combination? Considered as a generic term, the combination may be defined to be a co-ordination of individual functions so as to constitute a common function. Co-ordination necessarily implies some modification of individual functions of each element as it existed prior to the combination. To be patentable, a combination must be in harmony with this definition, and as well, and as necessarily, must be possessed of novelty and utility. In the very able work of Prof. Robinson on the Law of Patents, he thus enlarges the definition just given of a patentable combination, and distinguishes between it and a mere aggregation:

"A combination is an instrument or operation formed by uniting two or more subordinate instruments or operations in a new idea or means. In one sense, every invention is a combination, since every art and article is composed of elements which, by inventive genius, have been brought together to serve a common use; but the distinction between a combination in this general sense, and that in which the term is technically employed in patent law, seems to be this: That in a patentable combination every subordinate element must, in its separate state, have been an operative means, capable of discharging its own peculiar functions, and producing its own physical effects, and also must, while in the combination, still perform its individual functions, and retain its individual identity. Where operations or instruments are thus united, one of two results must follow: Either each element remains unchanged in function and effect, or by the action of the elements upon each other, or their joint action on their common object, they perform additional functions, and accomplish additional effects. The former union is a mere collocation or aggregation of the elements. Although they have been brought together in an apparent organism, and rendered more available for use, they still remain the same distinctive and independent means, still acting as so many separate units, and not co-operating with each other to perform additional functions, and accomplish additional results. Such unions, therefore, are not a creation of new means. They do not involve the exercise of the inventive faculties, nor can they be protected by a patent. But when those elements are so united that by their reciprocal influence upon each other, or

their joint action on their common object, they perform additional functions, and accomplish additional results, the union is a true combination." 1 Rob. Pat. 216 et seq.

This gives a safe criterion. If the new combination accomplishes results that could not have been achieved either by the individual or collective elements separately, then union must inevitably have brought into action some new, or as yet some unawakened, energy, which constitutes a new and independent means.

Now, the patent in this case successfully stands the application of this critical test. The result obtained by this device of Mr. Edison is the transmission from a distant generator of electrical current to a remote independent conductor, along or through which it is sent for service to numerous lamps, with equality of pressure, with no perceptible loss of tension, and is restrained by regulative means, operative only at the central station. It may be admitted that the action of the current as it traverses the consumption conductor is exactly similar to that which would follow if the generator had been placed at, and connected directly with, the end of that conductor; but the crucial fact is that there neither is nor is to be any generator so placed at the end of the conductor. The result which Mr. Edison sought to achieve, and which he has achieved, is that the electrical current shall act exactly as if there was indeed a generator there, where there is none. His object is to compel precisely the same action which would result in the consumption conductors if the generator had been directly in contact with the ends of those conductors; and that, too, when the generator was not only not in close or immediate connection, but was placed a long distance away. And he so combined and used his elements that he accomplished what he sought with so great an economy in the use of copper that for the first time he made electrical lighting feasible. Such achievement is plainly the result of the coaction of all the elements of this combination. It is true that the action of these elements may be successive, rather than simultaneous, but the fact that such action is of such character does not in anywise militate against the conclusion. *Newbury v. Fowler*, 28 Fed. Rep. 454.

The weighty objections in this cause, however, to the validity of the letters patent, go upon other grounds. The defendants, with great vigor and ability, contend that the letters patent are absolutely void because the alleged invention claimed by Mr. Edison has about it no characteristics which would imply the least operation of inventive genius; that the state of the art clearly showed anticipation; that the systems in vogue of equalizing pressure in the distribution of gas and water for general consumption were strictly analogous to the proposed distribution and regulation of the electrical current as described by Mr. Edison as his invention, and had been in use many years; that especially did the prior patents to Werdermann and to Khotinsky and to Lane-Fox, for systems of electric lighting, clearly and substantially, if not literally, anticipate the letters granted to Mr. Edison; and that the treatise of Giroud upon Water and Gas Distribution made known, years before, to the whole world, just what Mr. Edison so many years later claimed

to have discovered with relation to the control and distribution of electrical energy. It will be necessary to examine into the merits of these defenses. If they are well founded, the case of the plaintiff must fall.

In testing them it is important to remember the construction given to the claims of this patent, and the conditions which limit them, as heretofore stated. The defendants insist that the real issue, so far as patentability is concerned, is whether the single circuit covered by the claims in suit, when taken in its simplest form,—such as, for instance, a circuit running from a generator to a single house, with but a dozen lamps for its work,—involves patentable novelty at the date of Mr. Edison's alleged invention. The defendants have the right to criticise and test the validity of the invention by considering it in its simplest form, but it must be the invention as described and claimed by the inventor, and not as it exists in the mind of counsel. To lop off from the invention the limitations and conditions which are embraced in the claims would be to destroy the real substance of the invention itself.

Let us, then, first consider the Werdermann patent, and see if it can be called anticipatory to the patent now under consideration. This is a British patent granted on June 21, 1878, to Richard Werdermann, for an improvement in apparatus for electric lighting. It concerned itself more with the actual mechanism for producing the light itself, than to the construction of the feeders and conductors which were to convey the electrical current to the lamps. It further concerned itself with an arrangement of the conductors so that the current for all the lamps which may be employed shall be compelled to travel exactly the same distance from the generator, so as to equalize the pressure at the lamps. To accomplish the first purpose he simply brings the points of two electrodes into contact under certain conditions. It is not necessary to discuss that part of the patent. To accomplish the other purpose he determined to adopt this method, (I quote his words from the letters patent:)

"So to arrange the parallel circuits in which the lights are included that the light which is the first one or the nearest to the source of electricity on a positive conductor is also the first or nearest to the source of electricity on the negative conductor. But I prefer the arrangement illustrated in the drawings, in which the lamp or light which is first with regard to its position on the positive conductor is last with regard to its connection with the negative conductor. With this arrangement, the electric currents for all of the lamps or lights will have to flow through the same distance."

Upon inspection of the figures and diagrams annexed to the patent itself, it is apparent that the arrangement described is wholly similar to the multiple arc or parallel arrangement, excepting in one particular; and that is that the outgoing current, instead of reaching the nearest lamp, doing there its work, and then returning from it by a conductor equal in length, is only returned after traveling beyond the point where the most distant lamp is situated. In other words, the arrangement is what is technically called the "reversed parallel;" so called because the position of the return conductor is reversed from its position in simple parallel.

Evidently, Werdermann's idea was that in thus compelling the electrical current to pass over or through an equal length and sectional area of a conductor, in going to and returning from each lamp, he completely solved the difficulties of electric lighting arising from the harmful drop in tension. To insure the uniformity and brilliancy of his lamps he inserted at each lamp a "special resistance," as he called it; so that when the lamp was extinguished the special mechanical resistance would still have the same effect upon the electrical current as the lamp would have itself when burning. The idea of a division of a circuit into feeders and consumption conductors, to meet great difficulties, does not seem ever to have occupied his thoughts; still less, the proportioning of the feeder conductors or mains in such a way that all the drop in tension should be localized upon them. It is true that one of the diagrams attached to the patent, to some extent, seems to exhibit a circuit consisting of feeders, with their separate functions, and consumption mains, with illuminating devices. But Werdermann himself, in referring to the diagram in question, says that it does not represent the relative position of parts as they will exist in actual practice, but is only designed graphically to represent the arrangement of their lights, their arrangement of cables and conductors, and the manner in which the division of the current is effected in such manner that each light will be produced or extinguished independent of other lights.

The witnesses on behalf of complainant are very clear in their conclusions that the Werdermann patent is not an anticipation of the Edison patent, and give substantial reasons for their faith. Prof. Chandler says:

"I find that the Werdermann system differs in every important particular from that of the patent in suit: (1) It uses arc lamps, instead of incandescent lamps. (2) It uses a low-tension current, instead of a high-tension current. (3) It employs a constant current, no matter how many lamps are in use, instead of a variable current adjusted to the number of lamps in use. (4) It involves a uniform load upon the dynamo, no matter how many lamps are in use, instead of a variable load adjusted to the amount of energy required at different times. (5) It includes no central station regulation. The current being constant and the load uniform, there is no object in central station regulation. (6) There is no attempt to overcome the inevitable difficulties in distribution, due to distance, by dividing the circuit into two distinct parts,—a distributing or consumption part, and a feeding or supply part. (7) There is no such division of the circuit into (a) consumption circuit, upon which all the lamps are placed, so proportioned in size to its length, and to the number of lamps connected with it, that the drop in pressure will be so small as to be of no consequence, and that the nearest and the furthest lamps from the central station will receive, substantially, the same pressure; (b) feeding circuit, upon which no lamps are placed, designed to supply the current to the consumption circuit, and upon which all the drop in pressure due to distance will be intentionally located. (8) The Werdermann system would require so large a quantity of copper to distribute the current as to make the system absolutely impracticable. (9) The Werdermann system would also be altogether too expensive, as regards the supplying of electricity; there being no central station regulation, but, on the contrary, a constant current."

In this view, Sir William Thomson, Mr. Brevoort, and Mr. Jenks concur.

It seems to me that the design of Mr. Werdermann's invention was so to place the lamps at such equal electrical distance from the generator as to enable any sized consumption circuit to be used. Such invention cannot be adjudged an anticipation of what Mr. Edison did, for such was not his object.

The defendants also depend upon a French patent issued to M. De Khotinsky for improvement in electric lighting, dated March 19, 1875, as an anticipation. Khotinsky says his invention relates to improvements in electric lighting, with a view of obviating the inconvenience of the system proposed heretofore, by reason of which this mode of lighting has not been generally adopted. The first part of the invention is found in peculiar arrangement of the conductors of the electrical current, which permitted the current to pass into each lamp or light independent of the others, so that the variation or failure of light in one lamp has no effect upon the others; and, secondly, the arrangement of the burners of the electric lamps in such a manner that, after the consumption in service of one carbon or other luminous conductor, the current passes automatically into another luminous conductor, and from that into a third, and after the consumption of all the luminous conductors which had been provided the current travels automatically to a spiral, or a conductor of any form, whose resistance is equal to that of the lamp in connection, as described. It is to be noted that this patent was considered by the United States patent office when the Edison patent was granted, and was there overruled as an anticipation. There does not seem to be anywhere in the patent, so far as the phraseology is concerned, any indication that Khotinsky thought of dealing with the difficulties of "drop in tension" in an extended system of lighting. It is true that one of the diagrams attached to the patent seemed to illustrate to some extent, at least, the scheme of Edison; but there is nothing said in describing that drawing which would disclose the law for the proportions of the circuit in regard to the number of lamps connected therewith, nor any data given by which it might be concluded that the lamps would vary from each other in candle power, which variance was to be cured by this invention. Such failure of description or disclosure is fatal to the defendants' claim.

And for this cause alone the Khotinsky patent cannot be relied upon in this case as an anticipation of the plaintiff's patent. It does not anticipate, because it neither describes nor deals with, nor certainly provides for the difficulty, nor prescribes with precision the remedies which form the subject-matter of Edison's invention. In *Powder Co. v. Parker*, 16 Blatchf. 295, it was held:

"The prior description, to invalidate the patent, must be such as to show the article described in the patent can be certainly arrived at by following it."

In *Cary v. Manufacturing Co.*, 31 Fed. Rep. 347, Judge Acheson says:

"In respect to the prior publications relied on as a defense, we need only say that, in our judgment, they do not fulfill the requirements of the estab-

lished rule that such publications must contain in themselves such a full, clear, and exact description of the invention as, without anything more, will enable one skilled in the art to practice the invention."

In *Celluloid Manuf'g Co. v. Chrolithion Collar & Cuff Co.*, 31 O. G. 519, 23 Fed. Rep. 398, Judge Coxe says:

"The novelty of the invention is not negated by any of the patents, American or foreign, introduced by the defendants. * * * No one describes, with anything like the accuracy required, the fabric of the complainants. The burden is upon the defendants to satisfy the court that the prior descriptions contain such a clear, full, and exact statement that a person skilled in the art, with the statement before him, could produce the fabric in question. * * * The law requires something more, beyond the mere suggestion, to defeat a patent. Prophecy will not do it. Facts, not theories, are needed."

In *Seymour v. Osborne*, 11 Wall. 516, it was held that—

"Patent inventions cannot be superseded by the mere introduction of a foreign publication of the kind, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, instruct, and practice the invention to the same practicable extent as they would be enabled to do if the information was derived from a prior patent."

It is true that the expert witnesses for the defendants insist that the Khotinsky arrangement of circuits is wholly similar to that described and explained by Mr. Edison in the patent in this suit; but the evidence given upon the same point by the experts for the complainant, Sir William Thomson, Mr. Jenks, and Mr. Brevoort, is directly contradictory, and seems to be more weighty and conclusive. In speaking of the Khotinsky patent, Sir William Thomson says:

"Khotinsky does not suggest anything towards the illumination of towns, or the carrying of the electric energy to considerable distances. He does not contemplate any difference of pressure in the different parts of his circuit. He makes arrangements to provide for one lamp of his system being extinguished without disturbing the others, while the output of the engine remains constant. * * * The difficulties connected with supplying the current, and maintaining approximate enough quality of brilliance among all the lamps, through all the variations of numbers of lamps used in actual practice, * * * were not at all felt by Khotinsky, who in fact gives no indication of applying his system to working at a distance, or of there being any practical difference in the tension in the different parts of his conductors. There is certainly nothing in any part of his patent which gives any indication towards the solution of the problem discovered by Edison."

Prof. Chandler says:

"The Khotinsky patent does not deal with the problem of conveying electricity to a distance, for supplying a large number of lamps, scattered over a considerable area. * * * There is nothing in the language of the Khotinsky patent, when properly translated, to indicate that Khotinsky had considered the question of distance, or that he thought of locating his dynamo at any distance from his lamps. * * * Khotinsky evidently intends to do precisely what Werdermann does,—that is, to maintain a constant current in his system, and to offer to this a constant load,—for he has provided an equivalent resistance, which is to take the place of any lamp which goes out. * * * There is no suggestion of any attempt to overcome the inevitable drop due to distance by a system of feeders, devoid of lamps, upon which this drop is located where it could do no harm. There is no suggestion in the Khotinsky patent of dividing his system of conductors into two parts,—one of which is

to be the consumption circuit, the wires of which are so proportioned with regard to the number and location of the lamps that no drop in tension will occur upon them greater in amount than a negligible percentage; the other, a feeding system, devoid of lamps, upon which all of the inevitable drop due to distance should be located."

Mr. Jenks says Khotinsky does not show or describe—

"Any idea of dividing the conductors, and assigning to each division separate and peculiar functions,—among these functions being that of the intentional loss of a predetermined proportion of the total energy upon the supply conductors,—nor any method for distributing current over comprehensive areas by simply proportioning the conductors."

Mr. Brevoort says:

"There is nothing in the Khotinsky patent that shows that he contemplated supplying any large area, and there is certainly no division of the circuit into two substantial and material portions, distinct from each other,—one, free from translating devices, and adapted to act as a feeder and overcome the distance between the dynamo and the consumption circuit, which latter was to be so proportioned as to insure that the lamps in it would not suffer a loss of pressure of more than five per cent."

If these criticisms upon the patent of Khotinsky are well founded,—and I think they are,—it is very apparent that the scheme devised by him for improvements in electric lighting cannot be taken to suggest in any way the device of Mr. Edison to secure the same result. It does not appear that the difficulty in electric lighting arising from the necessary drop in tension presents itself in this invention at all. Undoubtedly the inventor does speak about the action of one lamp in no wise affecting the action of others; but this he regards as provided for either by the multiple arc arrangement, itself, or by his special contrivance of an automatic resistance equal to the resistance afforded by the lamp previous to any lamp being extinguished. I do not see that the defendants are aided by this invention.

The defendants next rely upon two British patents granted to Lane-Fox in the year 1878, and upon a letter from Lane-Fox to the editor of the London Times, and published in the London Times on December 26, 1878; and they insist that these patents, in connection with the letter, described a system involving the use of a large number of high-resistance incandescent lamps connected in multiple arc, and operated from a central station. They insist that in this system Lane-Fox professedly followed the general methods of distributing gas, and that he describes a system of conductors arranged like gas mains, supplied from a gasworks located at some central point in the system.

The invention in this case is for improvements in obtaining light by electricity, and conveying, distributing, measuring, and regulating the electric current from the same, and in the means or apparatus employed therein.

A careful reading, however, of the description of the invention, as declared in the letters patent, differentiates it, I think, entirely from the inventive device of Mr. Edison. Undoubtedly, Lane-Fox had in mind the difficulties of electric lighting due to drop in tension, but his plan for obviating those difficulties was to enlarge the

system of conductors as they approach nearer to the central station, forming what is generally known as the "Tree System." This may be described as a system of distribution in which the electrical energy starts from the central station on the largest of all the conductors in the system, then divides itself into so many branches as may be necessary to accommodate the groups of lamps to be operated, and which branches diminish in sectional area as the distance from the station increases. He does not depend entirely upon his system of conductors to obviate the difficulty of drop in tension, for which, "as a remedy," he proposes to annex or attach to his system, at various points, Plante batteries, which might act as storage batteries for storing up electricity, and distributing it through his system. Carefully reading the patent, I cannot see that there is any attempt on the part of Lane-Fox to localize or separate the circuit in such a way that a considerable drop of potential is admissible upon part of it, and no perceptible drop is admissible on the other part; that is, there seems to be nothing analogous to Mr. Edison's feeding or consumption circuits. For this opinion I find confirmation in the very clear statement made by Prof. Chandler. In criticising these patents of Lane-Fox, he used this language:

"In conclusion, I would say that I find none of the essential features of the Edison invention in the Lane-Fox patents. The only points of resemblance are the central station, and the large number of incandescent lamps. There is no division of the circuit into two distinct parts. The circuit is all consumption circuit. Lamps are shown upon all parts of it. There is no portion of the Lane-Fox distributing circuit which corresponds to the feeders of the Edison system; no portion upon which the inevitable drop in tension due to distance could be intentionally localized, where it would have no influence upon the lamp, and no means are adopted for maintaining equality of pressure at the terminals of the lamp, except by enlarging the conductors systematically as they approach the central station, which is the very plan which Edison practically disclaims in the patent in suit. * * * He has no system of feeders, and he does not anywhere in his system intentionally incur the inevitable drop due to distance, and there render it harmless."

It must be borne in mind that Mr. Edison's invention was to localize the drop in tension, which was inevitable, where it would be perfectly harmless, so far as the operation of the lamps upon the system was concerned. The effect which he produced by his invention was to strip the consumption circuit of all harmful drop in tension, so far as that circuit was concerned. The result is as if no such thing as drop in tension, perceptible in its effect, existed at all. Clearly, the main and chief thing accomplished by Mr. Edison was this division of the circuit. Now, in the Lane-Fox system of electric lighting, the whole circuit is a consumption circuit, from beginning to end. The diagram which he annexes to his patent, and which he refers to in his specifications, clearly shows that all of the circuit was to be used as affording stations for lamps; and his means of overcoming drop in tension, other than the enlargement of his conductors, was the use of supplementary batteries, which were placed throughout the system. It would require the assistance of a vivid imagination to draw an analogy, suggestive and educational in its character, between such a system, so planned

and devised, and to be so operated, and that of Mr. Edison. Save that in both systems conductors and electric energy and incandescent lamps and central stations are used, there is no patent similarity. The intent may have been identical. The means of realization are diverse. If it needs the close and acute examination of skilled experts to discover any similarity between inventions, such necessity would seem to deny the existence of suggestive character in either.

It is well to remark that in passing judgment upon these various inventions, in order that impartiality and exactness may be exercised, it is to be remembered that 10 years ago the science of electric lighting of large areas was in its infancy, and that the application of the knowledge which to-day is common possession, in forming our conclusion of the nature and character of operation of electric energy when chained down to the performance of labor, was then wholly impossible. What those inventions of those days were capable of performing was limited by the knowledge of those days. Some of those inventions may seem to be suggestive now, when we use our present knowledge touching electricity and its characteristics; but 10 years ago they were unsuggestive, simply because, as the fact shows, they failed utterly to suggest. This is the unanimous testimony of all scientists touching the matter.

The defendants, as an essential part of their defense in this case, further insist that the claims of the letters patent involved in this suit were clearly anticipated by prior publication and uses relating to electro-metallurgy, including therein, especially, electroplating and electrotyping. They depend upon Napier's work on Electro-Metallurgy, published in 1867, and upon the testimony of Mr. Weston, and perhaps one or two other witnesses, who were connected in the erection of a plant for electroplating and electrotyping in Newark, and upon a copy of the Scientific American, a newspaper published in New York City, of the date of September 1, 1877, which latter the defendants' claim shows clearly, in a cut of an electroplating plant, the same arrangement and proportioning of wires and conductors, and the division of the circuit into feeder and consumption circuits, to obtain equality of pressure, as Mr. Edison claims in his patent. Their contention, briefly stated, is that in electrotyping and electroplating, and similar applications of electricity, the electric current is distributed by multiple arc; that the necessity for equalizing pressure is fully as great as in electric lighting; and that long prior to the date of Mr. Edison's invention the method employed for equalizing pressure in these operations was the same as that described by him. That we may weigh this claim properly, and arrive at a just estimate of its worth, it will be necessary to consider for a moment just what electrotyping and electroplating are.

"Electro-metallurgy" is a term characterizing all processes in which electricity is applied to the working of metals. Electrotyping was in vogue as a popular amusement as early as 1840, and it was quite the fashionable thing at that date to copy, by the new process which had just been described in the scientific pa-

pers of the day, coins, seals, and medals. The apparatus employed was very simple, and practically is the same to-day. It consisted of a glazed earthenware jar containing a solution of sulphate of copper, and a small porous cylinder containing diluted sulphuric acid, in which a rod or plate of zinc was placed, and which was suspended in the jar. The object to be copied by electricity was attached by a copper wire to the zinc, and immersed in the solution. It thus formed the negative element of a galvanic battery, and a current of electricity passed from the zinc through the liquid in the jar and cylinder to the immersed object, and thence back to the zinc through the copper wire, thus forming a complete circuit. The effect of this electrical action was to deposit upon the object to be coated a thin film of copper, obtained by the decomposition of the copper solution. When the film or incrustation of copper had become sufficiently thick, it was readily removed from the object, and presented a complete fac-simile of it in reverse. A repetition of this operation, with this reversed object as a matrix, resulted in presenting the object itself in natural relief.

Electroplating, another branch of electro-metallurgy, was simply the coating of one metal by another, the deposited metal becoming inseparably a part of the object plated. The process was very similar in its operation to electrotyping. In both processes, now, separate batteries or dynamos are used as the generators of the electrical current, and the current is carried by wires to the tanks or vats or baths in which the object to be plated or copied is immersed. As in the electrotype bath, so in the electroplating bath, there is a liquid containing in solution a metal which it is desired to deposit upon an object temporarily immersed therein. The current of electricity is carried to the bath by means of a plate of metal, called the "anode," which is the same as that in solution. The object to be plated is immersed in the bath, opposite to the anode plate, and the electrical current passes through the liquid intervening between the two. This operation decomposes the liquid, separating the metal held in solution, and depositing it as a thin film upon the face of the object to be plated. The operation is continued until the resultant plating has become of the required thickness, when the plated object is removed from the bath. Looking at these operations generally, and without further explanation, it is exceedingly difficult to draw any analogy between them and the lighting by electricity of large areas, in which the necessary drop of tension is necessarily overcome. It is certainly very obvious that whatever may now be thought of the suggestiveness of the electroplating process or the electrotyping process, in view of what Mr. Edison has accomplished toward the solution of the problem of electric lighting, none of the scientists who in 1879 and 1880 were searching for the solution of that problem ever gathered from them any suggestion or hint towards the solution so ardently sought. It is difficult indeed to see the least possible analogy between a bath or a vat or a tank containing metal in solution, through which an electric current is to be passed—First, for the purposes of decomposition; and, secondly, for a fixing of the decomposed mole-

rules of the metal upon an object temporarily placed in the bath,—with a system of electric conductors, feeding and consumption, running for miles, perhaps, through thickly-settled territories, having upon the consumption circuit incandescent lamps permanently fixed, and in large numbers, usable at pleasure, and wholly beyond the influence of “drop in tension.” Certainly, a nonexpert, though never so alert, would scarcely discover resemblance between two things so utterly dissimilar, nor would he be any the more happy in searching for analogy to assist in the solution of a problem touching the distribution of the electrical current. Electroplating and electrotyping, even when the electric current was conveyed from dynamos or batteries exterior to the vat or bath, were, as a rule, carried on within a space of limited dimension. In the plant spoken of by Mr. Weston, in Newark, the feeder wires were but 16 feet in length, and the support upon which articles to be plated were suspended across the bath still less. Here, certainly, was no opportunity for a harmful drop in tension of the current in passing from dynamo to bath. And, besides, in these operations the current sent through the wires is of so low a tension that it would be utterly futile to consider it as a possible factor in electric lighting. It is true Mr. Weston says that in the construction of the Newark plant, illustrated in the *Scientific American*, the feeder wires and the supply wires, if they may be so called, were of different sectional area, and were purposely so made that there should be an equality of pressure at the baths. But he is the only one sufficiently bold to make such statement; and, without harshly criticizing it, surely it is remarkable that if he thus solved a problem which was exciting the whole scientific world with its difficulties, and its apparent impossibilities, he should not have made known his success in reaching the true solution, and that he should not have patented that invention, so pregnant with result, for his own peculiar benefit. He applied for, and was granted, other patents, about that same time, all having reference to the use of electricity; but he nowhere and at no time intimates or claims or suggests that he has accomplished the equalizing of electrical pressure by a due and proper proportioning of feeder and consumption conductors. It seems that Prof. Chandler’s explanation of the difference of sectional area of the wires in the Newark plant, or as suggested in Napier’s essay, is the more credible, as it is much more reasonable. Speaking of the fact that the bars or copper rods upon which are suspended the objects to be plated are larger in sectional area than the wires connecting them with the batteries or dynamos, he says:

“There can be no appreciable drop in tension upon them, in so short a distance, which would need the difference in sectional area to overcome; and the difference in size is a mere incident, and due to the necessity of selecting rods large and strong enough to support the weights hung upon them, and short, on account of the limited dimensions of the tank.”

All the experts examined by the complainant have answered very fully and completely in reference to the system of electroplating and electrotyping, and as to the information given by Napier in his essay; and they are unanimous that there was nothing, either in the

testimony of the witnesses, or in the processes described, or in the publications referred to, that was similar, or substantially similar, to the invention described in the first three claims of the patent in the suit. As was said before, the answer to the contention of the defendants with respect to this part of their case is that while, under the light that we have to-day, these processes and this imparted information may seem as if they ought to have suggested something of value, from which, as starting points, a learned electrician should, by successive and logical steps, reason out the result at which Mr. Edison arrived, yet in point of fact they did not suggest any such thing, and were evidently wholly valueless for any such purpose. And this is evidenced by the fact that the scientists of the day not only did not resort to these alleged processes and these technical works, but absolutely ignored them, as affording any assistance towards the solution of the problem which they were seeking to solve. It is a comparatively easy task to-day to argue that these various processes and arts and methods and publications ought to have revealed the solution of the problem involved in electric lighting of large territories. From each may be selected peculiarities, beneficial and unique, that in more or less degree bear resemblance to Mr. Edison's invention. But the truth is that they did not, conjointly or separately, give birth to suggestion. The logic of argument, then, must fail to compel conviction, when confronted by the more robust logic of fact.

The defendants further contend that there is no patentable novelty displayed, because the prior methods and systems of, and publications relating to, gas and water distribution for public use, constitute a complete anticipation of Mr. Edison's alleged invention. Their insistence is that the pressure in the distribution of gas and water was equalized by precisely the identical means adopted by Mr. Edison in his distribution of electricity.

The publications upon which the defendants rely are the works of Clegg, of 1841; two editions of the works of Giroud, of 1867; of Allavoine, published in 1879; the reports of the Philadelphia Gas-works from 1837, 1841, 1848, 1849, 1859, and 1860; and of the works of Du Moncel, published in 1878, relating to the distribution of gas. A number of witnesses were also examined, whose testimony was with reference to distribution of gas, and the means and process adopted to equalize it, in the cities of Newark, Lowell, and Philadelphia.

So far as the distribution of water was concerned, the defendants claim that the statement made by Mr. Church as to the distribution of the water supply in New York; of Mr. Greenough, as to the distribution of water in Boston; and of Mr. Brown, as to the distribution of water in Pittsburgh,—fully sustain their contentions.

It must be admitted that for certainly 50 years back, and more, perhaps, it has been the custom to have, in the distribution of water and of gas to customers distant from the reservoir or holder, independent mains or lines of pipes, from which originally no service pipes were laid, and which were used simply to carry the water

or gas to a point generally in the center of the general system, for the purpose of overcoming the effect of friction by a new supply of the gas or water to be furnished. The theory of the defendants is this, and at first glance it is extremely plausible: That the analogy between the flow of the liquids, gas and water, and the flow of the current of electricity, is exceedingly strong, and almost identical, and that any reputable engineer would necessarily, upon but little thought, adopt, from his knowledge of the distribution of gas and water, the same method and plan for dealing with the electric current. On the other hand, the complainant insists that the problem to be solved is wholly different with regard to water and gas, on the one hand, and electricity, on the other; that in the one case a retardation of the flow by the action of friction was the sole difficulty to be considered; in the other, how to deal with the absolute loss of the current itself became the vital question. Its thorough destruction lay at the basis of the problem which so tried their ingenuity. And they asserted that differences, radical and unexplainable, existed between the ponderable bodies which are called "gas" and "water," and that imponderable and intangible vibratory action of molecules which is called "electricity." Many differences between them were cited upon the argument, the effect of which was necessarily to weaken very much, if not entirely to destroy, the theory that there was a distinct and positive similarity between gas, water, and electricity, which would justify analogy in their treatment. It would be simply impossible to analyze and state here these different theories.

Evidently the questions thus submitted to the adjudication of the court are questions primarily for learned experts, and they were so dealt with in this case. A battle royal has been fought between those who have presented the theories of the defendants, and those who have explained and illustrated the contentions of the complainants. Weighing the testimony as best I can, and after the most careful consideration, I am of the opinion that neither the distribution of water nor of gas, nor the various publications referring thereto, and suggesting methods therefor, could have formed a basis upon which Mr. Edison could have successfully constructed his system. It would be tiresome, in the extreme, if all the opinions advanced by the experts on either side, touching this point, were quoted. I shall simply say that the evidence given by Sir William Thomson, the leading British scientist, upon this part of the case, is so satisfactory, and, as it seems to me, so logical and convincing, that I give it unqualified assent. He says:

"I do not think the analogies known, prior to 1880, between the action or flow of gas and water and of electricity, were sufficient to teach electricians that electricity could be successfully distributed over considerable areas to incandescent electric lamps in the manner and by the means referred to in the tenth interrogatory, so as to maintain uniform candle power throughout the system. I have myself, for many years,—at least thirty-five years,—been familiar with the analogies between the flow of gas or water in pipes, and electricity in conductors, and have explained and illustrated that analogy in many published works contained in my volume of collected papers mentioned in my answer to interrogatory 2. To make a proper working analogy, the pipe through which gas or water flows must be filled with porous or spongy

material, through which the gas or water would percolate when compelled to do so by difference of pressure at the two ends of the pipe. We should then have flow of the ponderable fluid in simple proportion to the pressure, as is the flow of electricity in a conductor. In reality, the flow of gas or water through a pipe is nearly in proportion to the square root of the difference of pressures, but it is also affected by various other circumstances, for which there is no analogy in the flow of electricity through conductors. Thus, in the defendant's translation of Giroud's treatise, (page 615,) we find: 'Coming from the holder under a pressure which is necessarily constant in Paris, 150 mm., for example, the flow of gas is obstructed first by the outlet valves at the works; then, by the turns or elbows of the pipes, by narrowings of pipes of too small diameter, by differences of level; and, finally, by the stopcock of the burner itself; and this obstacle, the last of all, allows the gas to escape from the orifice of the burner at a pressure of hardly more than two or three mm., and fifteen or twenty on burners constructed on false principles. It is between these two extremes that all the phenomena of circulation take place which we are about to discuss in this work.' This is absolutely unlike the problem of electrical distribution. The object of pressure for gas between the works and the place of consumption is merely to bring the gas to the place. The enormous range of pressure from 150 mm. to two or three for the best burners is utterly different from anything that occurs in the electric problem. The efficiency of the gas is not dependent on its pressure, but on its combustion; and it is remarkable, in contrast to the action of electricity, that it gives better results at the low pressure of two or three mm. than at the higher pressure of fifteen or twenty. In the electric light the efficiency of a certain quantity of electricity depends wholly on its pressure; and lamps adapted to work at a pressure of twenty would give, with the same quantity of electricity, ten times as much light as lamps of the same quality adapted to work at a pressure of two.

"In an electric system, delivering electricity from the source at a pressure of 150, and using it at a pressure of three, only one-fiftieth of the whole energy would be used, forty-nine fiftieths of it being wasted by the generation of heat in the conductors. The comparison of the flow of electricity in a single conductor, and the flow of water or gas in pipes, set forth in the diagram facing page 292 of the defendants' printed record in this case, represents the almost total loss of energy by the electricity in figure 3, in circumstances analogous to those of the outflow of gas at B in figure 2. The difficulty in making out anything of a quantitative comparison between the two cases is illustrated by the fact that the forces illustrated by the spring balances and repelled disks of figure 3 would be, not in simple proportion to the pressure, but would depend, in a very complicated manner, on the squares of the pressures, and the configurations of the lines of electric force between the disks, and round their edges to the earth. Thus, the lower ends of the springs would be nothing nearly in a straight line, as shown in figure 3, while the levels of the water in the pressure gauges of figure 2 would, as correctly shown, be essentially in a straight line. The electric system essentially involves two conductors, with a difference of potentials maintained between them. This difference of potentials is what is technically, and by English board of trade rule, called 'pressure.' To this there is absolutely nothing analogous in pipes for the distribution of water or gas. * * *

"The equalizing of electric pressure within five per cent. in the consumption circuit, in all varying conditions of the lamps used in different parts of the circuit, and the calculation of the conductors required for this purpose, and for the feeding conductors, after having formed the idea of using feeding conductors, is a problem upon which no light whatever is thrown by anything to be found in these treatises. And in fact, prior to 1881, none of the engineers who attacked the problem of the electric lighting of cities, many of whom were thoroughly acquainted with gas distribution, did propose or show any signs of having invented the system of consumption district and feeders until Edison gave it in his patent 264,642. Even as late as 1885 we find Professor George Forbes, in his Cantor lectures, delivered in the month of February of that year, and published in the Journal of the Society of Arts for October, 1885, giving an elaborate and full comparison of electric distribution with gas dis-

tribution, and describing Mr. Edison's feeder system and patent in the following statement: 'It must be acknowledged that the simple tree system, where all the dynamos are connected in parallel with the mains, presents a very serious obstacle in the rapid fall of potential; the maximum distance of a lamp from the station along the line of conductors, consistent with the economical considerations, being 124 yards, if the pressure required for all lamps is the same.' * * *

"The translating devices used for the electric light are utterly and essentially different from anything used in gas lighting, or in connection with gas distribution. The electric light, of whatever kind, acts entirely by the resistance of an arc, whether of air or of some solid conductor, to the flow of electricity through it. The electric current essentially passes through the lamp from one portion of the system of conductors to another, at a different potential from the first. The difference of potentials of the two is the working pressure of the lamp. In gas lighting the gas simply flows out of the pipe, and burns in the air. The light given depends on the quantity of gas delivered and on the temperature and manner of its burning. It depends on pressure only so far as this influences the manner of the burning. The work done by the pressure on the outflowing gas is infinitesimal in comparison with the work done by the combustion which generates the light. Every time the gas is lighted it is regulated by the user, who lights it and turns the stopcock till he sees the flame to be of the size and brightness which he desires. Doubled or tripled or halved pressure, supervening in the course of a morning or evening, on account of the extinction or the lighting up of other lights fed by the same mains or branches, is controlled by the user, who partially closes the stopcock when he sees the light flaring up too high, and opens it wider when he finds his light too low. This control by the stopcock does not in the slightest degree impair the economy or alter the quality of the light, however great the difference of the supply pressure may be. There is absolutely no analogy in gas to the electric bridge from one main to another main, such as is constituted by the incandescent light. The incandescent light has no regulator in connection with it. It is either off or on. The ordinary user has no means of altering the difference of potential in virtue of which it acts. The regulation of the pressure, or difference of potentials, is required for two purposes: (1) To prevent the lamp from being destroyed by too high pressure; (2) to keep up its brilliance to the proper degree. No such reasons demand equalization of pressure for gas, and the only reason for requiring a rough approximation to uniformity of pressure is to save the user the trouble of regulating by his stopcock, or to save the expense incurred by too much gas passing, or by the breakage of a lamp glass when a light is allowed to flare up without being noticed. With these well-known facts in every one's mind, it is not to be wondered at that electrical engineers did not look to gas distribution for suggestions as to how best to arrange the pairs of conductors required for the electric lighting of a city."

I do not think that the witnesses for the defense have by their statements and arguments in any wise weakened these reasons, or affected these conclusions. Of course, it is exceedingly hazardous for one not an expert to express an opinion on a question so wholly within the domain of scientific exposition; and the hesitation to do so would be unconquerable were it not that even the able and learned witnesses for the defense, when speaking of the problem of the distribution of electricity on a large scale in 1880, and its probable solution, were positive that there was a serious difficulty involved, which was apparently insuperable, and Dr. Morton did not hesitate to challenge as impossible the statement that Mr. Edison had really accomplished what he claims, even after his invention was made public; and yet Dr. Morton and the other most learned witnesses must have been thoroughly aware of the means adopted to equalize the pressure in gas and water distribution.

At that very time it was common knowledge with them. Yet, knowing what that method and those means were, these gentlemen not only failed to derive assistance from those methods, or to apply their knowledge to the distribution of electricity, but absolutely doubted, even after the announcement of Mr. Edison's successful experiment, whether it could possibly be true. At that time they could have had no faith in the educational power of the methods of gas and water distribution in their application to the distribution of the electric current.

The answer, I think, which must be given to this part of the defendants' case,—and in this I include, also, the defense which is based upon the alleged anticipatory system of equalizing pressure in electrotyping and electroplating, and upon the publications thereto relating,—is this:

“That while it is admitted by the experts on both sides, in this case, that all the learned electricians of the world, in 1880, were individually engaged, each in his own way, in attempting to solve the problem of the distribution of the electric current over large areas, so as to be successful, not one of them, so far as the testimony in this case goes, and so far as our knowledge extends, ever thought of adopting the means which it is alleged was used to equalize the pressure in water and gas distribution, or to equalize the pressure in electrotyping or electroplating, to overcome the harmful drop in tension, necessarily found in sending the electric current to a large number of incandescent lamps. Surely, if these were anticipations, or if they were so educational in their character and in their effect as is claimed by the defendants to-day, we would have seen the practical result in the operations of the minds of scientific gentlemen scattered all over the world, who were diligently seeking to solve a problem which, notwithstanding all this previous knowledge, seemed to them practically unsolvable.”

There were other patents and publications mentioned by the defendants, and some criticism made upon the original proceedings in the patent office, but I do not think it is necessary to consume time in discussing them. I have gone over what seemed to be the strongest points of the defense,—points which were relied upon at the argument,—and my conclusion is that they do not successfully disprove the claim which Mr. Edison has made to be the first inventor of the combination described in these letters patent. I think it is clearly proved that he was the first to conceive of such an arrangement and proportioning of the consumption and conducting wires of a circuit that the inevitable result would be to secure uniformity of pressure throughout the whole system. He was the first to divide a circuit covering a large area into smaller consumption circuits, in which the drop in tension would be negligible, without the expense of a very large sum of money in increasing the copper of his wires. He was the first to obtain the equalization of candle power. He was the first to supply his consumption conductors with feeding conductors set apart for that purpose only. He was the first to localize upon feeding conductors the drop in ten-

sion, so that the loss upon the consumption conductors was always negligible.

It is difficult—impossible, perhaps—to describe what invention is. If invention implies something more than a mere change of form or arrangement or mode of use; if it be the result of inventive, as distinguished from mechanical, skill; if it be the result of the operation of the intellect, not following the beaten track, but striking out into some new direction, and achieving some new triumph; if it be the resultant of the exercise of the creative skill and genius in harmonious combination,—then I think Mr. Edison, so far as the matters involved in this suit are concerned, should be termed an inventor of high order.

The defendants deny infringement. Considerable testimony was taken on both sides with reference to infringement, and, as usual, there is some contrariety of statement; but the weight of evidence shows clearly that the defendants had adopted the system of electrical distribution which Mr. Edison had described in these letters patent, and in so doing had clearly infringed the claims now in suit. It is not necessary to consume time in discussing the evidence on this point. Some technical questions touching the pleadings in the cause were presented at the opening of the argument; but, as leave was given to make such amendments as might be necessary to present the real merits of the controversy, they may be regarded as out of the case.

There must be a decree as prayed for in the bill.

GREEN v. CITY OF LYNN.

(Circuit Court, D. Massachusetts. April 7, 1893.)

No. 1,824.

1. PATENTS FOR INVENTIONS—ADJUDICATION BY SUPREME COURT ON QUESTIONS OF FACT—HOW AVAILABLE.

The decisions of the supreme court upon questions of fact in a suit determining the validity of a patent do not operate strictly as *res judicata*, or as a technical estoppel, in a subsequent suit in the circuit court upon the same patent between different parties, but operate merely upon the conscience of the inferior tribunal; and therefore, in applying conclusions of the supreme court, the circuit court should first inquire what facts are proven in the pending case by independent evidence, given under the ordinary rules of law, and, second, examine the opinions of the supreme court, and the line of reasoning and conclusions which they exhibit, and from these or otherwise, but not by formal evidence, become satisfied whether or not the proofs of which the latter court took cognizance were substantially the same as those in the case at bar; hence there is no reason for burdening the record in the case at bar with the record in the supreme court, and, if offered in evidence, it will be stricken out.

2. SAME—VALIDITY—LIMITATIONS—DRIVEN WELLS.

Reissued letters patent No. 4,372, granted May 9, 1871, to Nelson W. Green, for an improvement in driven wells, must be limited to the process in which the tube is driven through the earth, without boring, so as to form an air-tight joint by the pressure of the earth around it; but it covers this process whether the tube is so driven for the whole depth of the well or for only a part of such depth.

3. SAME—VALIDITY—INVENTION—WATER SUPPLY.

Letters patent No. 218,875, issued August 26, 1879, to N. W. Green, for a system of supplying cities and towns with water from driven wells, in so far as their object is to cause the force of suction developed by the pumps to combine with and aid the force of gravity in producing a flow of water from other subterranean reservoirs to the wells when the local supply of such wells has been exhausted by pumping, involve nothing more than the application of the ordinary training of the engineering profession to the subject-matter, and are to that extent void for want of invention.

In Equity. Suit by Nelson W. Green against the city of Lynn for the infringement of reissued patent No. 4,372, granted May 9, 1871, to N. W. Green for an improvement in driven wells, and letters patent No. 218,875, issued to the same inventor August 26, 1879, for "an inexhaustible water supply for cities and towns." In the system covered by the latter patent one or more pumps were connected with a series of any number of driven wells by a common suction pipe, through which water was drawn from all of them, and thence forced through a single set of mains. The eduction pipe was supplied with a valve so loaded that it would allow the escape of the water should a higher pressure than that desired be produced therein. The principal advantage claimed for the system was that, when the local supply of water was exhausted by the wells, and the force of gravity failed to renew it from other sources, the force of suction of the pumps would become effective to produce a flow of water to the wells from other subterranean reservoirs. Bill dismissed as to this patent, and sustained in part as to No. 4,372, with decree for complainant.

T. W. Porter, for complainant.

John R. Baldwin, for defendant.

PUTNAM, Circuit Judge. Preliminary to the final hearing of this case a question of proof arose, which was disposed of at the time without examination of authorities, and should now be restated. The defendant called the attention of the court to the opinion of the supreme court in *Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. Rep. 101, reaffirmed February 10, 1888, (124 U. S. 694, 8 Sup. Ct. Rep. 676,) declaring void one of the patents in issue here on the ground of prior public use. This opinion involved a serious question of law touching the construction of section 7 of the act of March 3, 1839, then for the first time settled; and also a question of fact whether or not there had been a prior use within the meaning of that statute as construed by the court. The court found against the patent on the issue of law, and also on that of fact. This decision was handed down in November, 1887, more than four years after the bill in this case was filed, and more than four years before the question hereinafter stated was raised in this court, so that the defendant had more than ample time to put itself in proper position to avail itself of the conclusions in *Andrews v. Hovey*.

Under these circumstances, the defendant produced and offered in evidence two large volumes, containing the record in *Andrews v. Hovey*, prepared and printed in accordance with rule 10 of the su-

preme court, (3 Sup. Ct. Rep. viii.) I refer to that rule in this connection in order to specifically describe the nature of the volumes thus offered in evidence, and to clearly distinguish them from a certified copy of the record of the court in the strict sense of the word, although I am not aware that the latter would have met the purpose in question any better than the volumes offered. There was not offered with these volumes any independent evidence of the facts proven in *Andrews v. Hovey*, although subsequently a certified copy of the deposition of the complainant in this case given in *Andrews v. Hovey* was put in evidence, the same being clearly relevant,—not as a deposition, but as an admission.

The complainant objected to the reception of the two volumes in question, and April 26, 1892, moved that the same be stricken from the record. It then appeared that the volumes had simply been produced before the examiner, with the intention of filing them as evidence in the cause, but had never been formally thus filed; so that the motion of the complainant was in all respects seasonable. At the hearing on this motion neither counsel was able to produce authorities bearing upon it, or to satisfy the court that any special practice in suits of this nature had become established. Thereupon the court applied to the case well-known rules of evidence governing proceedings in equity, as well as at law, and granted the motion of the complainant. The court has since been able to make some examination of the authorities, and believes its rulings to be fully sustained by them.

It is to be observed that this question did not arise on a motion for an ad interim injunction, with reference to which the rules of evidence are not strict, but are molded to meet the convenience of a summary hearing. This may safely be done, as the ultimate rights of parties are not then involved.

Of course the findings of the supreme court in *Andrews v. Hovey* on questions of law are conclusive on all other courts. The same is true, as to its findings of fact, with reference to any other cause in which the court perceives that the proofs are substantially the same as those which came before the supreme court. The reasons for this need not be elaborated, but this distinction is to be noted: that, when the parties are not the same in each case, the determinations of issues of fact by the supreme court do not operate strictly as *res adjudicata*, or as a technical estoppel, but merely upon the conscience of the inferior tribunal. How are the cases to be brought together for this purpose? An answer based on the fundamental rules of law seems simple. First, it is essential that the facts brought to the attention of the supreme court should be proven in the pending cause independently, according to the ordinary rules of evidence; and thereupon the court in the pending cause should advise itself as best it may of what appeared to the supreme court,—ordinarily from the opinion rendered by it, and, if this is not sufficient in detail, from an informal perusal of whatever was laid before it. As this ascertainment is merely to inform the conscience of the court in the pending cause, and to enable it to follow the line of reasoning and conclusions of the appellate tribunal, there is no oc-

casion for burdening the case with the formal proof of what appeared in the supreme court, nor is there any propriety in so doing. Therefore it was that this court granted the motion of the complainant to strike out the two volumes in question, and held that the defendant, if it sought to avail itself of the reasoning and conclusions in *Andrews v. Hovey*, must prove the substantial matters which there appeared as independent facts according to the usual rules of evidence.

3 Rob. Pat. §§ 1017, 1175, touches this question. This portion of this work must, however, be read with care, because, as is too frequent in discussions of this and kindred questions, sufficient discrimination is not made between the rules touching interlocutory and ad interim injunctions, and those pertaining to final hearings. The court conceives, however, that the author correctly states the principle in section 1175 as follows: "The weight to be attached to any judgment in favor of a patent, as evidence of its validity in future actions, depends upon the identity of parties, the identity of issues, the identity of testimony," and so on. By the words "the identity of testimony" the author evidently means that the same facts must be proven in each case independently.

In *Edgarton v. Manufacturing Co.*, 9 Fed. Rep. 450, the court, being asked to apply decisions in several cases to a pending patent cause, said as follows: "But the proofs in *Brown v. Whittemore*," (5 Fish. Pat. Cas. 524,) meaning one of the other cases, "on the question of prior use and sale with the consent of the patentee, and in *Edgarton v. Breck*," (5 Ban. & A. 42,) meaning also one of the other cases, "on the question of invalidity, do not seem to have been the same as in the cases now before the court. * * * Of course, if the testimony in these cases was substantially the same as that in the cases heretofore decided by the learned judges in the Massachusetts circuit court, I should feel wholly bound by their decisions, and the construction of the patent given by them." In *McCloskey v. Hamill*, 15 Fed. Rep. 750, the court, touching a like proposition, said: "The facts which the plaintiff proved upon the second hearing [meaning a second hearing in a prior cause] are the same which he relies upon in this case." In *Celluloid Manuf'g Co. v. Zylonite Brush & Comb Co.*, 27 Fed. Rep. 291, the court said, (page 295:) "The facts presented by the record are so strictly similar to those in" (naming a case on the same patent, previously heard by another tribunal.) In *American Bell Tel. Co. v. Wallace Electric Tel. Co.*, 37 Fed. Rep. 672, the court spoke of "the examination of the record," meaning plainly the record in the then pending case, made to ascertain whether distinguishable from cases theretofore decided.

None of these expressions indicate that the question now under consideration was formally presented, nor do they show distinctly how the record in each pending suit was made up; but the form of them carries a decided impression that no rule, except that which this court adopted, as already stated, ever occurred to them. Therefore, in applying the conclusions of *Andrews v. Hovey*, this court is—First, to inquire what facts are proven in the pending case by independent evidence, given under the ordinary rules of law; and,

second, to examine the opinions of the supreme court, and the line of reasoning and conclusions which they exhibit, and from these or otherwise—but not by formal evidence—become satisfied whether or not the proofs of which the latter court took cognizance were substantially the same as those in the case at bar. If they were, its line of reasoning and conclusions bind the conscience of this court upon the questions of fact involved; otherwise they fail to do so, perhaps wholly, perhaps in part.

It is true that this method of proceeding may produce a result on questions of fact differing from the latest findings of the supreme court, but in this respect we have the example of that court itself, as shown with reference to this very patent, in *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, and *Andrews v. Hovey*, already referred to. Moreover, inasmuch as it must be conceded that the conclusions in *Andrews v. Hovey* are in no sense a technical estoppel against the complainant in this case, it must also be conceded that he is entitled to an opportunity to correct any imperfections in the presentation of facts in the former case, especially if, as claimed by him, the result was in consequence of incautious admissions of his counsel, based on an erroneous assumption that the law was more favorable to the patent than was found by the supreme court. All that this court finds in this record touching these admissions appears on page 139, vol. 2, of the record, in an extract from complainant's brief in *Andrews v. Hovey*, commencing as follows: "But it is not denied that in this case there is proved that * * * other persons, without the patentee's consent and allowance, did put the invention into public use without his knowledge." It appears also (volume 2, p. 69) that this brief was put in as an exhibit, but the court has not found it in the record. So much as is given from it is an admission only of the result of what was proven in *Andrews v. Hovey*, and not of a general fact. It therefore can have no effect here, in the absence of facts actually proven in this case of like character with those shown in the earlier proceeding. The attention of the court has not been brought by the counsel for the defendant to any part of the record in which such facts appear.

It is also shown (volume 2, p. 138) that the complainant was one of the parties complainant in *Andrews v. Hovey*; but as the defendant parties are not the same, and are not shown to be in privity, this does not qualify what has already been said touching *res adjudicata* and estoppel. The court believes that it has on this part of the case covered all suggestions made by the counsel, whether in oral arguments or their briefs; and it was not necessary to refer to each suggestion specifically.

With reference to the complainant's letters patent No. 218,875, on which the bill is based in part, the patentability of the subject-matter thereof is denied in the amended answer of the defendant, and the court is compelled to concur with the defendant in this particular, and to dismiss the bill so far as that patent is concerned. The larger portion of the record and of the briefs, both on the side of complainant and of defendant, is taken up with discussing the

relations of this patent, and also of the earlier patent, No. 4,372, for the driven well simply, to certain theories touching subterranean waters; but that subject-matter was exhausted in connection with patent No. 4,372,—at least so far as the law is concerned,—by *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073. So far as this topic is concerned, a multiplicity of driven wells involves, under the law, no features beyond those recognized by the supreme court in the case last named.

The combination set out in patent No. 218,875 involves nothing except the application to the subject-matter of the ordinary training of the engineering profession, unless there may be something novel in the automatic waste valve claimed in combination by the complainant; but this particular question of novelty the court has not found itself obliged to investigate, for the following reasons: It is not claimed that the city of Lynn ever used this automatic waste valve, but that it so constructed its works as to get the benefit of a certain static pressure, which was its equivalent. Sometimes the most satisfactory way of ascertaining whether anything adopted by an alleged infringer is the equivalent of what is covered by the patent is to commence at the other end of the investigation, and determine whether what the infringer uses would have been patentable prior to or simultaneously with the patent in question. If not, of course it follows that it cannot be held to be the equivalent of anything lawfully patented. Now, in this case it is apparent that the use of the static pressure in the manner claimed in this record, either independently or in this combination, was not a novelty in the existing state of the art.

With reference to letters patent No. 4,372, all the questions raised in this record as to its patentability are disposed of by *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. Rep. 1073, and *Beedle v. Bennett*, 122 U. S. 71, 7 Sup. Ct. Rep. 1090. It is apparent that the facts proven in the present case touching this point are for all substantial purposes the same as those considered by the supreme court in the cases cited. Even the details of the circumstances attending the discovery or invention, the early experiments, and the reasons for not applying sooner for a patent, follow *Beedle v. Bennett*, *pari passu*, through the certified copy of the deposition of the complainant put into this case by the defendant.

The attention of the court has not been called to any evidence whatever of prior use of the character described in *Andrews v. Hovey*, already referred to, (123 U. S. 267, 8 Sup. Ct. Rep. 101, and 124 U. S. 694, 8 Sup. Ct. Rep. 676.) As the admissions of counsel in *Andrews v. Hovey* have, for the reasons stated, no bearing on the case at bar, this question is left as it was left by the supreme court in *Eames v. Andrews* and *Beedle v. Bennett*. As to the alleged anticipatory publications, the court perceives that the most important are identical with those considered in *Eames v. Andrews*, and with reference to the remainder the attention of the court has not been called to any proofs in the record touching them.

The court has been able to reach conclusions in regard to the question of infringement which appear satisfactory to it, although

it would have been more content if it could have heard more from the counsel touching it.

As to the effect and nature of the complainant's patent No. 4,372, this court turns to the reasoning and conclusions of the supreme court. While there is much which has the appearance of giving the patent a broader construction than this court gives it, the following references to the opinion in *Eames v. Andrews* seem to determine clearly its true nature: On page 57, 122 U. S., and page 1083, 7 Sup. Ct. Rep., the court refers to the fact that "the tube, in the act of being driven into the earth, to and into a water-bearing stratum, would form an air-tight connection with the surrounding earth;" and again, on the same page, it says: "The necessary effect of driving the tube is to displace the earth laterally by compressing it; and the elasticity of the earth is such as to cause it to cling and contract around the tube so as to exclude the air." On page 59, 122 U. S., and page 1084, 7 Sup. Ct. Rep., the court says: "It was equally a necessity to the perfect operation of the apparatus that the tube should be air-tight throughout its length." On page 61, 122 U. S., and page 1085, 7 Sup. Ct. Rep., it says again: "Therefore it follows from the amended specification and the claim of the reissued patent, by the necessity of the case, as expressly declared in the original, that a driven well cannot be constructed in a rock formation." On page 62, 122 U. S., and page 1085, 7 Sup. Ct. Rep., again referring to rock formation, it says: "The rod or tube, having been inserted in the opening made through the rock, may then be driven in the usual manner through the remainder of its course, until it reaches a water-bearing stratum of earth, as if no rock had been met in its passage."

Each of the above citations bears directly upon the proposition that, notwithstanding the speculations touching the laws of science alleged to be involved, the complainant was entitled by his patent to whatever benefit might come from driving his tube into the ground, in the literal sense of the word "driving," and to nothing more. This is made all the more clear by the references of the court (page 67, 122 U. S., and page 1088, 7 Sup. Ct. Rep.) to the extracts from "McKenzie's 5,000 Receipts" and Rees' *Cyclopedia*. The former described a method of boring for springs, and then putting pipes down the aperture. The court said that this was nothing more than a simple process of finding water in the usual way, as in the case of an ordinary dug or bored well, such as have been immemorially used. Of course, therefore, this process was not patentable; and, so far as the complainant might claim to cover it, his patent would be ineffectual. But the extract from Rees' *Cyclopedia* is even more striking. It describes a well constructed by perforating the ground to a sufficient depth by means of an auger or borer, followed by a cylindrical wooden pipe placed in the hole and driven down with a mallet, with the boring afterwards continued, so that the pipe may be forced down to a greater depth, until it reaches the water or spring. It is entirely plain that this describes a method of driving a wooden pipe in such manner that the earth about it would undoubtedly in most cases create an air-

tight joint. Yet the court held that this did not anticipate complainant's patent No. 4,372, because the "same observation" applies equally to this method of constructing a well as to that described in "McKenzie's 5,000 Receipts." In other words, the court said that merely boring a hole to be followed by a pipe driven into it in the manner described was, to repeat the language already cited from the opinion, "a simple process of finding water in the usual way, as in the case of an ordinary dug or bored well, such as have been immemorially used."

It is therefore plain that the claim of the complainant in patent No. 4,372 was held by the supreme court to be construed in its natural sense,—that is, a well obtained by actually driving a pipe into the earth without previous boring, and without removing the earth upward, so that the earth crowded back tends to make an air-tight joint; but the patentee is entitled to the benefit of this method of construction, although the driving is for only a portion of the depth, if that portion intervenes between the surface and the water-bearing stratum. *Eames v. Andrews*, 122 U. S. 70, 7 Sup. Ct. Rep. 1090.

This view of the patent, which this court feels bound to accept from its reading of the opinion in *Eames v. Andrews*, disposes of and renders unimportant all the experiments described by the defendant, of coloring the surrounding surface water, and holds the defendant liable for all wells which were driven in any part by wrenches or mauls, as described by the witnesses Walden and Hunt. So far as the wells were sunk by the use only of the water drill, they class with those described in Rees' Cyclopaedia, according to the reference already made, and are not infringements.

The patent has expired, but, as the bill was filed during its currency, the jurisdiction of the court in equity is not affected thereby. There can, of course, be no injunction.

There will be a decree dismissing the bill so far as relates to patent No. 218,875, and sustaining it so far as relates to patent No. 4,372, and for an account so far as touches any wells driven in whole or part by a wrench or maul, or by analogous methods, with costs for the complainant. Complainant will file a draft decree, and give notice thereof on or before the 22d day of the current month, and defendant will file corrections, and give notice thereof on or before the 29th day of the current month.

THE NOW THEN.

HERRESHOFF MANUF'G CO. v. THE NOW THEN.

(Circuit Court of Appeals, Third Circuit. April 25, 1893.)

1. REPAIRS TO VESSEL—LIEN—EVIDENCE.

If necessary repairs and materials be made and furnished to a vessel in a port other than her home port, the prima facie presumption is that they were made and furnished on the credit of the vessel, unless the work be done by order of the owner, in which case a lien by agreement of the parties must be shown. 50 Fed. Rep. 944, affirmed.

2. SAME—PERSONAL CREDIT OF OWNER.

Repairs to a yacht, amounting to \$1,615.05, were furnished on the order and credit of the owner, who was reputed a rich man and solvent, by libelants, from whom the owner had purchased the yacht. Afterwards further repairs, amounting to \$97.10, were furnished, and included in the same bill for the first repairs. *Held*, that in both instances libelants must be presumed to have relied upon the personal sufficiency of the owner for payment of their claims, and were not entitled to a lien on the vessel.

Appeal from the District Court of the United States for the District of Delaware.

In Admiralty. Libel by the Herreshoff Manufacturing Company against the steam yacht *Now Then* for repairs. The libel was dismissed below. 50 Fed. Rep. 944. Decree affirmed.

Henry W. Bates, (J. H. Hoffecker, Jr., of counsel,) for appellant.
Willard Saulsbury, Jr., for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

DALLAS, Circuit Judge. This is an appeal from a decree in admiralty dismissing a libel to enforce an asserted lien against the steam yacht *Now Then*. It was alleged in the libel that the libelants, "at the request of the master of the said vessel," and in a port as to which she was a foreign vessel, had repaired the yacht, and that there was due therefor \$1,712.15, with interest. The demand comprised two separate subjects of charge, viz.: As of October 24, 1889, \$1,615.05, for repair or renewal of the boiler, performed in or about the month of July, 1889; and as of April 11, 1891, \$97.10, for certain other repairs or materials made or furnished at the last-mentioned date. The main question was and is whether the libelants had established a right to a lien upon the vessel. The court below, citing the case of *The Lulu*, 10 Wall. 197, held the general rule to be: "If necessary repairs and materials are made and furnished to a vessel in a port other than her home port, the prima facie presumption is that they were made and furnished on the credit of the vessel, unless the contrary appears from the evidence in the case;" but also referred to the qualification of this rule under *The Mary Morgan*, 28 Fed. Rep. 196, and *The Francis*, 21 Fed. Rep. 715, to the effect that, "when the work is done by order of the master, a lien is implied, but for work done by order of the owner no lien will exist unless proved by the agreement of the parties." The learned judge of the district court was of opinion that, in view of this qualification of the rule, a lien did not exist in this case, because the work was not done nor the materials supplied upon the order of the master, but by order of a representative, not of the vessel, but of the owner; and that, even under the rule as broadly stated, there would be no lien, because it appeared from the evidence that, in point of fact, the work was not done on the credit of the vessel. We have no hesitation in adopting the learned judge's opinion as to the law, nor in accepting his finding of fact with relation to the first item of the claim; but with respect to the items of April 11, 1889, we have had some doubt; and have reached the same conclu-

sion as to them, only after careful consideration of the peculiar facts of the case.

Mr. Addicks bought this yacht from these libelants. He personally paid for it, and gave it to his wife. As is stated in the opinion of the court below, "he was reputed to be a rich man, able to pay his debts, and there was no thought on the part of the libelants that they would require a lien on the vessel to secure payment for their work." The previous repairs had been made upon his credit, not upon that of the vessel; and the only inference which can fairly be drawn from the evidence is that the libelants relied solely upon him for payment of all their claims. They presented both of these charges, finally, in the same bill; and in no manner did they ever distinguish between them as to the credit given. It is scarcely conceivable that, being content with the personal sufficiency of Mr. Addicks for the larger amount, they intended to hold the vessel for the comparatively insignificant sum of \$97.10; and therefore, although as to this item the materials were not supplied, as in the instance of the boiler repairs, upon the direct order of Mr. Addicks, we think the reasonable deduction from the proofs is that they also were furnished upon his credit. The decree is affirmed.

THE BEECHE DENE.

J. T. LUNN CO., Limited, et al. v. CAMERON et al.
(Circuit Court of Appeals, Fifth Circuit. January 16, 1893.)

No. 42.

SHIPPING—INJURIES TO GOODS—LIABILITY—EVIDENCE.

Where the fact of damage to goods on the voyage, and the extent of such damage, are shown, the burden is on the carrier to show that it was occasioned either by inherent defects in the goods or by sweat of the ship, and hence within the exceptions of the bill of lading.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel by William Cameron and J. W. Castles, trading as Cameron & Castles, against the steamship Beeche Dene, her tackle, etc., (the J. T. Lunn Company, Limited, claimant,) for damages to a cargo of sugar. The vessel was released on claimant's bond, Richard Milliken, surety. The district court entered a decree for libelants, from which the claimant and its surety appealed. Affirmed.

Joseph P. Hornor and Guy M. Hornor, for appellants.
Richard De Gray, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The appellants claim that the damage to the cargo was occasioned either by inherent defects in the goods or by sweat of the ship, and within the exceptions in the

bill of lading. The burden of proof was on them to show this, as the fact of damage and its extent were fully shown. A careful examination and consideration of the proof fails to satisfy us that such was the case, and our conclusion, therefore, is that the judgment of the district court should be affirmed at appellants' cost, and it is so ordered.

THE BEECHE DENE.

J. T. LUNN CO., Limited, et al. v. CAMERON et al.

(Circuit Court of Appeals, Fifth Circuit. March 6, 1893.)

No. 42.

ADMIRALTY—APPEAL—EVIDENCE.

Under rule 8 of the circuit court of appeals for the fifth circuit, the practice in admiralty appeals is not like that formerly existing in the circuit courts under admiralty rule 49, but like the supreme court practice, and new evidence cannot be taken by deposition *de bene esse*, but only by a commission under supreme court rule 12, (3 Sup. Ct. Rep. ix.) which should not issue of course, but only when it appears that the testimony is material, and a good excuse for not offering it in the trial court is given.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel by William Cameron and J. W. Castles, trading as Cameron & Castles, against the steamship Beeche Dene, her tackle, etc., (the J. T. Lunn Company, Limited, claimant,) for damage to a cargo of sugar. The vessel was released on claimant's bond with Richard Milliken as surety. A decree was entered for libelants, and affirmed by this court on appeal taken by respondents. 55 Fed. Rep. 525. Pending the appeal, the libelants took new evidence. Heard on respondents' motion to retax the costs. Granted.

Joseph P. Hornor and Guy M. Hornor, for appellants.

Richard De Gray, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

McCORMICK, Circuit Judge. This case is an appeal in admiralty. Our judgment was that the judgment below be affirmed at appellants' cost. Pending the appeal, the appellees took new evidence, without obtaining an order of this court for the taking of additional testimony. They proceeded under admiralty rule 49, promulgated by the supreme court in 1851, for taking further proof in a circuit court upon an admiralty appeal. Notice was given to the adverse party, who appeared, and duly objected to the proceeding as unwarranted. In taking and printing this additional evidence, costs to the amount of \$41 were incurred, which have been taxed against the appellants, to correct which this motion is made to retax the costs so as to relieve appellants of the \$41 above mentioned, urging, with other grounds not deemed necessary to notice, that said additional evidence was taken without any or-

der of this court authorizing it to be taken, and without showing any legal reason for taking it, and over the objection of appellants, duly made and entered before said testimony was taken.

By section 4 of the act of March 3, 1891, establishing this court, it is provided that no appeal shall thereafter be taken or allowed from the district courts to the circuit court, but only to the supreme court or to the circuit courts of appeals, according to the provisions of said act. By the last clause of section 2 of said act it is provided: "The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law."

This court is given appellate jurisdiction of all cases other than certain specified classes of cases which are reviewable only by the supreme court, and the provisions appear to point to precisely the same practice in reaching this court and proceeding in it, as in taking and conducting appeals or writs of error to and in that court. Authorized by these provisions of the statutes, we have adopted our rule 8, (47 Fed. Rep. v.): "The practice shall be the same as in the supreme court of the United States, as far as the same shall be applicable."

On the subject we are now considering, the practice in the supreme court is regulated by rule 12, (3 Sup. Ct. Rep. ix.,) which is in two sections:

"(1) In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission to be issued from this court or from any circuit court of the United States.

"(2) In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court or from any circuit court of the United States under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice: provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible."

In prize cases certainly the cause is heard *de novo* on appeal in the supreme court, (*Yeaton v. U. S.*, 5 Cranch, 283,) if not in all admiralty appeals; but ordinary appeals in admiralty have not been heard *de novo* in the supreme court in the same sense or to the same extent as was provided for and obtained in cases on appeal in the circuit court, as indicated and regulated by rule 24 and rule 49 in admiralty, authorized by section 6, 5 St. at Large, p. 518, and fully discussed in *The Lucille*, 19 Wall. 73, and in *The Charles Morgan*, 115 U. S. 75, 5 Sup. Ct. Rep. 1172; *The Mabey*, 10 Wall. 420. On the subject of taking new evidence in cases on appeal in the supreme court it is expressly held that such evidence cannot be taken by deposition *de bene esse*. That the provision of the statutes authorizing the taking of such depositions in express terms refers to cases in the district and circuit courts, and does not apply to cases pending in the supreme court, (*The Argo*, 2 Wheat. 289,) and that testimony by depositions can be regularly taken for the

supreme court only under a commission issuing according to its rules. There can be no substantial amendment of pleadings in the supreme court, and commissions to take testimony do not issue out of that court as a matter of course, on formal application under rule 12, but the party is required not only to show that the testimony is material, but is required to present a satisfactory excuse for not taking the evidence before the trial courts. The Mabey, supra. Parties and learned proctors have assumed in this case, and perhaps in others, that as the appeal from the district court in admiralty cases now comes to this court, the rules applicable to appeals in such cases to the circuit court before March 3, 1891, governed in such cases in this court. We do not so construe the statutes and the promulgated rules bearing on the subject, and our judgment rendered in this case on a former day of this term (55 Fed. Rep. 525) will be so modified as to read: It is ordered that the judgment of the district court be affirmed, and that appellant pay all the costs except the costs of taking and printing additional evidence taken after the allowance of the appeal, and the costs of this motion, which excepted costs are adjudged against the appellees.

MCLEOD v. 1,600 TONS OF NITRATE OF SODA.

(District Court, N. D. California. April 18, 1893.)

No. 10,253.

1. DEMURRAGE—EXCEPTIONS—POLITICAL OCCURRENCES—EVIDENCE.

Libelant's ship proceeded to a Chilian port for cargo under a charter party which provided for demurrage at a certain rate, "the act of God, political occurrences, fire, * * * excepted." Civil war was progressing in Chili. The port was blockaded by the de facto government, and the agent of the charterers was unable to procure cargo because the sellers would not deliver, for fear of being compelled to pay a second export duty in case the government fell. *Held*, there being no actual vis major encountered by the charterers, to prevent a loading, that they were not within the exceptions of the charter party, and were liable for demurrage.

2. SAME—ACTUAL PREVENTION OF LOADING.

The fact that the political occurrences in question indirectly prevented the charterers from procuring a cargo, or from bringing it to the port of loading, was not sufficient to exempt them from liability. They must have prevented the charterers, after procuring the cargo at the port of loading, from loading it on the vessel.

In Admiralty. Libel by George McLeod against 1,600 tons of nitrate of soda, (J. W. Grace & Co., claimants,) cargo of ship Dunstaffnage, for breach of charter party. Decree for libelant.

Andros & Frank, for libelant.

Page & Eells, for claimants.

MORROW, District Judge. The libelant, by his agents, Scammel Bros., of New York, chartered the British bark Dunstaffnage to J. W. Grace & Co., of San Francisco, by charter party dated September 16, 1890, for a voyage from a safe nitrate port, as ordered by

charterers or their agents, to San Francisco, Cal. The charter party contained the following stipulations:

"The said parties of the second part do engage to provide and furnish the said vessel, during the voyage aforesaid, with a full cargo of, say, nitrate of soda, in bags, to be received by the vessel as customary. * * * The said parties of the second part shall be allowed, for the loading and discharge of said vessel at the respective ports aforesaid, lay days, as follows: Thirty working lay days for loading, to commence 24 hours after her inward cargo ^{and} unnecessary ballast is finally discharged, and captain has given written ^{or} notice to that effect. * * * And for each and every day's detention by default of said parties of the second part, or their agents, they agree to pay to the said party of the first part demurrage at the rate of four pence sterling per ton register per day; but, should the vessel be detained by the master beyond the time herein specified, demurrage shall be paid to charterers at the same rate, and in the same manner. * * * The cargo shall be received and delivered within reach of the vessel's tackle. * * * The act of God, enemies, political occurrences, fire, and accidents beyond charterers' control, as well as the dangers of the seas and navigation, always excepted."

It was also provided that the loading port should be named by the charterers at the last port at which the vessel should discharge lumber. The bark discharged its cargo of lumber at Antofogasta, in the republic of Chili; and the charterers, about December 4, 1890, named the port of Caleta Buena as the loading port, under the terms of the charter party. The Dunstaffnage arrived at the last-named port February 9, 1891, when the master of the vessel was notified by the agent of the charterers that the port was blockaded. The cargo intended to be shipped by the Dunstaffnage was purchased by J. W. Grace & Co., for such purpose, in time for shipment in accordance with the terms of the charter party. But, under the laws of the republic of Chili, then in force, there was payable by the sellers, on all cargoes of nitrate of soda sold for shipment from Chilian ports, an export duty of \$1.50, Chilian money, for each 100 Spanish pounds. This duty was payable to the government of Chili, at its customhouse at the port of shipment. When the Dunstaffnage arrived at Caleta Buena, February 9, 1891, there was in progress, in the republic of Chili, a war between two parties, both of whom claimed to be the government of that country. One party was known as the "Congressional Party," of which George Montt, subsequently president of the republic, was one of the leaders; and the other, as the "Balmaceda Party," of which latter party, Balmaceda, then president of the republic, was the chief. The Congressional party, with its military and naval forces, held possession of the town and port of Caleta Buena, and so continued in possession during the period involved in this controversy; and during that time no representative of the Balmaceda party or government was at that port, to whom the duties could have been paid, but there was a representative of the Congressional party at the port, who was ready to receive such payment, and to issue thereupon a clearance to the vessel and cargo. The charterers failed to deliver a cargo on board the Dunstaffnage within the time required by the charter party; and they give as a reason for such failure the refusal of sellers of nitrate to deliver the same for shipment during such time as the Balmaceda party was

unrepresented at Caleta Buena, on the ground that payment of the export duty to the Congressional party would not be in liquidation of such duty, and a defense to them, as against any claim which might thereafter be made therefor by the Balmaceda party, or a defense against any charge that might thereafter be made against them by the Balmaceda party for a violation of the revenue laws of the government. As a matter of fact, the Balmaceda party never regained possession of the town or port of Caleta Buena; but on the other hand, while the Congressional party claimed to be the true government of Chili, at no time during the detention of the Dunstaffnage at Caleta Buena was the independence of the government of the Congressional party recognized by any nation, and it was not until September 4, 1891, that this party became victorious, and possessed the entire country, and formed a provisional government, which was recognized by the United States and other nations September 7, 1891.

The blockade of the port of Caleta Buena was raised by the Congressional party February 15, 1891, and permission given to vessels lying in port to load saltpeter, upon condition that the duties had been previously paid to the commander of the gunboat stationed at that port. On March 16, 1891, the master of the Dunstaffnage notified the agent of the charterers that the lay days provided for in the charter party expired on that day. In reply to this notice, the agent refused to admit the claim, and referred to the exceptions contained in the last clause of the charter party, providing: "The act of God, enemies, political occurrences, fire, and accidents beyond charterers' control, as well as the dangers of the seas and navigation, always excepted." The vessel was loaded with a cargo of nitrate, and dispatched April 23, 1891; and it is agreed that the amount of demurrage incurred, if any, is \$1,927.37.

The question is as to whether the charterers are relieved from liability for the detention of the vessel at Caleta Buena beyond the period of 30 days, under any of the conditions or exceptions provided by the charter party. The law is well established that where a contract specifies a certain number of days for the loading or unloading of a vessel, and provides that, for any detention beyond the lay days, demurrage is to be paid at a fixed rate per day, the shipper is held strictly to its terms. *Randall v. Lynch*, 2 Camp. 352; *Leer v. Yates*, 3 Taunt. 387; *Barker v. Hodgson*, 3 Maule & S. 267; *Bessey v. Evans*, 4 Camp. 131; *Barret v. Dutton*, Id. 333; *This v. Byers*, 1 Q. B. Div. 244; *Straker v. Kidd*, 3 Q. B. Div. 224; *Cross v. Beard*, 26 N. Y. 85; *Railroad Co. v. Northam*, 2 Ben. 1; *Sleeper v. Puig*, 17 Blatchf. 36; *Williams v. Theobald*, 15 Fed. Rep. 469. But it is claimed by the charterers in this case that the delay in loading the vessel was not their default, but the interposition of a superior force, for which they were not liable, under the terms of the stipulation providing for demurrage "for each and every day's detention by default of the said parties of the second part." In support of this position the following cases are cited: *Towle v. Kettell*, 5 Cush. 18; *The Cargo of the Mary E. Taber*, 1 Ben. 105; *Thacher v. Gaslight Co.*, 2 Low. 361.

In *Towle v. Kettell* the charterers agreed to pay demurrage for detention, provided such detention should happen by their default. The vessel was detained in quarantine, and the suit involved a claim for demurrage for such detention, but the court held that the detention was not the default of the charterer.

In the case of *The Cargo of the Mary E. Taber*, the stipulation was to the same effect,—that the charterers should pay demurrage for detention of the vessel, provided such detention should happen by their default. The cargo was wood. By the custom of the trade, the vessel was bound to deliver the cargo at different places in the port, if requested. The master, having delivered his deck load at one dock, was requested by the charterer to deliver the rest at another, and lost several days in getting there, by reason of the weather. The court held that no demurrage could be recovered, under the charter, for such detention.

In *Thacher v. Gaslight Co.* the stipulation was that the charterer would pay demurrage “for each and every day’s detention by default” of the charterer. The cargo was coal. The vessel was detained, waiting for a berth where she could be conveniently discharged. The court, in its opinion, referred to the two cases just cited, and *Davis v. Wallace*, 3 Cliff. 123, (decided by Judge Clifford in 1868,) and said:

“These three decisions are not inconsistent with each other; and they mean that the proviso intends to exonerate the charterer from delay occasioned by superior force acting directly upon the discharge of that cargo, and not from the indirect action of such force, which, by its operation on other vessels, has caused a crowded state of the docks. If the respondents do not furnish the wharf room, or any other means and appliances which they are to supply, it is not enough for them to prove that they have taken reasonable measures to procure them. In short, the default does not mean negligence, but a failure of contract on their part, unless it is caused by a direct and immediate vis major, or something like it.”

The law, as declared in this last case, certainly does not relieve the charterers from liability, upon the facts in the present case. No force was applied to prevent the delivery or loading of a cargo on board the *Dunstaffnage* at *Caleta Buena*. The most that can be said is that a third party, wishing to avoid the possible risk of being required to pay the export duties a second time, refused to deliver a cargo to the charterer in time to enable the latter to make the shipment in accordance with the terms of his agreement with the libellant. It was not a direct or immediate vis major, nor anything like it; but the voluntary act of the seller of the cargo, in refusing for a time to assume a risk which attached to the business, and rested upon one or both of the parties to that transaction. As between the owner of the vessel and the charterers, it was the duty of the latter to furnish a cargo within the time agreed upon, or be in default; and, being in default, it is not sufficient for them to plead now that they took reasonable measures to procure a cargo. This is the doctrine established by a number of the leading cases.

In *Davis v. Pendergast*, 16 Blatchf. 565, it was stipulated in the charter party that the charterers should have 45 running days for loading and discharging cargo, and in case the vessel was longer detained they were to pay demurrage, provided the detention should

happen by their default. The vessel was detained 13 days after the expiration of the 45 lay days; and the default involved, in part, the conduct of third parties, as appears by the following in the statement of the case:

"By the customhouse regulations, the assorted cargo could only be discharged at the customhouse, either from the vessel alongside, or by means of lighters. If lighters are employed, the expense is paid by the vessel. If the discharge is made at the customhouse, the vessel must wait her turn for a place alongside. All the cargo on the bark was discharged upon lighters, except the coal, which was delivered from the vessel at a wharf. The lighters were furnished by the consignees, and paid by the vessel. Seven days were occupied in discharging the coal, when it might have been put out in half that time. The reason for this delay was that the coal had been sold by the agents of the respondents, and was to be delivered at the rate of thirty tons per day. The lumber was delivered from the lighters to the different persons to whom it had been sold by the agents of the respondents. Much delay was caused by this mode of doing business, sometimes on account of the great distances the lighters were sent, and sometimes by the refusal of parties to take the lumber. There was no time when the persons receiving the cargo were delayed by the vessel. The lumber could have been put off in a little more than two days at the wharf, or upon lighters, if they had been ready to take it. The master of the vessel frequently called upon the consignees to furnish him with lighters more rapidly. The assorted goods were discharged by the lighters as soon as they could have been if the vessel had waited her turn at the customhouse."

In the district court the libel was dismissed; the court holding, upon the authority of *Towle v. Kettell*, that the burden of proof was on the owners to show that the vessel was detained by default of the charterers, that the mere lapse of time was not necessarily a default, and that the charterers were not responsible for the delay in furnishing the lighters. *Davis v. Pendergast*, 8 Ben. 84. Upon appeal to the circuit court, Chief Justice Waite, sitting as circuit justice, overruled this decision, holding, in favor of the libelants, that—

"The term 'running days' was evidently employed to exclude the idea of working days only. This throws upon the respondents (charterers) all the risks of detention by intervening Sundays and holidays, as well as by the ordinary interruptions incident to the business, such as customhouse and port regulations in reference to the manner of taking in or discharging cargo, lack of wharfage or lighterage facilities, not due to any fault of the vessel, and the like. The respondents, in effect, agreed that no more than forty-five running days should be occupied in loading and discharging the cargo, unless it was occasioned by some fault of the vessel, or some unusual and extraordinary interruption, that could not have been anticipated when the contract was made. Detention by reason of any of the risks assumed by the respondents placed them in 'default,' within the meaning of that term, as used in the charter, and rendered them liable for the stipulated demurrage."

Counsel for the respondents in the present case contends that the authority just cited is to be interpreted in their favor, because of the qualification that the charterers' liability is excused when the default is occasioned by "some unusual and extraordinary interruption, that could not have been anticipated when the contract was made." But an interruption was anticipated, as we shall see when we come to consider the exceptions provided in the charter party. For the present, we are only concerned in determining, in limine, what constitutes a "default" on the part of the charterers, without reference to other exceptions and conditions.

In *Dow v. Hare*, decided by Judge Hoffman, in this court, in 1876,

the charter party provided for the carriage of a cargo of coal from San Francisco to Ounalaska, to be there delivered to the United States steamer *Saranac*, which was expected to be in port at the time of the arrival of the chartered vessel. When the vessel arrived at Ounalaska the steamer *Saranac* was not in port, and the vessel lay through her lay days, and a number of days after, on demurrage. The *Saranac* had been wrecked and lost at sea. The chartered vessel discharged her cargo on the wharf, returned to San Francisco, and sued for demurrage. The demurrage clause in the charter party was the same as in the case at bar. It was contended on the part of the defense that the facts did not bring the case within the terms of the agreement, inasmuch as the failure to receive the cargo was not due to the "default of the charterers." The court held that it was the duty of the charterer to provide a consignee to receive the cargo at the place of destination, and, failing in this duty, he was "in default." The case was appealed to the circuit court, where the decree was affirmed. If we apply the law, as thus declared, to the present case, we must say that the charterers were in default when they failed to provide a cargo for the *Dunstaffnage* within the time stipulated in the contract, and that they were not relieved of their liability because their failure was primarily the result of a default of a third party. See *Abb. Shipp.* (13th Ed.) p. 268, and cases there cited.

We come now to the exceptions contained in the charter party, which, it is admitted, qualify the demurrage clause, and under which it is claimed that the charterers are relieved from liability because of "political occurrences" and "accidents beyond charterers' control." Assuming that these intervening causes did operate so as to prevent the sellers of nitrate from delivering a cargo to the charterers, the question arises as to whether they prevented the loading of the vessel, within the meaning of the exceptions. It is contended on the part of the libellant that it is not sufficient that these causes, if they existed, prevented the charterers from procuring a cargo, or from bringing it to the place or port of loading, but they must have prevented the charterers, after having had the cargo procured and ready at the port of loading, from doing the actual work of loading the cargo on board the vessel. In other words, they should have had the cargo bought and delivered to themselves at the usual place of loading, and then, if the political occurrences or accidents beyond charterers' control operated directly so as to prevent the loading of the vessel, the exceptions would be a defense, but if these causes simply prevented the charterers from securing the delivery of a cargo from the purchaser to them at the port of loading, and thus indirectly prevented them from loading the vessel, the exceptions are no defense, because the prevention is not only too remote, but not within the terms of the contract. The leading case in support of this construction is *Grant v. Coverdale*, (in the house of lords,) L. R. 9 App. Cas. 470. In that case the charter party contained a stipulation that the ship "shall, with all convenient speed, sail and proceed to Cardiff East Bute dock, or so near thereunto as she can safely get, and there load," etc. The demurrage clause was as follows:

"Time to commence from the vessel being ready to load, and ten days on demurrage over and above the said lay days, at forty pounds per day, except in case of hands striking work, or frosts, or floods, or any other unavoidable accidents preventing the loading."

The vessel proceeded to the Cardiff East Bute dock. The charterer did not have his cargo on the dock ready to load, but it was necessary for him to bring it from the West Bute dock, which was connected with the East Bute dock by a canal, and locks at both ends. During the lay days of the ship a frost set in, and the canal became impassable by ice, by reason of which the charterers were unable to bring the cargo alongside the ship, except, at extraordinary expense, by carting, which the referee found, though physically possible, was not a reasonable mode to adopt, under the circumstances. The court held that the frost did not prevent the loading, within the meaning of the exception, and in commenting on the scope of the exception the Earl of Selborne said:

"These words in the exception are as large as any words can be. They mention 'strikes, frosts, floods, and all other unavoidable accidents preventing the loading.' If, therefore, you are to carry back the loading to anything necessary to be done by the charterer in order to have the cargo ready to be loaded, no human being can tell where you are to stop. The bankruptcy, for instance, of the person with whom he has contracted for the supply of the iron; or disputes about the fulfillment of the contract; the refusal, at a critical point of time, to supply the iron; the neglect of the persons who ought to put it on board lighters to come down the canal for any distance, or to be brought by sea, or to put it on the railway, or bring it in any other way in which it is to be brought,—all those things are, of course, practical impediments to the charterer having the cargo ready to be shipped at the proper place and time. But is it reasonable that the shipowner should be held to be answerable for all those things, and is that within the natural meaning of the word 'loading'? Are those things any part of the operation of loading? Nothing, I suppose, is better established in law, with regard to mercantile cases of this kind, than the maxim, 'Cause proxima, non remota, spectatur,' and it appears to me that the fact that this particular wharf was very near the Cardiff East Bute dock can make no difference, in principle, if it was not the place of loading."

In the same case, Lord Fitz Gerald states his conclusion as follows:

"It seems to me that the exception applies only where the accident prevents the loading at the place of loading, and not where it prevents or retards the transit or conveyance of the cargo to the place of loading. The shipper was bound to have a full cargo at the place of loading, and he took on himself all the risks consequent upon delay in transit. If he had had it there, it could have been loaded within the lay days, and no case of demurrage could have arisen."

This case was cited as authority upon a like question by the circuit court of appeals for the fifth circuit in the case of *The India*, 49 Fed. Rep. 82; and the latter case was followed by the same court in *Sorenson v. Keyser*, 52 Fed. Rep. 163.

In the case of *The Village Belle*, 30 Law T. (N. S.) 232, the court appears to have given a somewhat wider range to the stipulated exceptions, but not to the extent of excusing the charterer for a delay caused by the happening of events not directed against the particular vessel. In that case the charterer was to furnish a cargo of iron ore at Bilbao, Spain. At the time of the arrival of the vessel at that port (February 23, 1873) the place was threatened by the

armed forces of the Carlist party. The excepted perils stipulated in the charter party, in favor of the charterer, were:

"All accidents and causes occurring, beyond the control of the shippers and of freighters, which may prevent or delay her loading or discharging, including civil commotions, strikes of any pitmen or workmen, riots, frosts, floods, stoppage of trains, accidents to machinery, &c., always excepted."

The ship was detained for 39 days after the expiration of the lay days, for which demurrage was claimed. The defense of the charterer was that the default in loading "during the lay days was excused by the happening of events excepted by the charter party in favor of the charterer. Sir Robert Phillimore held that the burden of proof was upon the charterer to show that the noncompliance with the terms of the charter party was occasioned by the happening of such events. The charterer accordingly produced evidence of great disturbances in the district from which the iron ore was being obtained; that the Carlists had cut the Deputation Railway, which brought ore down from the mines; and that the disturbed state of the country interfered with the hauling of the ore. The court held that the charterer could not excuse his default in loading within the lay days by giving evidence of general disturbance and cessation of work in the district about the time, but to exempt himself from liability he must show a disturbing cause actually preventing the loading of the particular ship.

In the case at bar the political occurrences and accidents beyond charterers' control had no direct relation to the loading of the chartered vessel; but, so far as they were unusual and intervening causes, they constituted a general condition of affairs, operating upon all vessels and all shippers alike. Such a condition, as we have seen, is not a sufficient excuse. The charterers should have provided a cargo at the place of loading within the time stipulated in the charter party; and if, in doing so, they, or those of whom they purchased, incurred any risk or peril, it was their misfortune, and not the fault of the owner of the vessel, who had performed his part of the contract.

It is, however, conceded, on behalf of the libellant, that the exceptions qualify other conditions of the charter party, and, among others, the stipulation that they should "provide and furnish" a cargo; and it is contended, on behalf of the charterers, that to provide a cargo for a vessel means to place it alongside for shipment. If it is not placed there, it cannot be loaded. If it is not loaded, it is because it is not provided. Consequently, the failure to load is a failure to provide, and vice versa, and a delay in doing the one act is a delay in doing the other. This argument assumes that political occurrences would not ordinarily operate upon the mere act of loading a vessel, but might interfere so as to prevent the charterer from having a cargo provided at the place of loading. This reason could be urged, however, with even greater force to enlarge the meaning of the words "frost," "flood," and "drought," making them qualify the antecedent stipulation, to provide and furnish a cargo; but in the cases cited these exceptions have been held to qualify only that part of the contract relating to the loading of the vessel; or if, by the terms of the stipulation, it is made ap-

plicable to the agreement to furnish a cargo, as in the case of The Village Belle, then it must appear that the intervening cause of delay was directed against the particular cargo. The real difficulty, however, with this argument, as applied to the present case, is that the charterers did not fail to provide and furnish a cargo. They performed that part of their contract, but not in time to avoid the penalty provided in another part of the contract,—for a delay in loading the vessel.

The conclusion is that it was the duty of the charterers to have a cargo at the place of loading, and that the exceptions in the charter party did not operate so as to excuse the charterers for the failure of a third party to supply them with a cargo for shipment within the period of lay days provided in their agreement. This determination renders it unnecessary to inquire as to what act or intervening cause would amount to a political occurrence, or an accident beyond the charterers' control. It is sufficient, for the present, to say that it is very doubtful whether the risk of being required to pay export duties a second time would come within the terms of either exception. A decree will be entered in favor of the libellant for \$1,927.37 and costs.

THE JOHN C. SWEENEY.

THE RELIEF.

CHARLESTON BRIDGE CO. v. THE JOHN C. SWEENEY AND THE RELIEF.

HIGBEE v. CHARLESTON BRIDGE CO. et al.

(District Court, E. D. South Carolina. April 11, 1893.)

1. COLLISION—EVIDENCE—FOUNDATION FOR EXPERT TESTIMONY.

In a libel against a bridge company for damage to a vessel, alleged to have been caused by improper construction of a draw, evidence that the secretary of war had notified the bridge company that their bridge was an obstruction to navigation; that the bridge had been examined by a board of officers, who prepared plans and directed changes to be made; that the changes were made by the bridge company's engineer; and that the work was examined by an officer representing the secretary of war and the board,—was properly admitted, as showing the opportunities for information which such officer possessed as an expert testifying to the sufficiency of the changes made.

2. SAME—INJURIES FROM DRAW—EVIDENCE.

A tug having a schooner in tow in mid-stream, with a hawser 190 feet long, passed safely through the draw of a bridge, and the schooner, following straight behind, entered between the fenders of the draw, and proceeded some feet within, when she suddenly sheered, and struck the fender almost bows on. The master of the schooner was at the wheel. There was nothing to show that the current caused the sheer, nor that the tug caused it, and the testimony of the master showed that something occurred which he could not explain. *Held*, that libels against the bridge company and against the tug must be dismissed, retaining a libel by the bridge company against the schooner for further evidence.

In Admiralty. Libels by the Charleston Bridge Company against the schooner John C. Sweeney and the tug Relief, and by Daniel E. Higbee, master of the schooner John C. Sweeney, against the Charles-

ton Bridge Company and another. The first libel was retained for further testimony; the other two dismissed.

J. F. Ficken and Mitchell & Smith, for libelant Charleston Bridge Company.

J. P. K. Bryan and J. N. Nathans, for respondents.

J. P. K. Bryan, for libelant Daniel E. Higbee.

J. F. Ficken, Mitchell & Smith, and J. N. Nathans, for respondents.

SIMONTON, District Judge. These are a libel in rem and a libel in personam. The original libel in rem was brought by the Charleston Bridge Company against the schooner John C. Sweeney and the tug Relief, for collision with the drawbridge over the Ashley river. The second libel is in personam, brought in behalf of the owners of the schooner John C. Sweeney against the Charleston Bridge Company and the owners of the tug Relief, for damages resulting from the same collision.

The facts immediately attending the collision are easily stated. The schooner John C. Sweeney reached the port of Charleston with a full cargo of coal, to be delivered to the Ashley Phosphate Company at its works on Ashley river above the bridge. She cast anchor off the upper end of the East Battery on the afternoon of 1st December, 1892. The tug Relief was engaged to tow her up the river, and, to that end, left her dock about 4 o'clock of the next morning, proceeded to the schooner, and took her in tow. The hawser by which she was towed was about 190 feet long,—30 to 35 fathoms. When the anchor was up, the master of the Sweeney, who was at the helm, gave the wheel to a seaman and went into the cabin. The tug and tow went down Cooper river, and turned into the Ashley, in mid-stream, the tow following closely the wake of the tug. The bridge spans the river about one and a half miles up, and is in full view for over a mile. Along this bridge at intervals are white lights. The draw is double, divided by a center pier upon which the drawbridge works. There are fenders running out, one on the east side of the eastern draw, and another on the west side of the western draw, above and below the bridge. On the ends of the center pier, and on the end of each fender, is a stationary red light. The drawbridge has a set of pillars and a network of iron as its top hamper. Above this is a line of three lights, so arranged that when the bridge is closed the lamps show a green light to the stream, and when the draw is open a red light. The tug steered for these lights on the draw, and, when the draw opened, took direction for the middle of the eastern draw, the tow following. When about to enter the draw the master took the wheel, a seaman being near him on the quarter. The mate was forward near the bow. The tug entered the draw about midway between the red light on the end of the center pier and that on the end of the easterly fender, and passed through. The schooner in tow entered the opening of the draw, and the mate on the bow on the lookout saw that she was going bows on against the eastern fender. He called out at once, "Starboard! Hard astarboard!" to the master at the wheel, and in a second or two the schooner struck the fender about 30 feet from its outer end, glanced off, and went across the draw, striking the drawbridge, then over the center pier, tearing

away the ironwork, and dislocating the bridge. Her bowsprit was broken off short near the stem, and her cathead was carried away, with damage to her topmast and lines. The time of the collision was just before daylight. The night was clear. The tide was about three quarters flood. The collision was witnessed by two men on the bridge connected with the drawbridge, by the mate of the schooner, and by the mate of the tug, who was at her stern in charge of the tow line.

These libels are the result. They make three questions: Through whose fault was the collision,—the schooner, the tug, or the defective construction of the drawbridge? We must get the answer to these questions from the circumstances immediately attending the collision. There may have been faults with each party. The injury must be the result of, or be contributed to by, such fault. *Glenn v. Railroad Co.*, 21 S. C. 470. What we must discover is *causa causans*.

Before entering upon this examination we must dispose of a question of evidence raised at the hearing. Under the provisions of the act of congress approved 11th August, 1888, the secretary of war notified the Charleston Bridge Company that their bridge was an obstruction to navigation. A board of officers was appointed, among them Capt. Frederick V. Abbot, of the corps of engineers, who is stationed in this state. This board made their examination and report, prepared proper plans for remedying the evil complained of, and directed the changes to be made. The bridge company employed their own engineer to make the changes required. His work was examined by Capt. Abbot, representing the secretary and the board. When these facts were offered in evidence they were objected to as incompetent, immaterial, and irrelevant. They were admitted subject to exception. Notice had been given that Capt. Abbot would be introduced in the case as an expert. In order that the court could properly appreciate the opinion which he would give as an expert, it was important to know, first, his profession and experience, then the circumstances under which he made his examination and formed his opinion. So, without discussing the constitutionality of the act of congress which was attacked in argument, or the right of the secretary to take the steps which he did take, or the conclusive character of the findings of the board or the right to impugn their finding, these facts showed that Capt. Abbot, the expert, was an officer of the corps of engineers of the army, of high character and ability, who, under the instructions of his superior, made an examination into this bridge, in which he was assisted by other officers of standing; that he himself personally made the examination, and under the sanction of his own official character, and under the orders of his superiors, formed his own conclusions, which conclusions he gave to the court. The facts leading up to this testimony may or may not have been, in themselves and standing alone, competent or material, but, as illustrating the character and value of Capt. Abbot's testimony, they were admitted. Capt. Abbot testifies that in his opinion the bridge, as now constructed, is reasonably safe for navigation. Every bridge built across a navigable stream

more or less obstructs navigation, but the public policy has always permitted the construction of such bridges for public convenience. All that is required is that in the channel of the stream over which they may be built there be secured an opening sufficient in width to permit the passage of vessels using such streams, and that this passage be so constructed with reference to the current as to offer the least resistance possible. An opening perfectly parallel to the current would accomplish this; but in tidal streams, especially in rivers with bends in them, the currents are not uniform in direction, varying their angles at different tides and different stages of the same tide. Over such streams the opening can only be made reasonably safe. So, also, with regard to the width of the draw. It must be reasonably wide. The evidence discloses that in some details this bridge might be defective. The fenders may or may not be of the exact length required, and the distance between the lowest chord of the bridge and the fenders in some cases may be greater than the plans demand. There may be other defects, and the requirements of statute may not all be complied with. If this be so, an indictment may lie against the bridge company as for a public nuisance; but no private person can sustain an action, except for a particular special injury, the direct result of the unlawful character of the obstruction. *South Carolina Steamboat Co. v. South Carolina R. Co.*, 30 S. C. 545, 9 S. E. Rep. 650. So the question remains, was this collision caused or contributed to by any defective construction of the bridge, or by the management of the schooner or the conduct of the tug?

The tug and her tow, when they were proceeding through Ashley river, came in sight of the bridge when opposite to Chisolm's mill. They were then about mid-stream, and the bridge lay straight before them. The course of the tug was directed towards the red light of the center pier. When they were approaching the bridge the usual signals were given for opening the draw, and they were promptly obeyed. The tug then directed her course to the eastern opening, steering for the middle of the opening. The tow followed straight after the tug, and when the latter straightened out for the draw the schooner did so too. The tug entered the draw about the middle of the opening, passed between the center pier and the easterly fender, and went through. The schooner followed in her wake, and entered between the fender and the center pier, and proceeded some feet within the center pier when she was found about to strike the fender almost bows on. This must have occurred suddenly and unexpectedly. Her mate, whose bearing and intelligence produced a most favorable impression on the court, was on the lookout at her bow, and up to that moment he saw nothing indicative of disaster. Just as soon as he saw this, and he saw it when he had just passed the red light abreast of the middle pier, he promptly called out to the helmsman, "Starboard!" and instantly, "Hard astarboard!" This was the fact of collision. What occasioned it? Not the want of length of the fenders, for the schooner was between the fender and the center pier. Not the obliquity of the current or her speed, for the tug had passed safely through the same current, and at the same speed. Not the want

of height of the fenders, or the want of proper distance from the lowest chord of the bridge to the structure beneath, for the schooner was in the stream, proceeding almost bows on to the fender, striking it and glancing from it, not running over it. There can be no doubt that the schooner sheered at that point. She ceased at this point to follow the wake of the tug. The mate of the tug, at the stern of the tug in full view of the schooner, says that she did. The other witness, the mate of the schooner, who was in a position to know it if it were so, or to deny it if it were not so, is discreetly silent as to the fact. All the witnesses concur in saying that up to that time the schooner was following strictly the direction of the tug. The declarations of the master himself indicate that something occurred with him at the wheel which he himself could neither understand nor explain. Counsel on both sides have presented ingenious theories accounting for this disaster. The fact, however, remains. The schooner made a sheer to starboard in the draw. In that sheer, because of that sheer, she collided. No evidence is given that the current caused it; none that the tug caused it. The most probable cause is that somehow there was a change of her wheel. The mate saw this, for at once he called for a correction of this very thing: "Starboard! hard astarboard!" It may be—it no doubt is—true that the bridge is not perfectly safe, and that by adopting the suggestions of Capt. Brown of the Wistaria it could be made perfectly safe. His suggestion is that proper buoys and anchors could be placed on a line the extension of the center pier; that a vessel approaching the bridge should stop when she reached them, and, by putting out a hawser, could drop through the draw slowly and safely. But the experience of mariners, the usage of the port, the very small percentage of accidents occurring at this bridge since it was remodeled, show that such a course is not imperatively necessary. Above all, this collision of which we are treating did not occur either because the schooner did not stop, or because she was moving at too great speed, or because of any deflection of the current. The most probable solution is the one which has been reached.

It is ordered, that the libels against the tug be dismissed; that the libel against the bridge be dismissed; that it be referred to E. M. Seabrook, Esq., to take testimony as to the damages accruing to the bridge by reason of the collision, and that he report the same.

THE JOHN C. SWEENEY.

CHARLESTON BRIDGE CO. v. THE JOHN C. SWEENEY et al.

(District Court, E. D. South Carolina. April 25, 1893.)

1. JURISDICTION—MOTION TO DISMISS AFTER HEARING.

A motion to dismiss a libel in rem in admiralty may be made although a full hearing has been had on the merits, with testimony and argument.

2. SAME—ADMIRALTY—COLLISION WITH DRAWBRIDGE.

Courts of admiralty have no jurisdiction over torts committed on water but resulting in damage upon land, and cannot entertain a libel in rem by

a bridge company owning a bridge built on piers, with a draw swinging on the center pier, against a schooner for damages caused to the bridge by colliding therewith.

In Admiralty. Libel in rem by the Charleston Bridge Company against the schooner John C. Sweeney and others for damages to a bridge. On motion to dismiss for want of jurisdiction. Granted.

Bryan & Bryan, for the motion.

J. F. Ficken, Mitchell & Smith, and J. N. Nathans, opposed.

SIMONTON, District Judge. The libel in this case was filed in rem for injuries to the bridge of libelant, caused by the schooner running into it. It was tried with a libel in personam by the master of the schooner for injuries to her, received at the same time, and growing out of the same collision. 55 Fed. Rep. 536. The libels were in tort. A full hearing was had, with testimony and argument. After consideration, the libel in rem was sustained, and the libel in personam was dismissed. After opinion filed, but at the same term, respondent in the libel in rem moves to dismiss that libel for want of jurisdiction.

The first question is, can this motion be now entertained? The question of jurisdiction of the court can be made at any time, (*Railway Co. v. Swan*, 111 U. S. 382, 4 Sup. Ct. Rep. 510;) indeed, can be made after decree below and writ of error, for the first time in the supreme court, (*Capron v. Van Noorden*, 2 Cranch, 126; *King Bridge Co. v. Otoe Co.*, 120 U. S. 226, 7 Sup. Ct. Rep. 552.) In *Mail Co. v. Flanders*, 12 Wall. 130, the circuit court had granted an injunction and had issued a writ of sequestration, on which latter writ the marshal had taken possession of a steamer, and held it subject to the order of the court. No question of jurisdiction had been made until after this was done. The supreme court sustained the action of the circuit court in setting aside the injunction and the order of sequestration and restoring the property, when want of jurisdiction was made to appear. Where the record discloses a controversy of which the court cannot take cognizance, its duty is to proceed no further; and this it can do on its own motion, if need be. *Morris v. Gilmer*, 129 U. S. 325, 9 Sup. Ct. Rep. 289. This case distinguishes *Hartog v. Memory*, 116 U. S. 591, 6 Sup. Ct. Rep. 521, which at first blush would seem to limit this doctrine. It must be noted also that the decretal order in this case has not yet been filed. The present motion is analogous to a motion in arrest of judgment. The motion is to dismiss the libel in rem because on its face it shows that the injury complained of is not within the jurisdiction of a court of admiralty. The libel sets out that libelant is the owner of a bridge constructed and located and extending from a point near the extreme west end of Spring street, in the city of Charleston, across Ashley river, in the said state, to the opposite shore; that the schooner collided with said bridge, striking first the eastern fender at or near the southernmost part of the draw opening, and then lurching over and striking against the center or draw pier, thereby causing great damage or injury to the bridge. The bridge is built on piers. The draw swings on a center pier, resting on the bottom of the river.

The proof sustaining the libel is that the schooner, entering the draw, sheered to starboard, striking and glancing from the fender, and crossing to the other side of the draw, driving her bowsprit into the iron work of the bridge, tearing it away, and breaking the draw-bridge by force of the collision against the center pier. She was afloat in a navigable stream from the beginning to the end of the accident. Is this case within the jurisdiction of admiralty? The jurisdiction in admiralty over tort depends exclusively on the locality. *Thomas v. Lane*, 2 Sum. 9. This whole case depends upon the determination whether this means the locality of the damage complained of, or whether the locality of the instrument causing the damage can be taken into consideration. "To ascertain what the maritime law of this country is, * * * we must have regard to our own legal history, constitution, legislative usages, and adjudications. The decisions of this court illustrative of these sources and giving construction to the laws and constitution are especially to be considered, and when these fail us we must resort to the principles by which they are governed. But we must always remember that the court cannot make the law; it can only declare it. If within its proper scope any change is desired in its rules, other than those of procedure it must be made by the legislative department. The *Lot-tawanna*, 21 Wall. 576, 577. The supreme court, in *The Plymouth*, 3 Wall. 20, discusses this question. A steamer anchored beside a wharf on a navigable stream took fire from the negligence of her crew. The fire communicated itself to the wharf, and consumed several large package houses thereon, with their valuable contents stored therein. The parties damaged filed a libel against the steamer in rem. The case was most ably and fully argued in the supreme court. The counsel for the libellant presented every view in favor of the jurisdiction which can be presented in a clear, precise, and elegant argument. The libel was dismissed (Mr. Justice Nelson speaking for a unanimous court) on the ground that the injury complained of occurred on the land. The opinion responding to the argument says: "We can give no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board of a vessel, except as evidence that it originated on navigable waters, —the Chicago river; and, as we have seen, the simple fact that it originated there, but the whole damage done upon land, the cause of action not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction. The negligence of itself furnishes no cause of action; it is *damnum absque injuria*." In other words, the cause of action is the injury inflicted on property on land. But for this injury, the action could not lie. The injury being on land, admiralty has no jurisdiction. In *Johnson v. Elevator Co.*, 119 U. S. 397, 7 Sup. Ct. Rep. 254, the jib boom of a vessel in tow of a tug on a navigable stream struck a building on the wharf through the negligence of the tug, causing great damage. A statute of Illinois, in which state the damage occurred, gave a right of action in personam secured by attachment, creating a lien on all water craft over five tons used in navi-

gating the waters of that state, for all damages arising from injury done to persons or property by such water craft, whether aboard the vessel or not, arising from negligence. Action was brought in the state court against the vessel to enforce this lien. The lower court gave the relief sought, and the court of last resort sustained the decision. It was carried to the supreme court on writ of error. The question was on the validity of the statute. It is the settled doctrine of the supreme court that no state statute can authorize suits in rem in a state court against vessels when the causes in action are cognizable in admiralty. The jurisdiction of admiralty is exclusive. The state statute cannot create nor confer admiralty jurisdiction in a state court. *The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, Id. 555. The first point for decision, therefore,—one going to the merits of the question,—was whether this cause of action was cognizable in admiralty. Mr. Justice Blatchford, speaking for the court, quotes and approves *The Plymouth*, 3 Wall. 20, and cites *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. Rep. 25, and reasserts the doctrine that when the substance and consummation of the wrong takes place on land and not on navigable water, and when the cause of action is not complete on the water, the remedy belongs wholly to the courts of common law, and admiralty has no jurisdiction. In *Ex parte Phenix Ins. Co.*, 118 U. S. 616, 7 Sup. Ct. Rep. 25, application was made to the district court under the limited liability act. The liability against which protection was sought grew out of communication of fire negligently from a vessel on a navigable stream to buildings on land. The court held distinctly that this was not within the admiralty jurisdiction of the district court, and on this ground alone granted a writ of prohibition. If the court had had jurisdiction, prohibition would not lie. These unanimous decisions of the supreme court, delivered by justices who, by their residence in New York, had ample experience in admiralty practice, leave no alternative to this court. They must be followed. And with but two exceptions the circuit and district courts of the United States maintain the same doctrine. *The Arkansas*, 17 Fed. Rep. 383, is a case in which the judge expresses an opinion in conflict with the rule laid down by the supreme court. This opinion was quoted with approval in *The F. & P. M. No. 2*, 33 Fed. Rep. 511. But that case was an action for collision with a raft afloat; and a raft, under these circumstances, is within the jurisdiction of admiralty. *Seabrook v. Raft*, 40 Fed. Rep. 596; *The Rock Island Bridge*, 6 Wall. 216. On the other hand, Judge Sherman, in *The Neil Cochran*, in a libel for damages against a vessel colliding with a swinging bridge, follows *The Plymouth*, and holds that a court of admiralty has no jurisdiction when the cause of action is negligence on the water and resulting damage on the land. See case in full, 23 Myers' Fed. Dec. 100. Judge Jenkins, in *City of Milwaukee v. The Curtis*, 37 Fed. Rep. 705, held that a libel in rem would not lie against a vessel for damages caused to a swinging bridge resting on a pier constructed on the bed of the river. See, also, *The Maud Webster*, 8 Ben. 555.

The text writers formulate this doctrine in accordance with the ruling of the supreme court. Cohen, Adm. 21; Henry, Adm. § 26. Mr. Henry, in his valuable book, while stating the established doctrine, comments upon it as a narrow one, not founded on substantial reason. Counsel in argument have pressed this on the court, and have urged an extension of the jurisdiction. There are two objections to this, each of which seems unsurmountable. One is that the court has not the power to do this. Judge Bradley, in *The Lottawanna*, quoted *supra*, says that changes in admiralty law cannot be made by the courts. They must be made by the legislature. This is not a mere matter of procedure. The court is urged to create a maritime lien for injuries done and consummated on land, to declare this inchoate right, and to sustain this libel, which seeks to make such right perfect. *The Mayurka*, 2 Curt. 77. Mr Justice Curtis, speaking of this maritime lien in *The Kiersage*, Id. 424, says:

"These privileged liens, constituting a *jus in re*, which accompany the property in the hands of bona fide purchasers, and operate to the prejudice of general creditors, are matters *stricti juris*, which cannot be extended from one case to another argumentatively or by analogy or inference. They must be given by the law itself, and the case must be found described by the law. '*Privilegia cum sunt stricti juris nec extendi possunt de re ad rem, nec de persona ad personam.*' Even when the court may be of the opinion that the law might be beneficially extended to include cases not described in its terms, it must be left to the legislative power so to extend it."

It is true that the supreme court has at times reversed what seemed to be established principles, and has extended the jurisdiction of admiralty, both as to locality and as to contracts. Notably was this done with the applause of the profession in *The Genessee Chief*, 12 How. 443, and in *Dunham v. Insurance Co.*, 11 Wall. 1. But in *The Genessee Chief* the extension of jurisdiction had the sanction of an act of congress, and, indeed, amounted simply to a change in the definition of the term "navigable waters,"—a change rendered imperative by the logic of events. And in *Dunham v. Insurance Co.* marine policies were declared maritime contracts, the risk against which they gave indemnity necessarily occurring on navigable waters. The other objection is the same suggestion, presented with similar earnestness, and the same force of argument which was pressed on the supreme court in *The Plymouth*. It did not prevail. Replying to the admission of the appellant's counsel that the case was one of first impression, the court say:

"The reason is apparent, for it is outside of the acknowledged limit of admiralty cognizance over marine torts, among which it is sought to class this. The remedy for the injury belongs to the courts of common law."

With this action of the supreme court, taken after an exhaustive argument, it would be presumptuous to differ. I have come to my conclusion with great reluctance. The case consumed many days on the trial of the merits, and hours were given for argument on the law and the facts. The result of this motion will make this consumption of time useless.

The motion is granted; but, as the motion is made at this stage of the case, the respondent must pay all the costs which accrued anterior to his motion.

WOLCOTT v. SPRAGUE et al.

(Circuit Court, D. Kansas. April 20, 1891, and April 11, 1893.)

No. 6,597.

1. CIRCUIT COURTS—JURISDICTIONAL AMOUNT.

S. and his wife, who owned valuable real estate, gave a mortgage thereon to B., to secure a loan of \$4,000. Thereafter they gave a deed absolute in form to the cashier of a bank to secure their note to the bank for \$1,000. They then insured the buildings for \$4,000 by policy containing the usual mortgage clause, which policy was delivered to B., the mortgagee. The buildings having been destroyed, B. sued on the policy, and to compromise the suit the insurance company purchased B.'s note and mortgage, paying the full amount, with accrued interest. Thereafter the bank cashier sued to foreclose his deed, making the insurance company, as well as the mortgagors, defendants. The insurance company filed a cross bill to foreclose the \$4,000 mortgage which it had purchased. The defendant mortgagors and the complainant attacked the insurance company's mortgage on the ground that it was satisfied by the insurance money due under the policy. *Held*, that the amount in controversy was not limited to the \$1,000 demanded in the complaint, but was the amount of the insurance company's mortgage and note, viz. \$4,000, with interest.

2. DIVERSE CITIZENSHIP—ARRANGEMENT OF PARTIES.

In determining the citizenship of the parties as affecting the jurisdiction of the federal court, the plaintiff and the mortgagors should be arrayed against the insurance company, and, as the insurance company was a citizen of another state, the jurisdiction was sustained.

3. FIRE INSURANCE—TRANSFER OF INTEREST—CHANGE IN PERSON OF TRUSTEE.

Before issuing the policy the insurance company's agent was informed by the mortgagor that, subject to the mortgage and the deed to the cashier, he was the owner of the premises, and the agent also made an examination of the records. Subsequently the grantee of the deed ceased to be cashier, and made a quitclaim deed of the property to his successor, at the same time transferring the note secured. A loss occurred, and the proofs were made by the new cashier, instead of the person in whose name the policy was issued. *Held*, that the change in the person of the trustee did not operate to relieve the insurer from liability on the ground that the new trustee, instead of the original trustee, made the proofs of the loss.

In Equity. This suit was originally brought in a district court of Russell county, Kan., by Charles A. Wolcott, cashier of the First National Bank of Russell, against H. F. Sprague and wife and the Oakland Home Insurance Company, to foreclose a deed, which, though absolute in form, was given by said Sprague and wife to secure the payment of a note to the bank for the sum of \$1,000. The insurance company filed a cross bill to foreclose a mortgage on the same property for the sum of \$4,000, with interest, given by said Sprague and wife, prior to the date of the deed, to Charles Berrick, and by him assigned to the insurance company. Subsequently the insurance company removed the cause to this court, and the complainant and the two defendants the Spragues filed a motion to remand, and a plea in abatement to the jurisdiction, which were denied by Judge FOSTER April 20, 1891, who filed the following memorandum opinion.

E. F. Ware, for plaintiff.

H. G. Laing and U. B. Sutton, for defendants.

v.55f.no.5—35

FOSTER, District Judge. In this case the amount in controversy as between plaintiff and the insurance company is not the \$1,000 set out in plaintiff's bill of complaint. The plaintiff attacks the mortgage of the insurance company, which is for \$4,000, and seeks to have it decreed, settled, and canceled. Under authority of *Meyer v. Construction Co.*, 100 U. S. 457, the parties to the controversy should be arranged according to their interest in the subject-matter, and not as they appear on the record. So the plaintiff and the Spragues must be arrayed against the insurance company, for so their interests appear.

The motion to remand and plea in abatement are overruled.

Subsequently the cause was heard on its merits before Judge RINER, who, on April 11, 1893, filed the following opinion:

RINER, District Judge. This suit was originally brought in the state district court for Russell county (the petition being filed on the 9th day of April, 1890) to foreclose a deed which, although absolute in form, was given to secure the payment of a note due the First National Bank of Russell, Kan., and was, in effect, a mortgage. Gen. St. Kan. 1889, par. 3885. The defendant the Oakland Home Insurance Company, on the 12th day of May, 1890, filed a petition for removal in that court, which was denied. Thereupon, on June 21, 1890, defendant insurance company filed its answer in the state court. Subsequently, and on the 10th day of September, 1890, defendant insurance company filed a transcript of the record from the state court in this court. The complainant and the two defendants the Spragues filed motions to remand, and a plea in abatement to the jurisdiction, which were argued before Judge FOSTER in April, 1891, and the motions to remand and the plea in abatement were by him overruled and denied. Thereupon the parties obtained leave to recast the pleadings to conform to the equity practice in this court. The complainant having filed his bill, the defendants the Spragues filed answer thereto, and the defendant the Oakland Home Insurance Company filed an answer and cross bill. The complainant, in his bill, and the Spragues in their answer, again object to the jurisdiction of this court, and insist upon their right to have the case remanded to the state court, which is perhaps proper enough, in order to save their rights. Judge FOSTER having already passed upon that question in ruling upon the motions to remand and the plea in abatement, I must decline to again consider it here, and will dispose of the case, leaving the question of jurisdiction to be settled by the court of appeals.

Even if my own views were not in harmony with the views expressed by Judge FOSTER in his opinion, which is on file in the case, I would not feel at liberty to disturb the finding already made by him. Sitting as a district judge holding the circuit court, I do not feel called upon, and, indeed, do not think it would be proper for me, even if I differed in opinion, to disturb a ruling already made in the same case by another district judge sitting in the same capacity. Whether or not that ruling is right is, it seems to me,

a question to be considered either by a circuit judge or by the court of appeals.

Proceeding, then, to the merits of the case, it appears from the record that on the 21st of January, 1888, the defendant H. F. Sprague was the owner of lot 10, in block 77, in the city of Russell, Kan.; that upon this lot there was a two-story stone and brick building, which was of the value of \$5,000; that on the date above mentioned the defendants H. F. Sprague and his wife made, executed, and delivered to one Charles Berrick a mortgage on the premises above described, to secure the sum of \$4,000, loaned by Berrick to them. Upon the same day, but subsequent to the making and delivery of the mortgage to Berrick, the defendants H. F. Sprague and his wife made, executed, and delivered to one E. C. Haskett a deed to the same premises, subject to the mortgage to Berrick. At the time this deed was made and delivered to Haskett, Haskett was cashier of the First National Bank of Russell, and the defendants the Spragues were indebted to that bank in the sum of \$1,000, for which they delivered their note to the bank, drawing interest at the rate of 12 per cent. per annum; and the deed to Haskett was made, executed, and delivered to him by the Spragues for the sole purpose of securing the payment of said note. Haskett, then being cashier of the bank, was acting as trustee and agent for the bank, and had no other interest in the transaction. On the 10th of March, 1888, the defendant H. F. Sprague applied to one E. T. Jones, then the duly-authorized and acting agent of the Oakland Home Insurance Company, defendant herein, for a policy of insurance in the sum of \$4,000 upon the buildings located upon the ground heretofore described. Jones, under his agency, was authorized to solicit and effect insurance risks for the defendant company, and had in his possession blank policies of insurance signed and executed by the proper officers of the company, which policies became effective and in full force and binding upon the company when countersigned and delivered by Jones. At the time Sprague applied for this insurance he informed Jones that he was indebted to Berrick in the sum of \$4,000 and interest, which was secured by the mortgage above mentioned; and that he was indebted to the First National Bank in the sum of \$1,000 and interest, which was secured to the bank by the deed to Haskett, its cashier. He also stated to Jones that, subject to the Berrick mortgage and the deed to Haskett, he was the owner of the lot and the buildings thereon, and stated that he desired to effect an insurance upon the buildings in such form that, in case of loss, the Berrick mortgage would be first paid. He then went with Jones, at Jones' request, to the office of the register of deeds of Russell county, where Jones himself made an examination of the records. After completing the examination, Jones returned to his office, and there told Sprague that he would make out the policy as requested. By agreement between Jones and Sprague the policy of insurance was to be taken out in the name of Haskett, and was to have attached thereto the mortgage clause mentioned in the pleadings. Jones thereupon wrote up the policy, and delivered it to Haskett, from whom he received the sum of \$40;

that being the amount of the premium on the policy. The \$40 was advanced by the First National Bank for Sprague, and Sprague subsequently repaid the same to the bank. After Jones had delivered the policy to Haskett, Haskett forwarded the same to Charles Berrick, the mortgagee, at Buffalo, N. Y. On the 24th of July, 1888, Haskett ceased to be cashier of the bank, and the complainant in this case, Charles A. Wolcott, succeeded him as cashier. On that day Haskett executed and delivered to Wolcott an instrument in writing in the form of a quitclaim deed describing the premises as they were described in the deed from the Spragues to him, and wrote upon the back of the promissory note the words: "Transferred without recourse on me. E. C. Haskett." Wolcott received the quitclaim deed and note from Haskett as cashier of the First National Bank, and as such cashier was the successor in trust of said Haskett for the bank. On the 6th of February, 1889, the buildings insured were totally destroyed by fire. The value of the property so destroyed exceeded the amount of the insurance. Subsequently, and within the time limited by the policy, the complainant herein made and presented to the defendant the Oakland Home Insurance Company certain papers purporting to be proofs of loss by such fire, which are set out at length in the agreed statement of facts. The proofs so prepared by the complainant were returned to him with a letter, which is also set out at length in the agreed statement. On the 10th of May, 1889, which was within the six months limited by the policy for bringing suits for loss claimed thereunder, Charles Berrick, the mortgagee, commenced an action in the district court of Russell county, Kan., against the defendant insurance company to recover upon the policy. This case was subsequently removed to this court, where it remained pending until the 26th of November, 1889, when the defendant company purchased the note and mortgage from Berrick for the sum of \$4,462.25, that being the full amount of principal and accrued interest. Berrick thereupon dismissed his action in the federal court, and assigned the note and mortgage to the defendant the insurance company, and delivered to it the policy of insurance, and said defendant company now has possession of the same, and attempts in its cross bill to foreclose the mortgage so obtained, without giving any credit thereon for the loss under the policy issued to Haskett and held by Berrick, the mortgagee, for whose benefit it was taken out.

The complainant and the defendants the Spragues contend that they have a right to have credited upon the Berrick note and mortgage, now held by the defendant insurance company, the amount of the insurance, viz. \$4,000, with interest from the date when the same should have been paid by the company. On the other hand, the defendant company contends that the complainant is not entitled to have this credit made, and denies all liability upon the policy of insurance, claiming that no proofs of loss were made out as required by the contract, and that the time limited by the contract for bringing an action thereon, to wit, six months, has long since passed, and tenders back the proportionate amount of

the unused premium. It is shown by the agreed statement of facts that Jones, the agent who procured this insurance and delivered the policy, had authority to bind the company in respect to any insurance placed by him; hence his act must be said to be the act of the company, and his knowledge the knowledge of the company. It appears by the agreed statement that at the time he issued this policy of insurance in Haskett's name he was fully acquainted with the condition of the title to this property; that he knew that Haskett's relation to the transaction was that of trustee and agent for the bank, and that the sole purpose of procuring the insurance in Haskett's name for the benefit of Berrick, the mortgagee, was to make the indebtedness of the Spragues to the bank, for which he was trustee and agent, more secure.

The agreed statement further shows that he remained at Russell, as the agent of the company, for the period of six months after the buildings were destroyed by fire, which was more than a year after complainant had succeeded Haskett as cashier of the bank. He must, therefore, have known of that fact, the policy having been issued to Haskett with the full knowledge on the part of the company that he acted in the matter merely as trustee for the bank. I do not think that a change in the person of the trustee can operate to relieve the company from liability on the ground that the new trustee, instead of the original trustee, made the proofs of loss. The agreed statement shows that the property insured was destroyed by fire, and that it was a total loss, and that the company had notice of such loss, and that it subsequently paid to Berrick, the mortgagee, the amount of the policy, and took an assignment of the mortgage and insurance policy. This, I think, was a recognition of the validity of this policy by the insurer. The supreme court of Kansas in the case of *Insurance Co. v. Marshall*, 48 Kan. 235, 29 Pac. Rep. 161, where the facts were almost identical with the facts in the present case, in the opinion say:

"We think the finding of the court that the insurance company paid to the holder of its policy the amount named therein clearly establishes the fact that it recognized the policy as a valid and subsisting obligation. The insurance company had no right to the full amount due upon the mortgage after recognizing the validity of the policy. The insurance was collateral to the debt, and the amount paid upon the policy should have been applied as a payment upon the debt secured by the mortgage. Equity and fair dealing between the parties to this contract of insurance requires that the insurer should be required to make such application in accordance with the finding of the court."

See, also, *Insurance Co. v. Smelker*, 38 Kan. 288, 16 Pac. Rep. 735.

Neither do I think the objection that no suit was brought either by Haskett or the Spragues within the six months limited by the terms of the policy well taken. Under the terms of the policy the loss was payable to Berrick, the mortgagee, and neither the Spragues nor Haskett could maintain an action upon this policy until they could allege the payment of the mortgage given by the Spragues to Berrick. Under the mortgage Berrick was entitled to receive the full amount of the insurance money without any regard to the Spragues or to Haskett, and therefore the only person who

had a right to bring an action upon this policy, until the mortgage was satisfied, was Berrick, the mortgagee, who did, as shown by the agreed statement of facts, bring his action within the six months limited by the contract of insurance for bringing suits upon the policy. *Insurance Co. v. Coverdale*, 48 Kan. 446, 29 Pac. Rep. 682.

My own view is that a decree should be entered declaring the \$4,000 received by Berrick on the policy of insurance to be a payment, as of April 6, 1889, of that amount on the note and mortgage given by the Spragues to Berrick, and that the cross complainant's (the insurance company's) mortgage, received by it from Berrick, be foreclosed for any balance of interest due thereon on the 6th day of April, A. D. 1889, and paid by it to Berrick, if said balance is not paid to it by the defendants the Spragues, or the complainant herein, within 60 days from the date of the decree; and that the complainant's mortgage be foreclosed (subject to the claim of the insurance company for any balance due it for interest paid as above stated) if the amount due the bank, for which the complainant is trustee, be not paid within 60 days from the date of the decree; and, in case of default in either or both cases, then the property covered by the mortgage shall be sold to satisfy these liens in the order stated; and it is so ordered.

LONERGAN v. ILLINOIS CENT. R. CO.

(Circuit Court, N. D. Iowa, E. D. April 24, 1893.)

CIRCUIT COURTS—JURISDICTION—DIVERSE CITIZENSHIP—CORPORATIONS.

In showing diverse citizenship for the purpose of sustaining federal jurisdiction, it is not sufficient to merely allege that a corporation is a citizen of a given state, for corporations are not strictly citizens. The averment must be to the effect that the corporation was created under the laws of the state named. *Insurance Co. v. French*, 18 How. 404, and *Muller v. Dows*, 94 U. S. 444, followed.

At Law. Suit brought by Sarah Lonergan, as administratrix, etc., against the Illinois Central Railroad Company in the district court of Floyd county, Iowa, and removed on application of the defendant to the United States circuit court for the northern district of Iowa, eastern division. Plaintiff moves to remand. Motion granted.

J. S. Root, for plaintiff.

Ellis & Ellis and W. J. Knight, for defendant.

SHIRAS, District Judge. This cause was originally brought in the district court of Floyd county, Iowa, whence it was removed to this court upon the application of the defendant. The motion to remand filed on behalf of the plaintiff presents the question whether the removal was applied for in time, and also whether a proper record had been filed in this court. These questions will not be considered, because upon the face of the record there appears another

objection to entertaining jurisdiction, which, in the judgment of the court, is fatal thereto. The rule is well settled that, as the courts of the United States are of limited jurisdiction, the presumption is against the jurisdiction, unless upon the face of the record the contrary affirmatively appears. *Robertson v. Cease*, 97 U. S. 646. It is furthermore required that the fact or facts upon which jurisdiction is sought to be founded shall be clearly and positively stated. In *Brown v. Keene*, 8 Pet. 115, it was said by Mr. Chief Justice Marshall, speaking for the court, that "the decisions of this court require that the averments of jurisdiction shall be positive; the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments." And in *Robertson v. Cease*, supra, it is ruled that, "in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinctness, in other parts of the record."

This action being brought to recover damages for personal injuries caused to plaintiff's intestate, the only ground upon which jurisdiction in the federal court could be based is that of the diverse citizenship of the parties litigant. In the original and substituted petition filed in the case it is averred that the defendant, the Illinois Central Railroad Company, is an incorporated company, organized and operating a railway in the state of Iowa. In the petition for removal it is averred that at the commencement of the suit, and ever since, the plaintiff was and is a citizen of the state of Iowa, and that the defendant "was at the time of the commencement of this suit, and still is, a citizen of the state of Illinois." In no part of the record nor in the petition for removal is there an averment to the effect that the defendant company is a corporation created under the laws of the state of Illinois. By the decisions of the supreme court in the cases of *Bank v. Deveaux*, 5 Cranch, 61; *Bank v. Earle*, 13 Pet. 521; *Railroad Co. v. Letson*, 2 How. 497; *Marshall v. Railroad Co.*, 16 How. 314; *Drawbridge Co. v. Shepherd*, 20 How. 232; *Railroad Co. v. Wheeler*, 1 Black, 286; *Muller v. Dows*, 94 U. S. 444; and *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. Rep. 426,—it is settled that a corporation is not, strictly speaking, a citizen; and therefore, to sustain a suit by or against a corporation in the federal courts, it is regarded as a suit by or against the stockholders of the corporation, and for jurisdictional purposes it is conclusively presumed that the stockholders are citizens of the state under whose laws the corporation is created. In other words, if it is averred in a given case that a corporation is created under the laws of a named state, the court will indulge in the legal presumption that all the stockholders are citizens of the named state, and that as citizens of such state they may sue or be sued in the corporate name. The jurisdiction is based upon the assumed citizenship of the stockholders; and to give rise to this legal assumption it must be averred, and in case of contest it must be proved, of what state the corporation is a creation. As already stated, it is not averred

in any part of the record in this cause that the defendant railway company is a corporation created under laws of the state of Illinois, or of any state other than Iowa, and therefore no facts are averred from which the court can draw the legal conclusion that the stockholders are citizens of Illinois, or of any state other than Iowa. The averment found in the petition for removal, that the defendant is a citizen of the state of Illinois, is not sufficient to justify the court in assuming that the company is an Illinois corporation.

Thus, in *Insurance Co. v. French*, 18 How. 404, the averment was that the plaintiffs, citizens of Ohio, complained "of the Lafayette Insurance Company, a citizen of the state of Indiana;" and it was held by the supreme court that "this averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation, or, if it be such, by the law of what state it was created. The averment that the company is a citizen of the state of Indiana can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state, within the meaning of the constitution." The ruling thus made was cited and approved in the subsequent case of *Muller v. Dows*, 94 U. S. 444, in which case it was averred in the bill that the defendants, the Chicago & South-western Railway Company and the Chicago, Rock Island & Pacific Railroad Company, were citizens of the state of Iowa. The supreme court, speaking through Mr. Justice Strong, held that, "were this all that the pleadings exhibit of the citizenship of the parties, it would not be enough to give the circuit court jurisdiction of the case. In *Insurance Co. v. French*, 18 How. 404, a similar averment was held to be insufficient because it did not appear from it that the Lafayette Insurance Company was a corporation, or, if it was, that it did not appear by the law of what state it was made a corporation. * * * It is therefore necessary that it be made to appear that the artificial being was brought into existence by the law of some state other than that of which the adversary party is a citizen." These decisions settle the proposition that the averment in the petition for removal, to the effect that the defendant railway company was when the suit was brought, and continued to be, a citizen of the state of Illinois, cannot be construed to be an averment that the company is a corporation, or that it was created such under the laws of the state of Illinois; and, unless these facts are made clearly to appear upon the record, the court cannot draw the legal conclusion that the stockholders are citizens of the state of Illinois. The other parts of the record do not supply this defect, but on the contrary it is averred in the original and substituted petitions that the Illinois Central Railroad Company is an incorporated company, organized and operating a railway in the state of Iowa, which averment certainly does not show that it is a corporation created under the laws of the state of Illinois. The record, therefore, fails to show that the controversy involved in the suit is one in which the adversary parties were when the suit was brought, and when the removal was

sought, citizens of different states, and of necessity it must be held that this court cannot take jurisdiction thereof. The case is therefore remanded to the state court, at cost of the defendant.

SINGLE v. SCOTT PAPER MANUF'G CO. et al.

(Circuit Court, N. D. Ohio, W. D. May 11, 1893.)

No. 1,136.

1. FEDERAL COURTS—JURISDICTION—NONRESIDENT PARTIES—SERVICE BY PUBLICATION.

Under Rev. St. § 738, which provides for serving nonresident defendants by publication "in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought," such a suit is maintainable in a circuit court when the parties are citizens of different states, although neither of them resides in the district where suit is brought.

2. SAME—SUITS FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND—STATE STATUTES.

In determining whether a suit to enforce specific performance of a contract to convey lands is a suit to enforce an "equitable claim" to real estate, within the meaning of Rev. St. § 738, the court may take into consideration the relief prescribed by the state statutes in favor of parties having the right to enforce such contracts; and in Ohio, where the statutes provide for constructive service on nonresidents, and also declare that if a judgment ordering a conveyance is not complied with the judgment itself shall operate as a conveyance, such a suit is an "equitable claim," and falls within the section.

3. SAME.

In such a case a federal circuit court, in Ohio, may acquire jurisdiction by constructive service, under section 738, and has authority to enter a judgment providing that, if the conveyance thereby ordered is not complied with within a time named, the judgment itself shall operate as a conveyance.

In Equity. Suit by John Single, a nonresident, against the Scott Paper Manufacturing Company and others, also nonresidents, to enforce specific performance of a contract to convey real estate. Heard on motion to dismiss the bill for want of jurisdiction. Denied.

Rev. St. § 738, provides as follows:

"When any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought is not an inhabitant of, nor found within, the said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated; and the said order shall be served on such absent defendant, if practicable, wherever found, or, where such personal service is not practicable, shall be published in such manner as the court shall direct."

King & Tracey, for complainant.

Brown & Tyler and Reeve & Roby, for defendants.

RICKS, District Judge. On the 17th of February, 1893, the complainant filed his bill in equity in this court, alleging that the defendant, by Clarence W. Scott, its president, director, and duly-

authorized agent, acting for the defendant corporation, for himself, and for Sadie E. Scott, Joe C. Sterling, and Clarence W. Scott, trustee, entered into a written contract by which he obligated the defendants, upon certain payments to be made by the complainant, and certain conditions to be performed by the complainant, to convey to said complainant certain valuable real estate situated in the division and district aforesaid. Complainant alleges full performance of all the conditions upon his part, and a tender in lawful money of the United States, and of promissory notes, and the mortgages to secure the same, in exact compliance with the conditions of said contract, and avers that the defendants refused to make conveyance and title of said property as they were obligated to do under said contract, and still refuse so to do. Complainant further avers that under said contract he entered into possession of said premises, spent a large sum of money in making valuable improvements thereon, has made contracts for other valuable improvements still being made thereon, and that defendants had full knowledge of his possession, and of the valuable improvements so being made, and allowed complainant to proceed in his said improvements without any dissent or notice to him of their intention not to perform and abide by the contract according to its terms.

Thereupon the complainant made proper affidavit under section 738 of the Revised Statutes of the United States, and asked for an order for service upon the defendants, who were nonresidents of the division and district aforesaid. Said order was made pursuant to the statute. The residence of said defendants is fully set out in said affidavit and order, and by the return of the United States marshal for the eastern district of Michigan, in which district the defendants reside, it appears that personal service of said order was made upon the Scott Manufacturing Company, by delivering, personally, to Sadie E. Scott, secretary of said company, a copy of said order, and personal service was further made upon each of the defendants except Clarence W. Scott, and Clarence W. Scott, trustee. The latter being absent from the district, service was made upon him by leaving a proper certified copy of said order at his dwelling place, with Sadie E. Scott, his wife,—an adult person, and a member of his family. The defendants, having entered a special appearance for the sole purpose of determining the question of the jurisdiction of the court, move to vacate and set aside the order heretofore made for service upon said defendants, "for the reason that said court has no jurisdiction of this cause, or of the persons of said named defendants." An elaborate brief is filed by counsel for the defendants, in which they contend that the court has no jurisdiction of this cause because said section 738 of the Revised Statutes, by virtue of the act of congress of March 3, 1887, as amended by the act of August, 1888, is but a part of said act, and that "any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon * * * real estate or property within the district," under said section, can only be "commenced" when the court, under section 1 of said act, acquires jurisdiction by reason of personal service upon some one of the

defendants interested in such real estate or property referred to in said section.

The complainant in this case is a nonresident of this district, and is a citizen of the state of New York. The defendants, who claim an interest and title to the real estate in controversy, are all residents and citizens of the state of Michigan. The property in dispute lies wholly within the western division of this district. The question, therefore, presented, is whether this court, in a suit in which neither the plaintiff nor the defendants reside in the district, but are citizens of different states, can acquire jurisdiction, and determine controversies between the parties, when the real estate in controversy lies wholly within the jurisdiction of the court. Under the last act of congress above referred to, it is well settled that, where the jurisdiction of the court depends upon diverse citizenship of the parties, either the plaintiff or the defendant must be a resident and citizen of the district. Counsel for the defendants contend that, inasmuch as neither the plaintiff nor the defendants are citizens of this district, the suit cannot be said to be "commenced," under section 738, because the court has no personal jurisdiction over either of the parties. And they contend, further, that a lien or equitable claim to real estate in this district cannot be enforced under said section unless either the plaintiff or the defendants are citizens of the district. In this contention, I think, counsel are wrong. Section 738 was originally the eighth section of the act of March 3, 1875. It was incorporated into the Revised Statutes as section 738. Section 739 specially provides as follows:

"Except in the cases provided in the next three sections, no person shall be arrested in one district, for trial in another, in any civil action before a circuit or district court; and except in the said cases, and in the cases provided by the preceding section, [which is section 738,] no civil suit shall be brought, before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant, or that in which he is found, at the time of serving the writ."

We therefore have in this section a legislative construction of section 738, and that construction is that a suit could be "commenced" in a district in which the real estate concerned was situated, without reference to whether the defendants could be personally served in the district or not. Personal service of process was not, therefore, essential to give the court jurisdiction under section 738, as section 8 of the act of March 3, 1875. As that section remains in force by special provision of the act of August, 1888, the legislative construction placed thereon also stands. It is sufficient, therefore, to give the court jurisdiction, if the real estate involved is within this district, and the parties are citizens of different states. I find nothing in the opinions of the court in *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. Rep. 303, or in *Ames v. Holderbaum*, 42 Fed. Rep. 341, inconsistent with this conclusion.

The next important question to determine is whether a bill for a specific performance constitutes a "legal or equitable lien upon, or claim to, or to remove an incumbrance or lien or cloud upon a title to real or personal property." In determining this question we are

authorized to consider the relief prescribed by the statutes of Ohio to parties having a right to insist upon a specific performance of a contract to convey real estate in that state; for the supreme court of the United States has expressly declared, in the case of *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495, that while—

"The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States, but having created a right, and at the same time prescribed a remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state court. On the contrary, propriety and convenience suggest that the practice should not materially differ, where titles to lands are the subjects of investigation, and such is the constant course of the federal courts."

Again, the same court, in the case of *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557, decided that—

"A state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court by publication. The well-settled rules that an action to quiet title is a suit in equity, that equity acts upon the person, and that the person is not brought into court by service by publication alone, do not apply when a state has provided by statute for the adjudication of titles to real estate within its limits, as against nonresidents who are brought into court only by publication."

In discussing this case, Judge Brewer says:

"The question is not what a court of equity, by virtue of its general powers, and in the absence of a statute, might do; but it is, what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of nonresidents to such real estate? * * * So it has been held, repeatedly, that the procedure established by the statute in this respect is binding upon the federal courts."

Further on, in referring to the case of *Clark v. Smith*, 13 Pet. 195, that learned justice quotes from that case, approvingly, as follows:

"A state has an undoubted power to regulate and protect individual rights to her soil, and declare what shall form a cloud over titles; and, having so declared, the courts of the United States, by removing such clouds, are only applying a new practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The state legislatures have no authority to prescribe forms and modes of proceeding to courts of the United States, yet, having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state court. In the case before us, the proceeding, though special in its form, is, in its nature, but the application of a well-known chancery remedy. It acts upon the land, and may be conclusive as to the title of a citizen of another state."

In the case of *Boswell's Lessee v. Otis*, 9 How. 336, although the judgment in that case was held to be void, yet, with reference to the jurisdiction of the court in a case for specific performance of a contract alone, the supreme court said:

"Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by service of process; or, secondly, by a procedure

against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question; and it is immaterial whether the proceeding against the property be by an attachment, or bill in chancery. It must be substantially a proceeding in rem. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem, in ordinary cases; but where such a procedure is authorized by the statute on publication, without personal service of process, it is substantially of that character."

From these decisions of the supreme court it is clear that the circuit courts of the United States, sitting in Ohio, exercising their general equity jurisdiction in a suit properly instituted, would rightfully enforce any additional remedies given under Ohio laws, so as to grant proper relief to a complainant asking for the specific performance of a contract to convey real estate lying in that state. It is further equally clear that if the laws of Ohio provide a remedy through which the performance of such a contract can be enforced, as against a nonresident, then such an existing contract in Ohio is an equitable "claim" to real estate, which this court may enforce, or an "incumbrance or cloud upon a title to real property," which this court may remove, under the provision of the United States statute to which reference has heretofore been made. The statutes of Ohio which enlarge the remedies of the complainant in this case are not essential to give the court jurisdiction originally. This court acquires jurisdiction because the complainant is a nonresident of Ohio, and a citizen of New York; because the real property to which he asserts an equitable claim lies wholly within this district; and because section 738 of the Revised Statutes of the United States specially prescribes the proceedings by which this equitable claim may be asserted. If there were doubts as to whether, under the general equity rules and principles administered by this court, aided by the provisions of section 738, the defendants could be brought within the jurisdiction of the court without personal service, the authority of the court to entertain such jurisdiction, and administer the relief sought, is made more certain and effective by reason of the Ohio statutes. Section 5024, Rev. St. Ohio, authorizes an action to compel the specific performance of a contract for the sale of real estate. Section 5048 provides for constructive service in such cases. Section 5318 provides that, when a party against whom a judgment or a conveyance * * * is rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance * * * had been executed conformably to such judgment. Considering these statutory provisions in the light of the principles announced in the case of *Boswell's Lessee v. Otis*, above quoted, our jurisdiction in this case seems clear.

If the complainant shall establish the allegations of his bill by proper evidence, and show that the contract set forth was properly executed by persons duly authorized, and that he is entitled to a specific execution of said contract, this court will have jurisdiction

to order the defendants, within a time named, to make such conveyance. If they fail to do so, and are beyond the jurisdiction of the court, so that personal enforcement of the order will be impossible, the decree may provide that, on a failure on their part to comply with the order of the court, the decree, in and by itself, may divest the defendants of all title in said property, and vest the same in the complainant. The equities of the case, so far as the allegations of the bill are concerned, are all with the complainant. It presents a case where the court ought to retain jurisdiction, if it can rightfully do so, because the relief sought is just and equitable, in the highest degree. I am therefore of the opinion that this court has jurisdiction over the property involved in this controversy, and over the defendants, so far as they have any claim or title to said property; that this proceeding is substantially a proceeding in rem; and that the general powers conferred upon this court, as a court of equity, under the constitution and laws of the United States, are so enlarged, and made more effective, by the statutes of the state of Ohio, as that, upon final hearing, if the complainant shall establish his right to relief, full and adequate protection can be given him to enforce the specific execution of the contract set out in his bill.

WOOLWORTH v McPHERSON.

(Circuit Court, S. D. New York. May 6, 1893.)

1. PARTNERSHIP—CONSTRUCTION OF ARTICLES.

W. & M. executed the following agreement: "St. Joseph, Missouri, February 1st, 1881. The undersigned have this day formed a partnership for the transaction of a general book and stationery business, * * * M. to be guaranteed \$2,000 per annum, same to be and to come out of his half of the profits; but, should the one-half profits not amount to \$2,000 in the year, he shall not be held for any deficiency in the salary account. In consideration of the guaranty of \$2,000 per annum to M., he shall give his entire time, during reasonable business hours, to the business of the firm, and W. shall not be held to give the same any more time than he may chance. * * * This agreement to run one year from this date." *Held*, that it was a copartnership agreement, and that the supposition of M. that the contract guaranteed him a salary of \$2,000 a year, and half the profits above that sum, but that he should not be liable as partner for any losses in business, was a mistake of law, for which he was not entitled to relief.

2. PAROL EVIDENCE—CONTRACT.

In a suit by W. against M. growing out of a former partnership between them, an order of dismissal was entered, pursuant to the following writing addressed to plaintiff's solicitor: "You will please enter an order in this cause discontinuing the same upon the payment by the defendant of the costs therein. Yours, etc., W. Agreed to. M." *Held* that, as this writing was informal, and contained no promise by either party to the other, and defendant's signature was presumably merely for the protection of the clerk, the writing did not constitute such a contract or memorandum thereof that defendant would be prevented in a subsequent suit from showing by other evidence that the order was entered pursuant to an agreement releasing him from all liability in consideration of the payment of the costs and certain services which he was to render to plaintiff.

In Equity. Bill by Calvin C. Woolworth against Thomas B. McPherson for the dissolution of a partnership and for an accounting. Dismissed.

Smith, Bowman & Close, for plaintiff.
Hyland & Zabriskie, for defendant.

TOWNSEND, District Judge. This is a bill in equity for the dissolution of an alleged copartnership between the complainant and defendant, and for an accounting. On February 1, 1881, the parties executed the following agreement:

"St. Joseph, Mo. Feb'y. 1st, 1881.

"The undersigned have this day formed a partnership for the transaction of the general book and stationery business, as successors to Woolworth & Colt, assuming the obligations and assets of Messrs. Woolworth & Colt, as shown by the inventory this date. B. F. Colt to have a salary of \$2,000. Two thousand dollars per annum to be charged to expenses. T. B. McPherson to be guarantied one hundred sixty-six and 67/100 dollars per month, (\$2,000 per annum,) same to be and to come out of his half of the profits; but, should the one-half profits not amount to two thousand dollars in the year, he shall not be held for any deficiency in the salary account. In consideration of the guaranty of \$2,000 per annum to McPherson, he shall give his entire time, during reasonable business hours, to the business of the firm, and C. C. Woolworth shall not be held to give the same any more time than he may chance. Bank debt, as it now stands, substantially about \$14,000, shall bear interest at the rate of 8 per cent. per annum, payable monthly, and shall not be increased except by mutual consent, but may at any time be reduced, as the resources of the concern shall permit. Interest on C. C. Woolworth's surplus, as shown by the books, to be credited his account at the rate of 8 per cent. per annum. This agreement to run one year from this date.

"[Signed]

C. C. Woolworth, T. B. McPherson."

The defendant alleges in his answer: First. That the above agreement was not a copartnership agreement. Second. That in July, 1882, it was orally agreed by the parties that the written agreement should be so construed as to give to defendant, in any event, an assured salary of \$2,000 a year, and one half of the net profits, if any, in excess of said sum, and that defendant should not be liable for any losses in said business. Defendant further alleged that under this oral agreement he continued to conduct the business up to January 1, 1883. Third. That on or about March 20, 1883, the plaintiff brought a bill against the defendant in the district court of the state of Nebraska for the same causes of action alleged in the present suit; that defendant appeared therein, and filed his answer, and afterwards, in consideration of his payment of the costs of said suit, and the rendition of services whereby defendant effected a settlement of the business affairs of the plaintiff, the plaintiff released the defendant from all claims and causes of action against him, and dismissed said suit.

The first defense cannot be sustained. The defendant does not demand, by way of affirmative relief, that the contract be reformed. He does not claim that it was procured by fraud, or that there was any mistake of fact on his part. He claims that he supposed the contract guarantied to him a salary of \$2,000 a year, and half the profits above that sum, but that he should not be liable, as partner, for any losses in the business. If he was mistaken in his under-

standing of the effect of the contract, it was a mistake of law, for which, under the circumstances, he is not entitled to relief. *Hunt v. Rousmaniere's Adm'rs*, 1 Pet. 1.

There is some evidence in support of the second defense, that an oral agreement was afterwards made by the parties in accordance with the defendant's understanding as to the effect of the written agreement. The defendant testifies that during his management of the business he rendered full statements thereof to the complainant every six months, in which the losses were charged to the complainant's surplus account. In July, 1882, he went to Chicago to meet the complainant and a prospective purchaser of the business, taking with him a full statement of the business. Defendant testifies that complainant then objected to the charge of losses to his private account, and said he proposed to hold defendant for his share, but that he (the defendant) referred to his understanding of the contract, and refused to return to St. Joseph unless this question should then be finally settled. He says that complainant then told him if he would return to St. Joseph, and stay until the first of the year, there would be no further claim on him for losses, and that in accordance with that agreement he went to St. Joseph, and remained there until February 12, 1883. But as the complainant denies the making of any such oral agreement, or his acquiescence in the claims made by defendant in his statements, I think the evidence is insufficient to sustain this defense.

The third defense presents the vital question in the case. On February 26, 1884, the Nebraska suit having been removed into the United States circuit court, the following order was entered therein:

"Calvin C. Woolworth vs. T. Buchanan McPherson et al.

"To J. M. Woolworth, Esq., Solicitor for Plaintiff.—Sir: You will please enter an order in this cause, discontinuing the same upon the payment, by the defendant, of the costs therein.

"Yours, etc.,

C. C. Woolworth.

"Agreed to. T. B. McPherson."

Complainant claims that this paper constitutes a complete and entire contract between the parties, and that all prior negotiations between the parties are merged therein. He urges that, as this paper was intended by both parties to express the whole contract between them, it is not competent for the defendant, by oral testimony, to seek to prove further stipulations providing for his entire release from all his liabilities to complainant. Where the parties have deliberately put their mutual engagements into writing, in such language as imports a complete contract, all parol testimony of further declarations will be rejected. *Thompson v. Insurance Co.*, 104 U. S. 259. But it does not seem to me that the principle of law invoked by claimant has any application to the writing referred to. This paper appears to be a mere letter of instruction by claimant to his attorney, to discontinue the suit upon terms. The defendant is only a party to it in the sense that he assents to the terms of the discontinuance therein expressed. Presumably, this was done for the protection of the clerk of court in entering the order by consent. There is no suggestion that the parties considered the paper as a

contract. There is no promise by either party to the other. But, even if it were to be treated as a memorandum of a contract, there is nothing to prevent either party from showing that the memorandum is not complete in itself, but that there were other independent stipulations entered into by them, not contradictory to the written memorandum. This is especially true where the writing is informal and incomplete upon its face. In such a case there is no presumption that it contains all the terms of the contract. Jones, Com. & Tr. Cont. §§ 129, 134, and cases cited.

But complainant contends, irrespective of the claim that oral evidence is inadmissible to vary the letter of discontinuance, that in fact it served to fully carry out the only agreement between the parties. He says that when the defendant left the partnership business at St. Joseph, and went to Omaha, he took \$2,000 from the firm treasury to which he was not entitled, and that the primary object of the Nebraska suit was to recover that specific \$2,000; but that the defendant, having afterwards convinced him that he had lost the \$2,000 in grain speculations, and that to press the suit would be financially disastrous to the defendant, he (the complainant) agreed, if the defendant would return to St. Joseph and help to close up the business, then he would "dismiss this case, and wind it up." The defendant claims that, in consideration of the services to be rendered by him at St. Joseph, the complainant not only agreed to dismiss the suit, but to discharge him from all further liability under said agreement of February, 1881. It is extremely difficult to say just what contract the parties did make, because of the peculiar way in which they dealt with each other. The complainant, while then professing the greatest friendship for the defendant, and confessedly needing his help to close up the business, seems now to feel that he could not have meant to surrender his claim. The defendant was so anxious to get rid of the Nebraska suit that he seems to have been willing to accept the discontinuance order as sufficient evidence of a release of all liabilities.

In view of the contradictory conduct and conflicting testimony of the parties, I have been obliged to carefully examine the relations of the parties, and the objects they respectively had in view, in order to determine what contract they intended to make, and d'd make, and how they understood its terms. The agreement of February, 1881, was artificially drawn. It purports to be a copartnership, but it contains the following stipulation:

"T. B. McPherson to be guarantied one hundred sixty-six and 67/100 dollars per month, (\$2,000 per annum,) same to be and to come out of his half of the profits; but, should the one-half profits not amount to two thousand dollars in the year, he shall not be held for any deficiency in the salary account. In consideration of the guaranty of two thousand dollars per annum to McPherson, he shall give his entire time, during reasonable business hours, to the business of the firm, and C. C. Woolworth shall not be held to give the same any more time than he shall chance," etc.

This statement is, to say the least, ambiguous. Evidently the parties disagreed as to its effect in case there were losses. It is claimed that the complainant misrepresented its legal effect at the time of the making of the agreement. It is admitted that it was

afterwards the subject of dispute between the parties. The claims of the defendant were fully stated by him in his answer in the Nebraska suit, in which he denied any liability to complainant. The agreement to discontinue the Nebraska suit was made in New York, in the summer of 1883. Defendant thereupon returned to Omaha, and called upon Judge Woolworth, counsel for complainant, and requested him to carry out the agreement. Judge Woolworth told defendant that claimant had concluded not to dismiss the suit until after defendant had succeeded in settling a certain claim against complainant, held by certain outside parties. Thereupon the following correspondence passed between the parties:

"Omaha, 29th August, 1883.

"Dear Mr. Woolworth: Have just seen the judge, and he advises me you had concluded, when he left you, to preserve the statu quo in your suit against me until settlement of the P. A. & Co. account. I did not so understand it when I left you, and am sorry for this decision. The delay may be very serious to me, and it can do you no possible good. I go to St. Joe Friday or Saturday, and will do what I can to help you there.

"Truly,

T. B. McPherson."

"N. Y., September 11th, 1883.

"Dear Mac: Yours Aug. 29 came during my absence from home. Ask J. M. W., and I think he can make such explanation to the elevator people as will enable you to carry out your plans with them in mutual safety. I don't want or intend to disturb you, nor to push for a dollar not to be got, and in a little while suppose the suit will be discontinued, according to direction of J. M. W."

"Omaha, 15th September, 1883.

"Dear Mr. Woolworth: To yours 11th, etc. * * * I note carefully what you say of the settlement of the suit now pending between us. It is entirely useless for me to attempt to do anything with the elevator company upon any one's say so. I have tried that. Nothing short of a withdrawal of the suit and a release from further liabilities under it will serve me. This you have promised, and the judge promises, but says it can or will be done after I have been to St. Joe, and aided you in the settlement of the difficulties you are there meeting. There's therefore nothing between us; but a little time is of no possible value to you, but is most important to me. There's but one possible advantage to you in holding back this settlement,—the fear which your brother appears to harbor, that I may go back on my promise to aid you should this suit be settled before the work is done. This thought, to me, is contemptible, and, in spite of all the past, seems to me to be beneath and unworthy of you. I repeat here that I am ready and willing to do all I can to assist you, and I know I can do so; but I ask you to show a like disposition. Will you not do it? I await your reply, and will not go to St. Joe until I get it.

"Yours very truly,

T. B. McPherson."

"N. Y., Sept. 21st, 1883.

"Dear Mac: Yours of the 15th rec'd. If you go to St. Joe, confer and act with Colt, and, whatever you and he conclude, I shall be satisfied with. Can the Xmas cards be lumped to Phelps & B. or Levin, Atchinson? Your views about the inevitable further shrinkage in the remaining resources of W. & McP. are probably correct. There are outstanding notes yet to be paid, (about \$1,560,) and the overdraft with W. & G. cash is about \$3,300; and so long as my money holds out you see I must keep paying, and in the very best event there will be a heavy loss,—I should now guess 15 to \$20,000,—in this liquidation, as compared with the supposed surplus of Jany., 1883. Of course, I want all the help I can possibly get in closing up these W. & McP. matters, and it is your duty and interest to make your full contribution to the extent of your ability, to get the most favorable possible conversion of those re-

mainders. You can prove your loyalty by your works, and in due time the controversy can be adjusted. Or, if it will suit your purpose and preference, I should think we may properly take your note, and then we could dismiss the suit at once; otherwise, we ought to let it rest for a while longer, and, when satisfied everything is straight, we can settle up. This appears to me to be reasonable in view of events since Jany. 1st. The fact is, Mac, this has been a bad business for me, and you cannot complain, but, on the contrary, congratulate yourself if, after a while, this claim is withdrawn. Think it over, and see if you would act any quicker if situations were reversed. I hope to hear of your best and prompt efforts at St. Joe.

"Yours truly,

C. C. W."

The correspondence subsequent to this date, and the uncontradicted evidence of the defendant, show that, acting under instructions from complainant, he went to St. Joseph on several occasions, and devoted his time to the settlement of the old business, and of the contracts made by complainant after dissolution. He secured the release of certain large claims against the complainant, collected accounts amounting to about \$10,000, and remitted the proceeds to complainant, and generally performed valuable services on his behalf under the agreement. All the expenses of the trips to St. Joseph were paid by the defendant. On January 16, 1884, the final statement was sent to complainant, and on February 25, 1884, the parties met at Omaha, and complainant gave defendant the order of discontinuance.

This evidence convinces me that, when complainant promised to dismiss the suit provided defendant would return to St. Joseph, he led him to believe that he would release him from all further obligations under said original agreement. Otherwise, why did he not agree to continue the case for a definite period? Why did he insist upon holding the suit over defendant until he should settle up the matters at St. Joseph to the satisfaction of complainant? There was nothing to be lost to complainant in the dismissal of this suit, provided the cause of action remained, for the \$2,000 had been drawn out of the bank before the commencement of the suit. There was nothing to be gained by defendant from a mere discontinuance of this suit, provided complainant reserved the right to institute a new one at his pleasure. When defendant said: "Nothing short of a withdrawal of the suit, and a release from further liabilities under it, will serve me. This you have promised. * * * There's therefore nothing between us," etc.,—complainant did not deny either the promise or the statement that there was nothing between them, but urges defendant that "it is your duty and interest to make your full contribution to the extent of your ability, to get the most favorable possible conversion of those remainders." It is not suggested that it is his duty to make any contribution of money; and when complainant further proposes, either to now take defendant's note, and "dismiss the suit at once," or "to let it rest for a while longer, and, when satisfied everything is straight, we can settle up," it seems to me the conclusion is irresistible that he meant to have defendant understand that a dismissal of the suit, whether upon the consideration of a note or of services thereafter rendered, meant a release of the whole claim. This conclusion is emphasized by the

suggestion, later in this letter, that defendant should congratulate himself if, after a while, this claim is withdrawn.

The claim that complainant at most only intended to release the \$2,000 which he supposed defendant had deposited in the Omaha bank is disproved by the fact already referred to, that the money had been withdrawn before suit, and by the pleadings in the Nebraska suit, which show a claim for dissolution of the alleged partnership and an accounting. It is further effectually disposed of by the testimony of the complainant himself. He testifies that when he discontinued the suit he intended to call it quits with the defendant so far as that suit was concerned, and all that was contained and embodied therein, so far as he remembered what was in the complaint sworn to by him.

I have not overlooked the conduct of the parties after the commencement of the present suit, as bearing upon the construction and interpretation of the contract under which the Nebraska suit was dismissed. The evidence is so unsatisfactory that it throws little light upon the question. The parties had two interviews in New York. Neither of them testifies what the conversations were. It appears from subsequent correspondence that complainant gave defendant friendly assurances, which he interpreted as a promise to dismiss the suit. I think the admissions contained in complainant's letters show that defendant was justified in assuming that the suit would not be pressed. But there had been some discussion at these interviews as to the effect of the original agreement, and, after complainant had found them, he wrote defendant that they "seem more than ever to hold you for losses as well as for profits." He then adds that he did not promise to dismiss the suit, but did say that he would not take such action as would break defendant up. Defendant, it is true, admits that at the New York interviews he did not claim that there had been an adjustment of this claim, but he explains this by saying that he then had another agreement with complainant, "in which he agreed to dismiss this particular suit." And, finally, when defendant again writes to complainant, again asserting that such promise was made, and reproaching complainant for having broken faith with him, complainant writes the following letter in reply:

"Albany, June 29th, 1889.

"Dear Mac: Yours 22nd, via N. Y., reached me here today. Dismiss your apprehensions of suit. I told you in N. Y. I wouldn't do that, and I won't. I write now, late at night, in great haste, to relieve your anxiety, and will write more later."

Here is no denial of the promise, as alleged by defendant; and the only explanation of this letter vouchsafed by complainant is the following answer on cross-examination:

"Well, if I bring a suit, and pursue him for \$2,000 or \$3,000 more than he is worth, it would break him up. If I bring suit, and he pays me what he can afford to pay me, it don't break him up. That is what I mean."

In view of the facts as stated above, I think the suit should be dismissed. Let judgment be entered accordingly.

BRICKILL et al. v. MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court, S. D. New York. April 4, 1893.)

1. EQUITY—MASTER'S FEES—PRACTICE.

A master's fee on adjournment of a hearing should be paid by the party asking the adjournment, and it is the better practice to pay such fee when the adjournment is had.

2. SAME.

On a hearing before a master, each party should pay, in the first instance, the costs, charges, expenses, stenographer's fees, and master's fees for taking its own direct, redirect, cross, or recross examination of any witness or witnesses; but on final decree the sum so paid by the prevailing party may be imposed on the defeated party.

In Equity. Suit by William Brickill and others against the mayor, etc., of the city of New York. On a question as to payment of master's fees and other costs.

Raphael J. Moses, Jr., for complainants.

Betts, Alterbury, Hyde & Betts, for defendant.

LACOMBE, Circuit Judge. In this case the master's fees are fixed at \$20 for an entire day's session, (both morning and afternoon;) \$10 for a half session; and \$5 for each adjournment. As to this latter item, it is a desirable practice, always, to pay that fee when the adjournment is had, and it should be paid by the party asking for the adjournment. When the master's bill is adjusted on this basis, each side should pay, in the first instance, for its own adjournments, and for the costs, charges, expenses, (including stenographer's fees,) and master's fees for taking its own direct, redirect, cross, or recross examination of any witness or witnesses. Upon final decree the sums so paid by the prevailing party may be imposed upon the defeated party.

An order to such effect will be made.

BRICKILL et al. v. MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court, S. D. New York. April 17, 1893.)

1. EQUITY—HEARING BEFORE MASTER—EXPENSE OF TAKING TESTIMONY.

At a hearing before a master the party who calls a witness must pay the expense of taking the direct and redirect examination of such witness, but his adversary must pay the expense of taking the cross and recross examination.

2. SAME—MASTER'S FEES.

Where a session is taken up entirely with taking testimony, the expense of taking which is to be borne by one party, the master's fees for that session must be paid by such party.

3. SAME.

Where a session is taken up with taking testimony, for a part of which one party is to pay, and for the remainder of which the other party is to pay, the master's fee for the session is properly chargeable, in equal shares, to both parties, irrespective of the proportionate amount of time consumed by them. Sessions consumed in whole or in part by argument may be settled for in the same way.

4. SAME.

Time consumed in the consideration and decision of questions involved, and in preparing the report, are chargeable, in equal shares, to both parties.

In Equity. Suit by William Brickill and others against the mayor, etc., of the city of New York. On a question as to master's fees, and other costs. See 55 Fed. Rep. 565.

Raphael J. Moses, Jr., for complainants.
Betts, Alterbury, Hyde & Betts, for defendant.

LACOMBE, Circuit Judge. I have signed the order submitted by defendant because it recited that the master's fees, calculated according to the rule before designated, amounted to the sums named. As counsel now state there is some error in the calculation, I shall hold the order till these amounts are corrected. The complainant entirely misapprehends my former memorandum. When a party calls a witness, he is to pay the expenses of taking direct and redirect examination of that witness. His adversary is to pay the expenses of taking the cross and recross of the same witness. As to apportioning master's fees: When a session is taken up entirely with taking testimony, the expenses of taking which one side is to bear, the master's fees for that session are to be paid by that side. If, however, the session is taken up partly with taking testimony which one side is to pay for, and partly with taking testimony which the other side is to pay for, the master's fee for that session is properly chargeable, in equal shares, to both, irrespective of the proportionate amount of time consumed by both. Sessions consumed in whole or in part by argument may be settled for in the same way. Time consumed in consideration and decision of the questions involved, and in preparing the report, is chargeable, in equal shares, to both parties.

If there is any difficulty about making the calculation in this case, the order may stand as signed, since both parties seem to agree that the apportionment is equitable.

UNITED STATES v. SOUTHERN PAC. R. CO. et al.

(Circuit Court, S. D. California. May 3, 1893.)

No. 184.

PUBLIC LANDS—RAILROAD GRANTS—SUIT TO DECLARE INVALID—ENJOINING THE CUTTING OF TIMBER.

In a suit by the United States to invalidate a railroad company's claim to certain lands under a grant from congress, and to annul patents which had issued for part of the lands, as well as such contracts and deeds as had been made by the company to individual purchasers, who are made parties to the suit, an injunction to restrain the cutting of timber from the lands will not be awarded in advance of the hearing on merits, when the answer sets up facts which, if proved, may sustain the company's title.

In Equity. Suit by the United States of America against the Southern Pacific Railroad Company and others to declare invalid the company's claim to certain lands under the grant by congress, and to annul such patents as have been issued to the company for such lands, and such contracts and deeds therefor as have been made by the company to individual defendants. Complainant moves for a preliminary injunction to restrain the defendants from cutting down and carrying away any wood, trees, or timber from the lands in controversy. Motion denied.

The Attorney General and Joseph H. Call, Special Asst. U. S. Atty.

Joseph D. Redding, for defendants.

ROSS, District Judge. This suit was brought by the government against the Southern Pacific Railroad Company and a large number of individual defendants to obtain a decree declaring invalid that company's claim to a large number of sections of land under a grant made by congress to aid in the construction of its railroad, and to annul such government patents as have been issued to the company for such lands, and such contracts and deeds therefor as have been made by the company to the individual defendants, as well as a mortgage thereon alleged to have been made by the company to the defendants Mills and Lansing to secure the payment of certain indebtedness of the defendant company.

The lands involved in the suit are said by counsel to embrace about 900,000 acres, for 100,000 acres of which it is said the government has issued its patents, and much of which is held by the individual defendants under deeds or contracts of sale from the railroad company. The bill, as amended, alleges the complainant's original ownership of the lands in question; the grant by congress to the Atlantic & Pacific Railroad Company, of July 27, 1866; its acceptance of the grant, and the definite location of the line of road it was by congress authorized to build; the subsequent forfeiture of the granted lands by reason of the failure of the company to build the road; and the act of congress declaring the forfeiture for the benefit of the government. The amended bill also sets up the grant by congress to the Southern Pacific Railroad Company of March 3, 1871, and the various acts performed by that company thereunder. These grants are specifically referred to in the recent opinion of the supreme court in the case of the same title as the present, reported in 146 U. S. 570, 13 Sup. Ct. Rep. 152. The bill, as amended, also alleges, in substance, that the lands in controversy were within the limits of the Atlantic & Pacific grant, for which reason they were excluded from the grant to the Southern Pacific Company. It also alleges that the Southern Pacific Company claims to have pretended patents, issued by the United States, in due form of law, purporting to convey to that company a portion of the lands in suit, but which lands are unknown to complainant; that certain defendants, unknown to complainant, claim to be bona fide purchasers for value from the Southern Pacific Company, and

claim that their rights to certain tracts of the land in controversy are protected and confirmed by the act of congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," (24 Stat. 556;) that the defendants Mills and Lansing have a mortgage or deed of trust from the defendant company covering, or purporting to cover, the lands in controversy, to secure the payment of certain indebtedness of the company to them as trustees, which mortgage is dated April 1, 1875, and executed in due form of law, and recorded in the counties in which the lands are situate; that the lands in question are naturally timbered and wooded lands, and have timber and wood thereon, and that the defendants, while claiming and pretending to own some interest in the lands at various times during the last five years, have unlawfully entered upon them, and chopped down the timber and trees thereon, and carried away such timber and trees, and converted the same to their own use, and are now removing from the lands wood so cut, and are threatening to chop down other trees on the lands, and unless enjoined will do so, to the great and irreparable injury of the complainant; that the defendant company, while pretending and claiming to own some interest in the lands in controversy, at various times during the past 10 years, to the complainant unknown, by pretended contracts and conveyances, has pretended to sell and convey large portions of the lands to the other defendants, the amount and description of which are unknown to complainant, and has thus realized from wood and timber on the lands large sums of money, which it has appropriated and converted to its own use.

The complainant asks, among other things, that the defendant company be required to state (1) the names of all of the pretended purchasers of said land, or any portion thereof, from the company; (2) the amounts and descriptions of lands so pretended to be sold; (3) that each and all of the defendants be required to state the nature and extent of their pretended claim or claims to said lands.

The respondents having answered the bill as amended, a reference was made to the master to take the testimony offered by the respective parties, which has been partly, but not wholly, done. At this stage in the proceedings an application is made on the part of the complainant, based upon the pleadings in the cause, for an injunction directed to all of the defendants, restraining them from cutting down or carrying away any wood, trees, or timber from the lands in controversy. Annexed to and made a part of the answer to the amended bill is a schedule showing the various portions of the lands in controversy, for which the defendant company has executed to the individual defendants deeds of conveyance and contracts of sale, amounting in the aggregate to many thousands of acres, under which, the answer avers, the respective parties claim and hold in good faith and for value. The answer puts in issue, among other things, all averments of the amended bill in respect to the location of the line of the Atlantic & Pacific Company, and sets up that that company never did definitely locate its line of road

west of the Colorado river. Of course, the court cannot now know what the evidence may show in regard to that fact. If established as alleged by the defendants, it may be that it would result that the lands in controversy never vested in the Atlantic & Pacific Company, but did pass to the Southern Pacific Company under the grant to it; for, in the late opinion of the supreme court respecting these grants, (146 U. S. 606, 13 Sup. Ct. Rep. 160,) it is said:

"The question is asked, supposing the Atlantic & Pacific had never located its line west of the Colorado river, would not these lands have passed to the Southern Pacific Company under its grant? Very likely that may be so. The language of the Southern Pacific Company's grant is broad enough to include all land along its line; and, if the grant to the Atlantic & Pacific Company had never taken effect, it may be that there is nothing which would interfere with the passage of the title to the Southern Pacific Company."

In view of the issues raised by the pleadings, and of the facts alleged by complainant and admitted by the defendants, that there are outstanding patents of the government purporting to convey to the defendant company large portions of the disputed premises, and that under and by virtue of those patents, and the grant from congress, the defendant company has, for value received, executed deeds of conveyance and contracts of sale to the individual defendants for a large part of such lands, under which such defendants possess and claim them in good faith, and for value paid therefor, I do not think an injunction should be awarded in advance of a hearing of the cause on the merits. The motion is accordingly denied.

CITY OF DETROIT v. DETROIT CITY RY. CO. et al.

(Circuit Court, E. D. Michigan. March 16, 1893.)

No. 3,320.

1. EQUITY PRACTICE—MOTION TO POSTPONE HEARING—SUIT IN STATE COURT.

Although federal courts follow the construction of the statutes and constitution adopted by the courts of the state, yet when a suit in equity in a federal court, involving the construction of the statute and constitution of the state, has been set for hearing, the court will not, on motion of a party, postpone the trial to await the decision by the supreme court of the state of a suit pending before it, and said to involve the same question, if it is not clear that the point involved will be determined in the latter suit, and it is uncertain when it will come on for determination.

2. SAME—PROCEEDING IN QUO WARRANTO.

Nor will the hearing be postponed on the motion of the complainant, a city, although it intends to invoke the aid of the state to test the question involved in a quo warranto proceeding, when doubt exists whether the question can be raised and presented in that way.

3. SAME—DISMISSAL OF BILL WITHOUT PREJUDICE.

Although a complainant may usually, as of course, have his bill dismissed without prejudice on payment of costs, yet the rule does not apply where the dismissal would prejudice the defendant in some other way than by the mere prospect of future litigation, e. g. if the defendant has gone to the expense of a full preparation for hearing, and has filed a cross bill asking for affirmative relief.

4. SAME—REMOVAL OF CAUSE—PLEADINGS—ANSWER ASKING FOR AFFIRMATIVE RELIEF.

If the chancery rules of a state court provide that it may give relief to a defendant setting up, by answer, the facts upon which his equity rests,

to the same extent that relief might have been had on a cross bill filed, the defendant need not, upon the removal of a cause to the federal circuit court after such an answer has been filed, reframe his pleading to conform to the federal equity rules, by filing a cross bill setting up the same facts, and praying for relief thereon.

5. SAME—DISMISSAL ON MOTION OF COMPLAINANT.

In 1863 street franchises for a term ending in 1893 were granted to a street-railway company. In 1879 the city council passed an ordinance extending the franchises until 1909. In 1892 the council adopted an ordinance which repealed the ordinance of 1879, and declared all rights claimed thereunder to be void. The city then filed a bill in a state court against the railway company, alleging that the attempted extension of the franchise was unlawful, and praying that the right of the company to use the streets be declared ended after 1893. The railway company answered, alleging the validity of the extension, and praying that the ordinance of 1892 be declared void, and that the city be restrained from interfering with the operation of the railways. It also appeared that the litigation prevented the sale of the company's bonds, and prevented it from making necessary expenditures in the improvement of the streets and of the motive power of its cars. The mortgagee of the railways and franchises, a foreign trust company, was made a party to the suit, and the cause was removed by it to the federal court. Mich. Chancery Rule No. 123 provides that a defendant may claim, by answer, the benefit of a cross bill, and that relief may be given on such answer as on a cross bill. *Held*, that the railway company was entitled to relief in the federal court on its answer as on a cross bill without reframing the pleading; and that, after it had prepared for hearing, a motion by the complainant to dismiss the bill without prejudice must be denied, the effect of the motion being to defeat its prayer for relief.

6. SAME—DISMISSAL—REMOVAL OF CAUSE BY CORRESPONDENT.

The railway company is entitled to oppose the complainant's motion to dismiss without prejudice, and to insist on the trial of the cause, although the trust company, its codefendant, by whom the cause was removed, has filed no cross bill, and although the railway company has no right to be in the federal circuit court except with the trust company.

7. SAME—PREJUDICE TO DEFENDANT.

The court cannot hold that the railway company will suffer no prejudice from the dismissal of the bill merely because the complainant intends to commence a proceeding in quo warranto, when it is not clear that the question at issue can be presented in that proceeding, or that a judgment in the suit in equity would not be a bar to such proceeding.

In Equity. Bill filed in the circuit court of Wayne county, Mich., by the city of Detroit against the Detroit City Railway Company, the Detroit Citizens' Street Railway Company, Sidney D. Miller, and William K. Muir, trustees, and the Washington Trust Company of the City of New York. The Washington Trust Company of the City of New York removed the cause to the federal circuit court, and a motion to remand was denied. 54 Fed. Rep. 1. The complainant now moves to postpone the hearing on bill and answer, or, in the alternative, to dismiss the complaint. Motions denied.

John J. Speed, Charles A. Kent, and Benton Hanchett, for complainant.

Ashby Pond, Frederick A. Baker, John C. Donnelly, Henry M. Duffield, Otto Kirchner, and Henry M. Campbell, for respondents.

Before TAFT, Circuit Judge, and SWAN, District Judge.

TAFT, Circuit Judge. This is an equitable cause, which was removed from the circuit court of Wayne county on the ground of local prejudice, after it was set for hearing on bill and answer. A motion to remand, after full hearing in this court, was denied. 54 Fed. Rep. 1. It was regularly noticed in this court for hearing at the present March term, and, when called on the opening day of the term, was specially set over to be heard at a later day. That day having arrived, the complainant submits two motions in the alternative. The first motion is that the case be postponed for hearing until the June term. The ground for this motion is not that the complainant and its counsel are not now prepared to argue the case on its merits, but it is that a case is now pending before the supreme court of the state of Michigan which, when decided, will settle the construction of the statutes and constitution of Michigan, and determine the only question involved in this case. It may be fully conceded that this court, upon such a question, will follow exactly the decisions of the supreme court of Michigan when rendered because they constitute the law of the state which we are to administer; but it is by no means clear that the case referred to will necessarily decide the point here involved, and it is also uncertain when the case will come on for final determination. It is also said that the complainant proposes to invoke the aid of the state to test the question here involved, in a quo warranto proceeding to be begun after the 9th day of May next against the respondent the Detroit Citizens' Street Railway. It is not free from doubt whether the question can be presented in that way. It is the duty of the federal courts, as of other courts, to give as speedy justice as may be to suitors, and, while it is also their plain duty to accept state law from the state supreme courts on the construction of state laws and constitutions, it never has been held proper for them to delay litigation before them until state courts shall have decided the same questions, for this would be an abdication of their duties as courts. When a question of law is presented, of whatever character, they must follow the lights they have. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10. The motion to postpone will be overruled.

The motion in the alternative is to dismiss the bill in this case without prejudice. The motion is accompanied with the frank statement that the complainant prefers another tribunal than this in which to litigate its rights, and that, with this in view, it proposes after the 9th of May to procure the attorney general to institute quo warranto proceedings which cannot be removed to this court. While it may not be usual to have so candid an avowal of the fact made, the federal courts are frequently compelled to administer justice in cases where one of the parties would prefer another forum. A motion to remand implies this preference. We have found, however, that one of the respondents had the right, under the constitution and laws of the United States, to call upon this court to take jurisdiction of the case. If we are wrong, the question can be reviewed in the supreme court of the United States. As against the right of one party, the preference of another has not usually been regarded of weight. It may not be pleasant to administer justice

under such circumstances, but, as we cannot consult the preference of a party, so we cannot consult our own, where our jurisdiction is rightfully invoked. We can only assure ourselves that the attitude of the parties with respect to this court does not in any way affect our earnest wish to reach the truth, and decide this case as equity and law may require.

The motion to dismiss presents a question of equity practice which is not as clearly settled as could be desired. It seems hardly fair that after a case has been got ready for hearing and the defendant has gone to the expense of a full preparation, the complainant may deprive the defendant of the benefit of all that preparation by a dismissal, under which he reserves full power to harass him by bringing a new bill when he shall choose to do so, on the simple condition that he pay the costs, which are so notoriously inadequate to compensate defendant for his actual expenditures. In England, since 1845, the rule has been, by virtue of an order in chancery, that a dismissal of a bill after a cause is set for hearing is on the merits and must be a bar to the bringing of another bill. General Ordinance No. 117; *Mayor, etc., of Liverpool v. Chorley Waterworks Co.*, 2 De Gex, M. & G. 852; *In re Orrell Colliery & Fire Brick Co.*, 12 Ch. Div. 681, 682. The equity rules of the United States supreme court adopting the practice of the high court of chancery of England were published in 1842, and it follows, therefore, that the equity practice in this regard of the federal courts continues to be that prevailing in the English chancery courts before the new rule was promulgated, in 1845. *Badger v. Badger*, 1 Cliff. 237; *Stevens v. The Railroads*, 4 Fed. Rep. 97; *Western Union Tel. Co. v. American Bell Tel. Co.*, 50 Fed. Rep. 662.

It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 Sup. Ct. Rep. 594. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind. The exceptions are as broadly and clearly stated as anywhere by Chancellor Harper, of South Carolina, in the case of *Bank v. Rose*, 1 Rich. Eq. 294, as follows:

"Harper, Ch. The general rule is, as contended for, that the plaintiff at any time before decree, perhaps before the hearing, may dismiss his bill as of course upon the payment of costs; but certainly it cannot be said that the rule is without exception. The exception, stated in general terms, is that it is within the discretion of the court to refuse him permission to do so if the dismissal would work a prejudice to the other parties; and I gather from the cases, compared with each other, that it is not regarded as such prejudice to a defendant that the complainant, dismissing his own bill, may at his pleasure harass him by filing another bill for the same matter. But whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a codefendant, and the dismissal would put him to the expense and trouble of bringing a new suit and making his proofs anew, such dismissal will not be permitted."

In that case there had been a cross bill filed, and affirmative relief asked, and the case had been prepared for hearing, and it was held a case where the motion to dismiss could not be granted. In

Booth v. Leicester, 1 Keen, 247, where a bill and cross bill were set down for hearing together, it was held that the complainant would be prejudiced by dismissal of the cross bill without prejudice, and leave was not granted. In *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602, Mr. Justice Brown held that where, under an answer, and by virtue of the statute controlling patent litigation, a defendant was given a right, in the nature of affirmative relief, to have the patent sued on declared void, and the case had been pending three years, the defendant was entitled to have the original bill heard in spite of a motion to dismiss. In *Manufacturing Co. v. Waring*, 46 Fed. Rep. 87, Judge Lacombe held that a complainant was not entitled of right to dismiss his bill after the answer is filed, setting up that the license to use a patent upon which the suit is brought is fraudulent and void; and showing that defendant is entitled to a decree for its cancellation. In *Western Union Tel. Co. v. American Bell Tel. Co.*, 50 Fed. Rep. 662, 664, the rule is stated by Judge Colt as follows:

"Under that practice [i. e. the English chancery practice before 1845] the general rule was that a complainant might dismiss his bill upon payment of costs at any time before interlocutory or final decree; and this has been the general practice both in the federal and state courts. There are, however, certain well-recognized exceptions to this rule, and the question which arises upon this motion is whether the defendant comes within any of these exceptions. These exceptions are based upon the principle that a complainant should not be permitted to dismiss his bill when such action would be prejudicial to the defendant. But this does not mean that it is within the discretion of the court to deny the complainant this privilege under any circumstances, where it might think such dismissal would work a hardship to the defendant, as, for example, where it might burden him with the trouble and annoyance of defending against a second suit; but it means that if, during the progress of the case, the defendant has acquired some right, or if he seeks or has become entitled to affirmative relief, so that it would work an actual prejudice against him to have the case dismissed then, the complainant will not be permitted to dismiss his bill."

The question remains whether the case at bar comes within the exceptions. If it does not, we have no discretion to deny the motion. If it does, we have a discretion to grant or refuse it. The bill was brought to have the rights of the Detroit Citizens' Street-Railway Company to use the streets of Detroit declared ended after the 9th of next May, in order to enable the city to sell the street privileges now enjoyed by that company to the highest bidder, and to give the future purchaser time in which to make the necessary preparation to exercise the franchise to be conveyed to him. The bill recited that the predecessor of the Detroit Citizens' Street-Railway Company in enjoyment of the grant—the City Railway Company—was organized in 1863, with a corporate life limited to 30 years, and that soon after its organization it was granted street privileges or franchises to last until May, 1893; that in 1879 the common council of the city unlawfully attempted, and without any power in the premises, to extend the franchises until 1909 by ordinance; and that the Detroit Citizens' Street-Railway Company claims to exercise its rights under the void ordinance of 1879, by assignment from the City Railway Company. The bill is in the nature of a bill

to remove a cloud from the title of the city to the exclusive use of its streets for the benefit of the public, unincumbered by the claims of the Detroit Citizens' Street-Railway Company, so that it may dispose of street-railway privileges therein to the best advantage. The Washington Trust Company of New York is made a party because it holds title to the property, and franchises of the respondent company, under a deed of trust to secure a large amount of bonded indebtedness. The railway company answers, setting up a number of additional facts in regard to its ownership and use of the street privileges, claimed by it to operate as an estoppel against the present contention of the city, and recites the passage of an ordinance by the city council of Detroit in 1892, repealing the ordinance of 1879, and declaring all rights under the ordinance of 1879 as void and of no effect. The answer of the railway company concludes with a prayer:

"(a) That the ordinance of March 29, 1892, which by its terms purported to repeal so much of the ordinance of November 14, 1879, as extended the right of the Detroit City Railway Company to use the streets after May 9, 1893, may be declared to be null and void; (b) that the complainant may be enjoined from attempting to enforce the ordinance [of March 29, 1892] in any way, and from interfering in any way, or attempting to interfere in any way, with its rights to use and operate its street railways on the streets and avenues mentioned in the several ordinances, up to the full period named and fixed by the ordinance of November 14, 1879; (c) and for general relief."

This answer was filed in the Wayne circuit court before the case was removed to this court, and the prayer was made in the answer under chancery rule No. 123 of the Michigan equity practice, which provides that—

"In any case in equity, when a defendant shall claim from the complainant any relief which, according to the established course and practice of courts of chancery, might be had by cross bill, such defendant shall be at liberty, by his answer, to present the facts upon which his equity rests, and to claim by such answer the benefit of a cross bill, and the court shall have power to give relief upon such answer to the same extent that it might have given had a cross bill been filed."

No summons or subpoena is issued on this answer in the nature of a cross bill, but the complainant is required to answer or demur to the same without further process. When this cause was removed from the state court, therefore, the complainant was in court both on the bill and the cross bill. The issues as to the bill and answer were made up, and the complainant was in default as to the cross bill. We do not think that the equity rules of the federal courts require a reframing of the pleadings to conform to the practice that must have obtained had the suit been originally brought here. After an equity suit is brought in the United States court, subsequent proceedings are of course governed by the federal equity rules, but, on removal, the rights of parties are exactly the same as when the case was taken from the state court, and are not to be changed except so far as is required by the fact that the equity and law jurisdictions of the federal courts are entirely distinct. This is a purely equitable cause, and no inconvenience is experi-

enced, and no departure from federal equity practice is required, by the form in which it comes into this court in subsequent proceedings here. Our conclusion is not based upon the case of *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. Rep. 638, because an examination of that case shows that the peculiar equity practice in reference to cross bills in Illinois, referred to there, occurred in a case tried in the state court, and that the decree in the case was only under collateral examination, and the case was not directly before the federal court on removal. Our conclusion is based on the language of the removal statute, and the anxiety of the federal courts to preserve the rights of parties on removal exactly as they existed in the state court, so far as this is possible and consistent with the federal statutes and constitution. We think, therefore, the Detroit Citizens' Street-Railway Company is here asking affirmative relief on its cross bill, and, if its contentions are well founded, it entitles itself to that relief by injunction. Its answer and prayer, like the city's, is also in the nature of a cross bill to remove a cloud upon its title to the privileges it claims it ought to enjoy until 1909. If we dismiss the bill, it would seem that under the decision in *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 Sup. Ct. Rep. 594, the cross bill would fall too; and the question is whether this would prejudice the defendant railway company. We think it would, under the authorities already cited. Moreover, an affidavit has been filed in which it is alleged (and the allegation is not denied) that this litigation has prevented the sale of its bonds, and also that in a short time, during the coming year, if it is to enjoy the franchises it claims, it will have to expend a large amount of money,—more than half a million dollars,—in the improvement of the streets, and of the motive power of its cars. We think it may, on this state of facts, rightfully say that it would be prejudiced by a discontinuance of this suit. Thereby it would be required to bring another bill to assert the same right to affirmative relief it now claims, and the ordinary delays in litigation would delay the decision on such new bill until after the time when this franchise is said to terminate. It is naturally of paramount interest to it, under the circumstances, to know as soon as possible what its rights are in the streets.

The Washington Trust Company files no cross bill; and because it removed the case here, and as against it, if sole defendant, this bill could be properly dismissed without prejudice, it is argued that the defendants the railway companies cannot object to dismissal, because they have no right to be here except with the Washington Trust Company. After the case was removed here, the rights of the parties remained exactly what they would have been in the state court; and, if the complainant could not have dismissed against the railway company there, it cannot here. The complainant cannot dismiss its bill against the trust company without also dismissing it against all the other defendants, and so long as they object to the dismissal, and prevent it, the Washington Trust Company must remain, because it is a necessary party to the litigation.

Finally, it is urged, as a reason why the railway company will not be prejudiced by a dismissal of the bill, that by a quo warranto proceeding, in which the decree of this court, if rendered against the city and in favor of the company, will not be a bar, the city, through the state authorities, can retry the question. The counsel for the railway company contend otherwise, and the question does not seem to be clearly settled in favor of complainant's position. As the railway company is the only one which will be prejudiced by the inconclusive character of a decree in its favor, its willingness to rely on its decree, as such, ought to end the matter. If the city is successful in this case, it is not denied that the railway company will be bound by the decree, and will have to leave the streets. The complainant can hardly be injured, therefore, if it enjoys the unusually advantageous opportunity of being able to try its case twice, in different courts, with two chances for success. For the reasons given, the motions for postponement and dismissal are overruled.

As counsel for the city have previously stated that they, except for the grounds already considered, are ready to argue the case on the merits, the hearing will proceed.

CLAFLIN et al. v. BEAVER et al.

(Circuit Court, S. D. Ohio, E. D. May 1, 1893.)

No. 228.

1. CONFUSION OF GOODS—LIMITS OF DOCTRINE.

The doctrine of confusion of goods is not in any case to be carried further than necessity requires, and is only applied in cases where chattels, such as corn or wheat, not capable of being identified, and owned by different persons, have been fraudulently intermingled by the wrongdoer. It has no application if the goods can be separated, even though the act of mixing was fraudulent.

2. REPLEVIN—WRONGFUL SEIZURE—EVIDENCE—CONFUSION OF GOODS.

Two lots of dry goods were taken in replevin by the sheriff. In the selection of the first lot the goods were identified as described in the invoices made out by the plaintiffs, and in the hands of their agent, who was present at the execution of the writ, goods not identified as those described in the invoices being returned to stock. In taking the second lot goods were taken indiscriminately from the stock which was in the possession of the defendants. *Held* that, as the evidence showed that it was possible to distinguish the goods, not only by their appearance, but by marks, the doctrine of confusion of goods could not apply, and the plaintiff could not justify the taking of the second lot on the ground that his goods had been fraudulently intermingled by the wrongdoer.

At Law. Action of replevin by H. R. Claflin & Co. against A. M. Beaver, Myrtie Beaver, George Melvin, and B. H. Milliken. On rehearing.

Kramer & Kramer, for plaintiffs.

H. B. Maynard, for respondents.

SAGE, District Judge. This case is before the court on rehearing of the collateral issue framed under the order made by Judge Severens. Claflin v. Beaver, 35 Fed. Rep. 259.

The objection that the court had no right to make that order was fully considered and overruled in *Clafin v. Beaver*, 41 Fed. Rep. 204, 206, and will not now be reconsidered.

There remain to be disposed of one question of fact and one of law.

Depositions have been submitted on behalf of plaintiffs in support of their contention that the goods claimed by the assignees of Beaver & Co. were purchased by Beaver & Co. from the plaintiffs, and not paid for, and depositions on behalf of defendants in support of the claim set forth in the petition filed under Judge Severens' order. Without entering upon a review of the testimony of the witnesses, it is sufficient to say that the preponderance of evidence is against the plaintiffs. It is contradicted not only by the testimony of A. M. Beaver, defendant, but also by that of the assignees Melvin and Millikin, Millikin then being a merchant of Washington C. H., from whom a part of the stock was purchased; Silcott, also a merchant of Washington C. H., and one of the appraisers selected by the marshal; and Ridgway, dry goods clerk employed by the marshal to assist in the execution of the writ. All these witnesses, with the exception of the defendant Beaver and possibly Melvin and Millikin, to the slight extent of their interest as assignees, are disinterested. They were all present when the goods were taken in replevin by the marshal. They testify that in the selection of the first lot of goods taken, which amounted to about \$1,900, and which were identified as described in the invoices of sale made out by the plaintiffs and in the hands of Leopold Cohn, their agent, who was also present at the execution of the writ, goods not identified as those described in the invoices were returned to stock; but when it came to taking the second lot,—that is, the lot described in the assignees' petition under the collateral issue,—there was no effort at or pretense of identification, nor was there any reference to the invoices nor to the description contained in the writ. To make up in value the amount of plaintiffs' claim, goods were taken indiscriminately from the stock which was in the possession of the assignees, the only care being to select the best. Their testimony is that none of the goods described in their schedule, which is attached to and made part of their petition, were included in the fraudulent purchase; that some of them were purchased from other parties, and that such as had been purchased from the plaintiffs were fully paid for before the commencement of this action. This statement of their testimony is taken from the opinion of the court reported in *Clafin v. Beaver*, 41 Fed. Rep. 204, and from depositions since filed, which strongly contradict the testimony of the principal witness for the plaintiffs. Their evidence has much more weight with the court than the testimony introduced on behalf of the plaintiffs. The findings of fact, therefore, made by the court in that opinion are affirmed.

But it is claimed that under the doctrine of confusion of goods the plaintiffs had the right to take merchandise of the same general description and value from the stock at large. This claim is not well founded. Confusion of goods takes place when, upon the

proof, it appears that the property of each of the parties interested cannot be distinguished. If the goods can be separated, no change of property takes place, even though the act of mixing was fraudulent. The doctrine is applied in cases where chattels, such as corn or wheat, not capable of being identified, owned by different persons, have been fraudulently intermingled by the wrongdoer. It is not in any case to be carried further than necessity requires. *Bigelow, Frauds*, 576; *Hesseltine v. Stockwell*, 30 Me. 241; *Moore v. Bowman*, 47 N. H. 501. The testimony in this case shows that it was possible to distinguish the goods, not only by their appearance, but by marks; and that care was taken, in selecting the first lot, to return to stock goods not mentioned in the writ, and that in the selection of the second lot no such care was exercised, but goods were taken indiscriminately. That the goods were incapable of identification is not claimed even by the plaintiffs, for the witness on whose testimony they place their chief reliance, and who was at one time a member of the firm of Beaver & Co., and was their buyer, undertook, from an alleged inspection in the store after the assignment was made,—which turns out to have been much less extended and thorough than represented in his deposition,—and from a subsequent inspection after they had been shipped to Kenton, Ohio, and there unboxed, to identify them as goods purchased from the plaintiffs, and not paid for. However, he was so overwhelmingly contradicted as to other matters by witnesses called by the defendants that little or no credit can be given to his statements. The testimony that the value of the goods claimed by the assignees was as stated in the opinion reported in 41 Fed. Rep. 204, preponderates, notwithstanding the evidence introduced by plaintiffs tending to establish a lower value. Judgment will be entered in favor of the assignees for the sum of \$2,469.84, with interest from March 16, 1886, as found in the opinion last above referred to; and, as there directed, judgment will be entered in favor of the plaintiffs upon the verdict for the residue of the goods taken by the marshal in the execution of the writ of replevin. The costs of the case, down to and including the trial before Judge Severens, will be taxed against the defendants. The costs of the supplementary proceedings upon the defendants' petition will be taxed against the plaintiffs, as directed in that opinion.

H. B. CLAFLIN CO v. KERN et al., (SHWARTZ et al., Interveners.)

(Circuit Court, E. D. Louisiana. April 21, 1893.)

No. 12,059.

1. SALE—DELIVERY—ATTACHMENT.

K. sold to S. a stock of goods in a store at certain percentages of discount, in some classes of goods, on the cost price, and in others on the selling price, the quantities of goods in each case to be ascertained by a count to be made by clerks under supervision of the parties; S. to take possession of the goods as soon as the count was completed. S. gave his check for \$40,000 to bind the bargain, to be increased or curtailed according to the result of the count. *Held*, as against an attaching creditor

of K. who levied on the goods before the count was finished, that, but for a subsequent secret agreement as to the price made before there had been a payment, the property in the goods would have been in law that of S. from the time possession was taken under the contract, and was not dependent upon the subsequent count.

2. SAME—SUBSEQUENT AGREEMENT.

After the levy of the attachment, S.'s check was by secret agreement between K. and S. placed in the hands of a third person in trust to indemnify S. against loss by the attachment. *Held*, that the legal effect of this arrangement was to subordinate the question of who should receive the consideration to the question as to the validity of the sale, and that it qualified the sale to the same extent as if it had been a part of the original agreement; and hence that the sale was invalid as against the attaching creditor.

At Law. Action by the H. B. Claflin Company against H. Kern & Son. A. Schwartz & Sons intervene. Intervention dismissed, and judgment for plaintiff.

Lazarus, Moore & Lemle, for plaintiff.

Howe & Prentiss, W. S. Benedict, Percy Roberts, B. Titche, W. H. Rogers, and F. J. Dreyfous, for defendants.

BILLINGS, District Judge. On February 20, 1892, the following contract was entered into between the defendants and interveners:

"Agreement.

"This agreement, entered into this 20th day of February, 1892, between H. Kern & Son of the first part, and A. Schwartz & Sons of the second part, witnesseth: The said H. Kern & Son agree to sell to said A. Schwartz & Sons, who bind themselves to purchase, the entire stock in trade, merchandise, fixtures, and all the appurtenances of the dry-goods store, corner of Canal and Dauphine Sts., with no other exception than one iron safe, one desk, and one stove.

"This sale is to be made on the following basis, viz.:

"First. All piece goods having over ten yards, and all other merchandise upon which the cost price shall be marked, to be taken at said cost, less ten per cent. upon the aggregate amount.

"Second. All remnants or piece goods measuring less than ten yards shall be taken at the selling price, less fifty per cent. upon the aggregate amount.

"Third. All piece goods measuring more than ten yards, and other merchandise upon which the cost price is not marked, shall be taken at the selling price, less twenty-five per cent. upon the aggregate sum.

"Fourth. The invoices for all goods in transit, purchased by said H. Kern & Son, shall be turned over to the purchasers, who, upon delivery of said goods, shall assume the amount of said invoices, and be responsible therefor.

"Fifth. All the furniture, tools, and fixtures (save those above mentioned) shall be accepted for the price of one thousand dollars.

"Sixth. In order to expedite the ascertainment of the price of the within sale, the said parties of the first and second parts shall put at once as many clerks as they may deem necessary (satisfactory to both parties) to measure all unmeasured piece goods, and count all other merchandise. Thereupon persons representing both parties shall call off the said merchandise to others likewise representing both parties, (in such manner as complete fairness shall exist,) who shall enter the merchandise in books numbered alike, a copy of which to belong to either party. As soon as the entire stock shall have been thus entered, the parties of the first and second parts shall proceed without unnecessary loss of time to the ascertainment of the value of said stock of merchandise on the basis above established, which value shall be thereupon paid in cash by said A. Schwartz & Sons to said H. Kern & Son.

"Seventh. The book accounts are not included in this sale, but shall remain the property of said H. Kern & Son; and, for the purpose of facilitating

the settlements of said firm and the collections, they shall be allowed the use of space within the building for a reasonable time, free of rent.

"Eighth. The said A. Schwartz and Sons shall enter into immediate possession of the said stock of merchandise, and be permitted to dispose of the same as they may deem best, after the said goods shall have been duly entered as stipulated in paragraph sixth; nor shall any delay in the ascertainment of the total of the amount of the present sale delay the delivery of said goods to A. Schwartz & Sons.

"Ninth. The lease to the building shall be transferred to said A. Schwartz & Sons by said H. Kern & Son, who shall obtain the consent of the owner thereto.

"Tenth. In order to bind the present sale and agreement, the said A. Schwartz & Sons have presently paid to the said H. Kern & Son, who acknowledge the receipt thereof, the sum of forty thousand dollars; it being well understood that, in the event the stock, etc., hereby sold should be found, under the present agreement, to be worth less than that sum, the said H. Kern & Son shall make good the difference; likewise, should the said stock, etc., be found to exceed the amount herein paid, the said A. Schwartz & Sons shall pay said difference to said H. Kern & Son as soon as ascertained.

"Thirty-three words erased, null and void.

"At the moment of signing it was agreed that, in case of disagreement in the carrying out of the present agreement between the parties of the first and second parts, the matter in difference shall be submitted to arbitration,—Henry Beer to act on the part of H. Kern & Son, and Gus. Lehman, Sr., to act on the part of A. Schwartz & Sons; these two to appoint an umpire; the parties to abide by the award of the majority of the arbitrators.

"Signed in presence of

F. J. Dreyfous.

"G. Lehman.

H. Kern & Son.

Emile Kern.

A. Schwartz & Sons."

The 20th of February fell on Saturday. At from half past 7 to 8 A. M. on Sunday morning, February 21st, the measuring and counting of the merchandise commenced. It was continued during Sunday, and into Monday. The levy of the attachment by the marshal was made on Monday afternoon, between 2:15 and 2:30.

As to the time when the measuring, counting, and entering in the nine books duplicated, without the extension of the price, were completed: On this issue, on the part of the interveners, twenty-nine witnesses were called. Nineteen testified that they individually completed their work before the time of the levy of the writ; one testifies that he does not remember the time; one testifies that his work was completed on Monday evening, or after the levy; one testifies that entries were being made during the time after the levy; four who were not engaged in taking the inventory, and who were not there Sunday or Monday, but reported Tuesday for work, did not know of their own knowledge the time that the inventory was completed, but did not see any inventory going on in their department; one testifies that the inventory was completed before the levy; and the two Schwartzes' testimony is to the effect that while the entries were not entirely completed, there being some things left unfinished, the entries were made before the levy. On the part of the plaintiffs, sixteen clerks testify that they completed the measuring and the counting and entering not till after the time of the levy; one testifies that he completed his work before the levy; one testifies that the clerks were measuring and counting goods after the levy; and two do not remember the time. The chief deputy marshal testifies that the measuring was going on after the levy was made. Another deputy testifies that they were unrolling

goods, and taking down goods from the shelves and placing them on the counter. He says he judges they were measuring. A third deputy, who was not there Monday, but was there Tuesday, does not testify as positively as the others, but says they were taking down goods from the shelves and putting them on the counter, but does not testify that on Tuesday they were counting or measuring. Captain Donnally, the United States marshal, testifies that Monday evening he was at the store, and heard them quarreling and contending about the quantity or measurement of goods. The senior Mr. Kern, one of the defendants, testified that the measuring and the counting were concluded at 5 or 6 o'clock Monday evening. It is to be observed that twenty-three witnesses testify to the completion of the measuring and counting before the levy of the writ. Twenty-four testify, to the contrary, that the levy was made before the counting or measuring was finished. Of the twenty-three witnesses twenty-one were clerks now in the employ of the interveners, and two were the interveners. Of the twenty-four witnesses, nine were in the employ of the defendants; eight were formerly, but not now, in the employ of the interveners; two are now in the employ of the interveners; four were the marshal and his deputies; the remaining one was the senior defendant Kern.

This summary shows that the preponderance of testimony is against the claim of the interveners, and in favor of that of the plaintiff; and I find as a fact that the levy of the writ of attachment was made before the measuring, counting, and entering without extension of the price of the goods was completed.

I find further as facts that on Saturday two checks, amounting in the aggregate to \$40,000, were delivered by the interveners to the defendants as the estimated price of the whole stock of goods agreed to be sold. That on Sunday evening the defendants delivered the keys of the store to the interveners, who opened the store with them on Monday morning. That on Monday, after the levy of the writ of the plaintiff, neither of the two checks having been presented for payment nor having been paid, an agreement was entered into between the interveners and the defendants that the whole of the purchase price of the goods sold, except the \$2,500 belonging to G. Lehman, should be deposited with and held by F. J. Dreyfous in trust to protect A. Shwartz & Sons from loss in case their title to the stock of goods should not be maintained. That it appears from the evidence that, from this amount so deposited with Dreyfous, payments were made on the drafts of the defendants, so that the amount was reduced to \$27,415.56 down to May 2, 1892, and that subsequently this last amount was turned over to W. S. Benedict, Esq., who received the same, and holds and has paid a portion of the same, as appears from his statement:

"The H. B. Claflin Co. v. H. Kern and Son et als. No. 12,059.

"U. S. Circuit Court.

"Statement of W. S. Benedict.

"There is no written contract respecting the trust established by H. Kern & Son, in view of the attachment, to protect A. Shwartz & Sons. The check

for \$37,500, which has been offered in evidence, was held by F. J. Dreyfous as trustee under this trust, and from its proceeds various payments were made by H. Kern & Son down to May 2, 1892. Mr. Dreyfous having retired from the trust, the balance of \$27,415.56 was turned over to me as money of H. Kern & Son, to be held in trust for the same purpose, viz. to protect A. Schwartz from danger of double liability in the premises. By consent of H. Kern & Son, the following sums were paid from the said fund of...\$27,415 56 viz.: 1st. Stenographers' fees.....\$ 368 15

2d. J. A. Mercier, rent due by H. Kern & Son on the Canal street store up to sale of Feby. 20th, 1892... 7,083 33

3d. P. Roberts and B. Titcher, attorneys of H. Kern & Son..... 1,000 00 8,451 48

Balance\$18,964 08

"A balance of \$18,500, funds of H. Kern & Son, is held by me under the trust to protect A. Schwartz and Sons in the premises. The further balance of \$464.08 is also in my hands, less payments for disbursements incidental to the trust. W. S. Benedict."

That it also appears that the defendants, after their insolvency, gave information as to this amount so held surrendered by Mr. Dreyfous and Mr. Benedict to the insolvent court, and the terms and conditions upon which it was deposited and held.

The facts as to the defendants' adjudication as insolvents and the proceedings in the insolvent court appear in the findings of the court upon the motions for a new trial filed December 17, 1892, which are adopted and made part of these findings.

Upon these facts two questions arise: First. But for the peculiar arrangement as to the disposition of the price of these goods, and laying that, for the time being, out of consideration, would the sale have been complete, and would the title to the goods have passed to the interveners? There had been a delivery, symbolical and actual. Forty thousand dollars had been given in checks as the estimated price which was to be ascertained by measuring and counting, and the price increased or diminished, and paid or returned, accordingly. I think, laying aside the consideration of the agreement as to price, the case of *Shuff v. Morgan*, 9 Mart. (La.) 592, is in substance this case. In each case there was a delivery, and nothing remained to be done but the ascertainment of quantity. Articles 2458 and 2459, Rev. Civil Code La. 1889, are but re-enactments of articles 6 and 7 under title 6, p. 346, Code 1808. In the case of *Shuff v. Morgan* the court held that the rule "*res perit domino*" was a general, but not a universal, one; that, with complete title in the vendee, for him to run the risk of the destruction of the property sold was of the nature, but not of the essence, of the contract of sale, and that the reservation by the statute of the risk in the vendor did not prevent the title to the thing agreed to be sold passing to the vendor, so as to prevent a creditor of the vendor from making a valid attachment.

There is nothing peculiar in the provision in the contract of sale in this case. It was in substance the same as in *Shuff v. Morgan*. The whole effect of paragraph 8, when considered in connection with paragraph 6, is that the stock of goods was sold, and the title was vested in the vendors, the interveners. There was to be a tale of the goods to determine the exact amount of the price. The case

of *Shuff v. Morgan* was decided in the year 1821, and has never been overruled or called in question; so that, so far as concerns the provision as to the tale, the property would have passed.

There remains the question as to what the court must say as to the effect of the arrangement about the price. The facts necessary to be considered are these: A debtor is in failing circumstances. A sale of his whole stock of goods is made. The consideration is \$40,000. For this amount checks are given. Before the checks are paid or presented, a creditor levies an attachment. By a secret agreement between the seller and the purchaser, the whole price (\$40,000) is placed in trust in the hands of a third person, to indemnify the purchaser against loss by service of the attachment. The legal effect of such a qualification of an agreement to sell is to subordinate the question of who shall receive the consideration to the question as to the validity of the sale. The trustee holds in trust for the vendor in case the sale shall be held to be valid, and for the vendee in case it shall be held to be void, and it is a secret trust. In the eyes of the law the property has been placed beyond the reach of the creditors by the sale. By this secret trust the consideration for the sale also is placed beyond their reach. It is a sale if the attachment is defeated, and no sale if it is maintained. To render a sale valid there must be price. That price cannot conditionally belong to the purchaser. Nor can the indications of a payment be held out which are not according to fact, when the necessary effect of such indications must be to baffle the creditors of the vendor. I think such a transaction, before the checks have been paid, ingrafts upon the sale a qualification which becomes a part of the original agreement of sale, and characterizes it precisely as if it had been made along with it, and that courts must declare a transaction with such a feature invalid, and ineffectual to defeat the rights of the attaching creditor to the extent of his attachment.

The conclusions of law from the facts above found are:

1. That the attachment was dissolved by the insolvency proceedings, in which the defendants made, and the proper court accepted, a surrender of all their property. Section 933, Rev. St., (9 Stat. 213, 214;) especially the intent and meaning of the statute, as shown in the title and as declared in the body of the act.

2. That the plaintiffs have and recover against the defendants \$21,728, with interest, as prayed for in their petition, and their entire costs in the cause, and upon the attachment up to the time of the surrender, without any lien or privileges resulting from the attachment.

3. That the intervention of A. Shwartz & Sons be dismissed, and that they pay the costs of the intervention.

McHOSE et al. v. EARNSHAW.

(Circuit Court of Appeals, Third Circuit. April 17, 1893.)

1. ACTION FOR PRICE OF GOODS—OCEAN FREIGHT—REMISSION OF STEVEDORE CHARGES.

The owner of foreign ore sold a portion thereof to defendants under an agreement which contained this clause: "Freight rate. The above prices [for the ore] are based on an ocean freight rate of 12 shillings per ton. All freight over 12 shillings to be added to the invoice as part of the price of the ore, and all freight under 12 shillings to be deducted from the invoice." *Held*, in an action to recover the price of part of the ores, that defendants were not entitled to the benefit of a rebate on unloading which plaintiff received from the stevedores as a commission for procuring them the job, the same not being a reduction of ocean freight. 48 Fed. Rep. 589, affirmed.

2. SAME—FALSE REPRESENTATIONS—MEASURE OF DAMAGES.

Defendants were induced to enter into the contract for the ores by plaintiff's false statements, but accepted the ores after discovering the falsity of the statements. *Held*, that the true measure of damages for the deceit was the difference between the contract price of the ore and its value in the market at the time, unaffected by the false representation, and not such sum as the jury might find from all the evidence was the value of the ores to defendants. *Peek v. Derry*, 37 Ch. Div. 541, and *Smith v. Bolles*, 10 Sup. Ct. Rep. 39, 132 U. S. 125, distinguished.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

At Law. Assumpsit by Alfred Earnshaw against Isaac McHose and others, trading as Isaac McHose & Sons, to recover the price of goods sold and delivered. There was a verdict for plaintiff, and motions to increase and diminish the same were subsequently made and denied. 48 Fed. Rep. 589. From the judgment entered on the verdict, defendants bring error. Affirmed.

F. P. Prichard and John G. Johnson, for plaintiffs in error.

R. C. McMurtrie, for defendant in error.

Before DALLAS, Circuit Judge, and WALES and GREEN, District Judges.

DALLAS, Circuit Judge. This was an action of assumpsit by the defendant in error against the plaintiffs in error, upon a written contract dated January 29, 1890, by which the defendant sold to the plaintiffs certain ore, at prices named, to be shipped in as nearly equal monthly proportions as possible, and to be delivered free on board vessels at Philadelphia. The contract recited that the defendant had purchased from the Marabello Iron Ore Company the total output of their mines for the 12 months commencing March 1, 1890, and the sale to the plaintiffs was of one third of that ore. The contract contained this clause:

"Freight rate. The above prices [for the ore] are based on an ocean freight rate of twelve shillings per ton. All freight over twelve shillings to be added to the invoice as part of the price of the ore, and all freight under twelve shillings to be deducted from the invoice."

Several cargoes were delivered and paid for, but others, subsequently delivered, were not paid for, and to recover a balance

thence arising, of \$56,807.32, this action was brought. Two (among other) defenses were set up—First, that the stevedores had unloaded a considerable part of the ore for 35 cents per ton, but had returned 10 cents per ton thereof to the defendant, who had not applied the sum so returned (\$4,096.10) in reduction of freight under the “freight-rate” clause of the contract; second, that the defendant had made a false and fraudulent representation of a material fact, which was intended to, and did, induce the plaintiffs to make the contract. This brief and incomplete statement of the case is sufficient for the present purpose. The arguments of counsel have been confined to two questions, which will be separately considered.

1. That the defendant received from the stevedores \$4,096.10 under the circumstances which have been mentioned, and that, if the sum so received should have been applied in reduction of freight, the plaintiffs were entitled to a corresponding deduction from the defendant's claim, was admitted. There was no allegation of fraud in this particular transaction. The point made was, and is, solely as to the true construction of the freight-rate clause of the contract. The defendant contended, and now insists, that this money was properly paid to and received by him as “commission allowed by stevedores” for his services in procuring them the job of unloading cargo, and was not a reduction of the “ocean freight.” If this view of the matter is the correct one, then, in the absence of any charge of fraud in connection with it, the plain language of the contract determines the question. The learned judge who presided at the trial instructed the jury that the contractual provision, “all freight under twelve shillings to be deducted from the invoice,” was not applicable to these commissions, because the service of unloading was distinct from that of ocean carriage, to which alone the provision referred; and we are of opinion that this construction of the clause, and consequent restriction of its operation, were clearly right.

2. A more important and difficult subject is now to be dealt with. The defense chiefly relied upon was that the contract of purchase was procured by fraud. Upon this point, the case was tried, and properly, precisely as if the positions of the parties upon the record had been reversed, and the action had been for deceit. The burden was upon the defendants below to show, and it is now to be assumed that they did show, that a material statement of fact had been made to them by the plaintiff below, which was untrue, and which he knew to be untrue; and that it was made with intent to induce the defendants to make the contract, who, in reliance on the statement, did make it, and thereby suffered damage. All of these elements of the actionable wrong of deceit must, we repeat, be, for the present purpose, assumed to have been established, and therefore it is not necessary to refer to the evidence which was adduced in proof of their existence. The only question is as to what loss resulted therefrom for which the defendants below were entitled to compensation in damages; and, as pertinent to this question, but a single additional fact, and that an undisputed one, need be stated. Although the defendants below believed the state-

ment to be true at the time it was made, and contracted in reliance upon it, yet they knew it to be untrue before they received any of the deliveries, and, notwithstanding that knowledge, they accepted the ore. In view of this fact, the court below held the true measure of the damages for the deceit to be "the difference between the contract price of the ore and its value in the market at the time, unaffected by the alleged false representation; that is to say, the difference between the price which the defendants contracted to pay and the price others generally would have paid in the market, in the absence of such a representation." Such was the instruction given to the jury, notwithstanding a point presented on behalf of defendants below, (which was disaffirmed) that the effect of the misrepresentation was "to annul the contract, and leave defendants liable only for the benefits which they received under it; or in other words, for such sum as the jury may find from all the evidence was the value of the goods to them." The ruling of the court was, in substance, that the defendants below were entitled to be compensated for any loss sustained from making the contract, and for such loss only, because the making of the contract, and that alone, was induced by the fraudulent falsehood; whereas the defendants below, although they admitted acceptance of the ore with knowledge of the fraud, claimed allowance of the difference between the contract price and the value to them of the ore so accepted.

Certain broadly expressed rules of the law respecting recoverable damages and the measure thereof have been long settled, and the present case, like many to be found in the books, presents no difficulty which does not arise from its special circumstances, and which is not wholly dependent for its solution upon the discriminating application of established general principles to particular facts. The principle that the damages recoverable in an action of deceit are such only as naturally and proximately result from the fraud is not open to question. Indeed, resultant damage is an essential component of the wrong. "When you have proved that the statement was false, you must further show that the plaintiff has acted upon it, and has sustained damage by so doing." *Edgington v. Fitzmaurice*, 29 Ch. Div. 459-482; *Peek v. Derry*, 37 Ch. Div. 541-551. If the fraudulently induced act and the damage be not connected as cause and effect, the injury itself is not complete, and, without injury, of course nothing can be recovered. Hence it is manifest that, in order to establish that the wrong of deceit has been committed, as well as to supply the measure of the compensation to which the person wronged is entitled, damages naturally and proximately occasioned by doing the induced act must be made to appear. Keeping this in mind, we recur to the material facts of this case. From time to time, after the making of the contract, the defendants below accepted deliveries of the ore. These acts were not constrained, but voluntary. They were not influenced by the fraud, for that had been discovered; and, as has been not only admitted but insisted on behalf of the plaintiffs in error, they retained and used the ore only because the exigencies of their business required that they should do so. They knew that they were

at liberty to reject it. That they accepted it under the stress of urgent need may be conceded; but no matter what else may have induced them to take it, it is plain that the fraud did not, and that they had no right whatever to the ore which was not derived from the contract in suit, nor at any price which that contract had not fixed. Yet the contention of the plaintiffs in error amounts to this: that they were, by reason of a fraud not then operative, entitled to keep the ore, not at any price that had ever been agreed upon, but for such sum as might be equal to its value to them. We know of no principle of law or of equity which supports this position. It certainly cannot stand upon the right of rescission. In assertion of that right the ore might have been rejected, but the fact is that it was accepted, and, of necessity, at the stipulated price; and for that price, therefore, the defendants below were properly held to be liable. For any loss which they sustained by acting upon the fraud they were, of course, entitled to allowance, and this the jury was directed to award them, under instructions as to the method of arriving at the amount thereof which accurately applied to the facts we have discussed the rule of the law to which we have referred.

It is, however, earnestly contended that our understanding on this subject conflicts with the views of the learned judges by whom the case of *Peek v. Derry*, 37 Ch. Div. 541, was decided; and also that the supreme court, in *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. Rep. 39, has authoritatively determined the question here involved in such manner as to require a reversal of the judgment now under review. But careful examination of the reports of these cases discloses that in neither instance is the judgment of the court to the effect supposed. On the contrary, upon scrutinizing each of them with reference to the facts upon which it was founded, it becomes quite manifest that in neither was it intended to disregard the familiar principles to which we have adverted, or to depart (and that without the expression of any such purpose) from the prior judicial decisions, both in England and in the United States, which had theretofore been accepted as settling the law in accordance with those principles.

Peek v. Derry was an action of deceit. The plaintiff had been fraudulently induced to buy certain shares, and had taken them before he discovered the fraud. Cotton, L. J. said, (37 Ch. Div. 591:)

"The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares."

And, per Lopes, L. J., (page 594:)

"Any damage occurring after the discovery of the fraud, when the plaintiff might have rescinded the contract, and which would not be attributable to his acting on the misrepresentation, but to other causes, in my opinion would not be recoverable."

We cannot suppose that the judges who used this language intended either to gainsay or to renounce the rule we have heretofore stated. Indeed, we think it would be difficult to more posi-

tively affirm it, or to more distinctly indicate its applicability to the present case.

The judgment in *Smith v. Bolles* is binding upon this court, but it does not rule the precise point now under consideration. The plaintiff there had, in February, 1880, upon false representations, "agreed to buy" certain stock from the defendant, "which contract was completed in the month of March, 1880, by payment in full of the purchase price." The contract seems to have been treated as having been actually made in March, and the purchase and payment as having been contemporaneous; but, be this as it may, it at least did not appear that the plaintiff completed the transaction with knowledge of the fraud, and when he might have rescinded the contract. Consequently, not only the making of the contract, but the acts done in pursuance thereof, were attributable directly to the wrong committed, and of course any damage sustained from doing those acts were recoverable. There was no question about this, but only as to how, in such a case, the damages should be estimated; and it was with reference to this state of facts, and to this precise question, that the court held that "the measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented." The reason for this is obvious. The plaintiff having, as a result of the fraud, taken the stock, and paid for it, damages occasioned by making the contract merely would not have been co-ordinate with the injury. He was entitled to "what he had lost by being deceived;" to "such damages as naturally and proximately resulted from the fraud," and were "legitimately attributable to defendant's fraudulent conduct." Now, when it is remembered that in the case before this court the vendees' acceptance of the ore is not attributable to their acting on the representation, but to other causes, the essential character of the difference which distinguishes it from *Smith v. Bolles* cannot fail to be comprehended; and we may add that attentive reading of the whole opinion in that case has satisfied us that the principle upon which it rests was clearly perceived by the court below, and was properly adapted to the especial facts of the case on trial.

The judgment is affirmed.

MILLS et al. v. PESSELS.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1893.)

No. 50.

1. PREFERENTIAL ASSIGNMENTS—MORTGAGE—EVIDENCE.

B., an insolvent merchant, conveyed a stock of goods of the value of \$63,000 to a trustee, requiring him to sell the same, and out of the proceeds pay certain scheduled creditors, making preferences between several classes of the creditors; the balance, if any, either of money or goods unsold, to be paid over or delivered to the grantor. B. then owed about \$210,000, and had assets, exclusive of the stock of goods conveyed to the trustee, amounting to about \$51,280. He did not intend to redeem the

stock, but intended the trust solely as a fund to pay the creditors. *Held*, that the transaction amounted to a mortgage to secure creditors, and was not a partial assignment preferring creditors, forbidden by the laws of Texas.

2. SAME—FRAUDULENT CONVEYANCES—PROVISION FOR ATTORNEYS' FEES.

The fact that the conveyance secured a fee of \$2,500 to the attorneys preparing the conveyance and rendering legal services in and about the trust to the grantor, did not render it fraudulent and invalid as to unsecured creditors.

3. SAME—WITHDRAWAL OF ATTORNEYS' CLAIM.

An agreement entered into between the grantor, the attorneys, and one of the secured creditors, by which the attorneys withdrew their claim in so far as it affected the claim of the creditor mentioned, could not affect the validity of the conveyance with respect to the other creditors thereby secured.

In Error to the Circuit Court of the United States for the Northern District of Texas. Affirmed.

M. L. Crawford, for defendant in error.

Before PARDEE, Circuit Judge, and LOCKE, District Judge.

PARDEE, Circuit Judge. On November 25, 1890, B. K. Brockinton made a deed of trust conveying to G. Pessels, trustee, a certain stock of goods, wares, and merchandise, situated in Hillsboro, Tex., to secure certain named creditors in amounts aggregating about \$98,000. Pessels at once took possession as trustee, and was proceeding to execute the trust, when the plaintiffs in error instituted a suit in the circuit court against B. K. Brockinton to recover an alleged indebtedness of \$4,947.58, and in said suit caused a writ of attachment to be issued out of said court with garnishment process against Pessels, trustee. The issue made by the pleadings was whether the conveyance from Brockinton to Pessels, trustee, was or not fraudulent as against other creditors of Brockinton. Upon the trial, the parties, by stipulation in writing, waived a jury, and submitted the case to the court. The court, after hearing the evidence, made the following findings of fact and law:

"First. Plaintiffs, Mills & Gibb, a firm composed of P. L. Mills, John Gibb, and William T. Evans, citizens of the state of New York, sued B. K. Brockinton, a citizen of the state of Texas, in this court, on December 22, 1890, for \$4,947.58, in cause No. 453, and sued out an attachment against said Brockinton on the ground that he had disposed of his property for the purpose of defrauding his creditors, and caused a writ of garnishment to be served on defendant, G. Pessels, as a debtor of said Brockinton, or has having effects of said Brockinton in his possession; and on April 30, 1891, plaintiffs recovered judgment against Brockinton for the sum of \$5,079.54 and costs.

"Second. On November 25, 1890, Brockinton conveyed to G. Pessels his entire stock of goods, wares, and merchandise in Hillsboro, Texas, in trust, requiring him to sell the stock as speedily as possible, and to the best advantage, for cash, at either public or private sale, and out of the proceeds, after paying the expenses of executing the trust, to pay in full certain creditors in Schedule A, viz.: Crawford & Crawford, \$2,500; the H. B. Claffin Co., \$10,104.76; Bernheim, Bauer & Co., \$14,141.49; A. C. Bernheim, \$20,300; Sturgis National Bank, \$23,000; Hill County National Bank, \$5,700; F. B. Q. Clothing Co., \$618.85,—aggregating \$76,365.10; and, after paying certain creditors, then out of the balance, if any, to pay in full certain creditors named in Schedule B, whose debts aggregated \$3,704.44; and, after paying these creditors, then

out of the balance, if any, to pay in full certain creditors named in Schedule C, whose debts aggregated \$18,102,—in all, \$98,171.54; and, after paying said debts, then to redeliver to Brockinton all of said goods unsold, or all sums of money being the proceeds of such sales remaining in said Pessels's hands; the instrument further stating that 'it is the intent and purpose of this mortgage to secure and pay in full my creditors hereinbefore named.' This deed of trust was delivered to G. Pessels, and was accepted by him, and it was duly filed for registration immediately on November 25, 1890, at 9 o'clock P. M. Thereupon Crawford & Crawford, G. Pessels, acting as agent for the H. B. Claffin Co., and J. D. Crawford, acting for Bernheim, Bauer & Co., A. C. Bernheim, and F. B. Q. Clothing Co., whose agent he was, indorsed their acceptance on said instrument, and they were all the creditors who accepted up to the time the instrument next mentioned was filed for registration, November 26, 1890; and after that certain creditors in Class B, whose debts were as follows: L. Gowan, \$1,200; A. S. Johnson, \$1,250; and C. K. King, \$600,—indorsed their acceptance of said instrument, and these were all the creditors who accepted, there being no proof that any other creditors had accepted the instrument, except the Sturgis National Bank, as hereinafter mentioned.

"Third. A few hours later, B. K. Brockinton, Crawford & Crawford, and the Sturgis National Bank entered into a written agreement, stipulating that the Sturgis Bank agreed to the deed of trust with the understanding that the claim of Crawford & Crawford for \$2,500 should be withdrawn as a preferred claim in so far as it affected the claim of the Sturgis Bank, and 'that, after the property shall be sold by the trustee,' referring to the deed of trust, 'then, if any money shall remain in his hands, he shall pay over the same to whomsoever in law shall be entitled to receive the same.' This was duly registered as a chattel mortgage, November 26, 1890, at 3:30 o'clock A. M. Pessels was informed of it in the morning of that day.

"Fourth. B. K. Brockinton, at the time of the execution of the deed of trust, owed about \$210,000, and was insolvent, and unable to pay his debts as they matured. His assets consisted of the merchandise conveyed by the deed of trust, which cost originally about \$100,000, but was afterwards sold by the trustee for \$63,000, and was of the value of about \$63,000; notes and accounts amounting to \$100,000, valued at \$25,000; compress stock, \$25,000; real estate, estimated at \$1,280. At the time he conveyed the merchandise he did not intend to redeem the same, or to pay off the debts preferred in the deed of trust, because he was not able to, but conveyed it to the trustee to secure the creditors named, with the intention of thereby raising a fund to pay off the debts specified in the deed of trust. The trustee knew he was insolvent, and could not intend to redeem, as did also the creditors preferred in and accepting the deed of trust.

"Fifth. The deed of trust was prepared by Messrs. Crawford & Crawford, attorneys at law, and the debt of \$2,500 to them, secured in the deed of trust, was for their services in advising about and preparing the instrument; and Crawford & Crawford, in consideration of this debt of \$2,500, afterwards represented Brockinton in various attachment suits brought against him by his creditors. Said fee was reasonable, in view of the services rendered. The trustee made a separate contract for the services of Crawford & Crawford in his own behalf in his fiduciary capacity.

"Sixth. The facts as to this fee of \$2,500 were known to the trustees and to the creditors above mentioned, and who accepted the deed of trust; and the agreement above recited, made by Crawford & Crawford, Brockinton, and the Sturgis Bank, was entered into because the attorneys of the Sturgis National Bank entertained doubts as to whether this attorneys' fee could be legally provided for in the deed of trust, and so they insisted on said agreement in behalf of the Sturgis Bank. The court refused to find the conclusions of law as requested by plaintiffs, but finds as follows from the above stated facts:

"Conclusions of Law.

"First. The court finds the instrument in controversy was not a partial assignment, but a deed of trust in the nature of mortgage.

"Second. The deed of trust, in connection with the written agreement of November 26, 1890, is not a partial assignment, but a mortgage.

"Third. That said instrument, being a mortgage, is not in contravention of the statute regulating assignments for benefit of creditors.

"Fourth. The debt of \$2,500, if void of itself, did not affect the deed of trust.

"Fifth. The reservation of the surplus did not vitiate the deed of trust.

"Sixth and Seventh. Judgment should be rendered in favor of the defendant for costs and a reasonable compensation, to which rulings of the court plaintiffs then and there excepted in open court, and tender this, their bill of exceptions, and pray that the same may be approved under the hand and seal of the court, and enrolled as part of the record of this cause."

The counsel for the plaintiffs moved the court to find as conclusions of law from the facts with reference to the issues the following:

"First. That the instrument in controversy, being a conveyance of only a part of B. K. Brockinton's property to a trustee for the benefit of only a part of his creditors, he having a large amount of other property, and owing a large amount of other debts, and being insolvent, and entertaining an intention not to pay off the preferred creditors out of his other property, and redeem said conveyed property, is not a deed of trust in the nature of a mortgage, but is a partial or special assignment for the benefit of creditors.

"Second. That said deed of trust, in connection with the written agreement entered into by B. K. Brockinton, Crawford & Crawford, and Sturgis National Bank, is a partial assignment, and not a mortgage.

"Third. That said instrument or instruments in writing, being a partial assignment, as aforesaid, is in contravention of the statutes of Texas regulating assignments for the benefit of creditors, and is prohibited thereby, and is null and void.

"Fourth. That the debt of \$2,500 of Crawford & Crawford was fraudulent and illegal as against the creditors of B. K. Brockinton, and entirely avoided the deed of trust.

"Fifth. That the reservation of B. K. Brockinton in the deed of trust aforesaid of the surplus of goods or money remaining after executing the trust therein mentioned is illegal and fraudulent as against his creditors, and rendered said instrument void.

"Sixth. That, as the goods conveyed to the defendant sold for \$63,000, and the debts of the creditors who accepted before November 26, 1890, amounted to only \$47,665, the balance was subject to the garnishment of plaintiff.

"Seventh. That judgment should be rendered in favor of plaintiffs against the garnishment for the amount of their judgment against B. K. Brockinton, interest and costs."

Judgment having been given in accordance with the findings of fact and conclusions of law, the plaintiff sued out this writ of error, and asked the court to review the case on the following assignments of error:

"(1) The court erred in refusing to find the conclusions of law requested by plaintiffs in error in their motion for findings of conclusions of fact and law, filed in said cause on December 3, 1891, to which motion reference is made for the finding so requested.

"(2) The court erred in finding its conclusions of law as shown in the bill of exceptions, filed herein by plaintiffs in error on December 3, 1891, to which bill of exceptions reference is here made for said conclusions of law so found.

"(3) The court erred in rendering judgment in favor of defendant in error. Wherefore plaintiffs in error pray that the said judgment of the court below be reversed, and this cause be remanded for a new trial in conformity to the opinion of this court."

From this assignment it appears that the error complained of in the court below was in not finding the conclusions of law asked

by the plaintiff in error, instead of those actually found. A comparison of the two shows practically three questions involved: (1) Whether the conveyance from Brockinton to Pessels was a partial or special assignment for the benefit of creditors; (2) whether, as a mortgage for the security of creditors, it was in contravention of the statute regulating assignments for the benefit of creditors; (3) whether the conveyance, otherwise being lawful, was fraudulent, and therefore void as against creditors, because of the recognition and preference given to the debt of Crawford & Crawford.

None of these questions are new in the jurisprudence of Texas. In *Hudson v. Elevator Co.*, 79 Tex. 401, 15 S. W. Rep. 385, a precisely similar conveyance, except as to the recognition of the indebtedness of Crawford & Crawford, was held to be a mortgage, and not an assignment; citing *Stiles v. Hill*, 62 Tex. 430; *Jackson v. Harby*, 65 Tex. 710; *Baldwin v. Peet*, 22 Tex. 708; *Watterman v. Silberberg*, 67 Tex. 100, 2 S. W. Rep. 578; and the same case holds that such a conveyance is not in contravention of the statute of the state regulating assignments. Mr. Chief Justice Staton, in delivering the opinion of the court, said:

"It must be presumed that the legislature understood the difference between assignments for the benefit of creditors and mortgages to secure creditors, and it cannot be held that the legislature intended the declaration that 'any attempted preference of one creditor or creditors of such assignor shall be deemed fraudulent and without effect' should operate a denial, even to an insolvent, of the right to make a mortgage whereby some creditors would obtain over others preference. This case, as well as others that have been before this court, however, have proceeded upon the theory that such was the effect of the language above quoted, which is found in the law regulating general assignments. The contrary has been steadily held. *Wagon Works v. Tidball*, 59 Tex. 291; *Stiles v. Hill*, 62 Tex. 430; *Watterman v. Silberberg*, 67 Tex. 100, 2 S. W. Rep. 578, and cases cited. Any other ruling would involve judicial legislation."

Stiles v. Hill, supra, *Watterman v. Silberberg*, supra, and *Johnson v. Robinson*, 68 Tex. 399, 4 S. W. Rep. 625, fully sustain the position taken. See, also, *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. Rep. 1013; *Reagan v. Aiken*, 138 U. S. 109, 11 Sup. Ct. Rep. 283.

The facts show that the debt secured to Crawford & Crawford was for services as attorneys in advising about and preparing the instrument in controversy. In our opinion, this could not affect the validity of the deed of trust. It seems to have been a debt which the grantor had a right to contract; and if he had a right, under the laws of Texas, to prefer creditors, (and it seems he had,) then the obligation to Crawford & Crawford, and the preference given to them, no fraud appearing, was lawful. See *Baldwin v. Peet*, 22 Tex. 708; *Lowenstein v. Finney*, (Ark.) 15 S. W. Rep. 153. Certainly the subsequent agreement entered into between Brockinton and Crawford & Crawford and the Sturgis National Bank, with reference to withdrawing the claim of Crawford & Crawford as a preferred claim, in so far as it affected the claim of the Sturgis National Bank, could not avoid the mortgage previously made in favor of other creditors. We see no error in the conclusions

of law as found in the court below; on the contrary, find them sustained on principle and authority.

The judgment appealed from is affirmed, with costs.

McCORMICK, Circuit Judge, having rendered judgment in the court below, took no part in the decision of this case.

HOLYOKE & SOUTH HADLEY FALLS ICE CO. v. AMBDEN.

(Circuit Court, D. Massachusetts. April 5, 1893.)

No. 3,620.

1. WRITS—SERVICE OF PROCESS—INTERSTATE COMMERCE.

The service of process from a Massachusetts court on a defendant who is a citizen of Vermont, and is at the time of service traveling through Massachusetts in order to attend court in Connecticut as a witness for and at the request of a citizen of Massachusetts, is valid, and is not an unlawful interference with interstate commerce. *Crutcher v. Kentucky*, 11 Sup. Ct. Rep. 851, 141 U. S. 47, distinguished.

2. SAME—EXEMPTION OF WITNESS.

The policy of the law exempting from service of process parties and witnesses going to and from court extends only to the jurisdiction in which attendance at court is required, and does not render invalid a service of process from a Massachusetts court upon a citizen of Vermont while traveling through Massachusetts to attend court in Connecticut as a witness.

At Law. Action in the superior court of the county of Hampden, Mass., by the Holyoke & South Hadley Falls Ice Company, against Rollin Ambden. Defendant removed the cause to this court, and it is now heard by the court on a plea in abatement, and plaintiff's traverse and demurrer to the same. Plea overruled.

William H. Brooks and Henry A. Wyman, for plaintiff,

Cited *Larned v. Griffin*, 12 Fed. Rep. 590; *People v. Judge, etc.*, 40 Mich. 729; *Blight's Ex'r v. Fisher*, 1 Pet. C. C. 41; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Person v. Grier*, 66 N. Y. 124; *Plimpton v. Winslow*, 9 Fed. Rep. 365; *In re Healey*, 53 Vt. 694; *Small v. Montgomery*, 23 Fed. Rep. 707; *Compton v. Wilder*, 40 Ohio St. 130; *Palmer v. Rowan*, 21 Neb. 452, 32 N. W. Rep. 210; *Christian v. Williams*, 35 Mo. App. 303; *Bank v. McSpedan*, 5 Biss. 64; *Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. Rep. 250; *Dungan v. Miller*, 37 N. J. Law, 182; *Greer v. Young*, 120 Ill. 184, 11 N. E. Rep. 167; *Robbins v. Lincoln*, 27 Fed. Rep. 342; *Hurst's Case*, 4 Dall. 387; *Smith v. Jones*, 76 Me. 139; *Sanford v. Chase*, 3 Cow. 381; *Mitchell v. Judge*, 53 Mich. 541, 19 N. W. Rep. 176; *Hopkins v. Coburn*, 1 Wend. 292; *Matthews v. Tufts*, 87 N. Y. 57; *In re McNeil*, 3 Mass. 287, and 6 Mass. 245; *Ex parte McNeil*, Id. 264; *Com. v. Huggeford*, 9 Pick. 257; *Chaffee v. Jones*, 19 Pick. 260; *Wood v. Neale*, 5 Gray, 538; *May v. Shumway*, 16 Gray, 86; *Thompson's Case*, 122 Mass. 428.

Gilbert A. Davis and D. E. Webster, for defendant,

Cited, in addition, to the first point, *Crandall v. Nevada*, 6 Wall. 35; *Passenger Cases*, 7 How. 283; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851; and to the second point, *Bridges v. Sheldon*, 7 Fed. v.55f.no.5—38

Rep. 43; *King v. Coit*, 4 Day, 130; *Case v. Rorabacher*, 15 Mich. 537; *Hall's Case*, 1 Tyler, 274; *Halsey v. Stewart*, 4 N. J. Law, 420; *Sewing Mach. Co. v. Wilson*, 22 Fed. Rep. 803; *Harkness v. Hyde*, 98 U. S. 476; *Atchison v. Morris*, 11 Fed. Rep. 582; *Bentley v. Finance Corp.*, 44 Fed. Rep. 687; *Kauffman v. Kennedy*, 25 Fed. Rep. 785; *Miles v. McCullough*, 1 Bin. 77; *Lyell v. Goodwin*, 4 McLean, 29.

CARPENTER, District Judge. This is an action at law, originally brought by writ of summons from the superior court of the commonwealth of Massachusetts for the county of Hampden, sued out by the plaintiff, a corporation of Massachusetts, against the defendant, who is a citizen of Vermont. The action was by the defendant removed into this court, and is now heard on his plea in abatement, as follows:

"And now comes the defendant, and moves that said writ and action may abate for the following reasons: The plaintiff's process was served upon this defendant in the state of Massachusetts, and not out of said state; and at the time of the service of the plaintiff's process upon him in this action the defendant was a citizen of the state of Vermont, and was traveling through the state of Massachusetts from his home and residence in Windsor, in the state of Vermont, to Hartford, in the state of Connecticut, at the request and on the procurement of a citizen of Massachusetts, for the purpose of testifying as a witness in a suit then pending in behalf of said citizen of Massachusetts in the superior court for Hartford county, Connecticut, in behalf of said citizen, and for no other purpose whatsoever; and that the service made upon the defendant in this action while so traveling was illegal, and that by said illegal service this court acquired no jurisdiction of the defendant; and the defendant avers that no other or different service of the process in this action was ever made upon him than aforesaid, and that he, the defendant, never accepted service of said process."

To this plea the plaintiff has filed a reply, wherein he traverses the plea, and also demurs to the same, and both issues have been heard by the court under the written agreement of the parties.

I find on the evidence that the allegations of the plea are true, and the question now to be determined is whether the service so made on the defendant was illegal. The defendant makes two points. The first is that the process herein is an interference with intercourse or commerce among the several states, the exclusive power to regulate which is devolved on the national government; and he cites *Crandall v. Nevada*, 6 Wall. 35; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865; and *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851. These cases seem to me only to decide that a state may not lay a tax on passengers passing through the state, and may not in certain cases forbid the sale of goods brought into the state, otherwise lawfully, from another state, nor forbid them to be brought in. They go on the ground that such enactments, if permissible, might be so framed as to restrict or to prohibit the right of transit and the right of commerce between the states. I do not see any analogous result, or any result inconsistent with the rights of the citizen or the powers of the national government, which will follow if the states be held competent to extend the civil jurisdiction of their courts of justice to all citizens of the United States

who may be found within the states where such courts are established.

The second contention of the defendant is that the service of this writ is in violation of the policy of the law which exempts from service parties and witnesses going to and from court on the business of the court. An examination of the cases shows that it has been held that parties to a suit are exempt from arrest, and in some cases from suit by summons, while within the jurisdiction of the court on the business of the court, and that this exemption has in some cases been extended to witnesses. In none of them, however, has it been held that a party or witness is exempt from service in any other jurisdiction than that in which his attendance as a party or as a witness is required. I cannot see any reason for further extending this rule. It is established by courts to protect their own process and their own suitors, by the assurance that the court in which the party has brought his action, or into which he has been summoned, or into which the witness has been summoned, will not permit its own process, or that of other courts in the same jurisdiction, in another action, to embarrass the proceedings. It seems to me that evils greater than these sought to be remedied would arise if the courts of one state should assume so to guard and protect all the other courts in the country. The rule is in derogation of common right, and restrains the plaintiff from suing, lest a greater evil may arise than that involved in the temporary suspension of his right to bring his demand into a court of justice having jurisdiction to determine it. The rule, therefore, ought to be extended with great caution; and to extend it beyond the jurisdiction immediately concerned seems to me to be unnecessary and mischievous.

I shall not determine whether the law of the commonwealth of Massachusetts should furnish a pointed rule of decision in this case; but I think it most instructive, to say the least, to observe that the courts of that commonwealth extend the doctrine of exemption only to writs of arrest, and to cases in which the party, and perhaps the witness, is in attendance on, or going to, or returning from, a court of that jurisdiction.

The plea, therefore, must be overruled.

ATCHISON, T. & S. F. R. CO. v. PARKER.

(Circuit Court of Appeals, Eighth Circuit. February 6, 1893.)

No. 166.

1. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.

In an action by a railroad employe against the company to recover for personal injuries alleged to have been caused by a defective engine, where the defense is negligence on the part of the engineer, who was plaintiff's coservant, plaintiff may introduce evidence that it was an imperative rule with defendant's officers to either discharge, suspend, or reprimand employes guilty of negligence causing a collision, and that the engineer in question was never discharged, suspended, or reprimanded.

2. SAME—DEFECTIVE MACHINERY—EVIDENCE OF SUBSEQUENT REPAIRS.

In an action for personal injuries alleged to have been caused by defective machinery it is error to receive evidence that the machinery was re-

paired subsequent to the accident, for the purpose of proving negligence, or as an admission of negligence.

8. SAME.

In an action against a railroad company to recover for personal injuries alleged to have been caused by a defective engine, statements made by the engineer to third parties as to the condition of the engine are hearsay and inadmissible.

In Error to the United States Court in the Indian Territory.

Action by David D. Parker against the Atchison, Topeka & Santa Fe Railroad Company to recover damages for personal injuries. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Statement by THAYER, District Judge:

The defendant in error brought a suit against the Atchison, Topeka & Santa Fe Railroad Company (hereafter called the Railway Company) to recover damages for injuries sustained on the 13th day of July, 1890, while in its employ as a freight conductor. The complaint on which the case was tried alleged in substance that at the time of the accident the Railway Company owned an old, worn-out, and defective engine, which was unfit to run upon its road, and had been sent to the town of Purcell, in the Indian Territory, to be there used in the yards as a switch engine, with full knowledge on the part of the Railway Company that the valves of said engine, and the ratchet which controlled the throttle valve, were so worn and out of repair that said engine would at times take steam in spite of the efforts of the engineer in charge to control it, and thus become unmanageable and dangerous. It was further alleged that, in consequence of the unmanageable condition of the engine in question in the respect last mentioned, it escaped from the control of the engineer while it was being used for switching purposes in the Railway Company's yard at Purcell, and dashed violently into a caboose car standing on a side track, in which the defendant in error was at the time sleeping, thereby precipitating him from his berth, fracturing his collar bone, and otherwise injuring him. The evidence offered by the defendant in error tended strongly to show that the ratchet and dog which controlled the throttle valve of the engine were in fact badly out of order, and that the engineer lost control of the engine on the occasion of the accident in consequence of such defect. On the other hand, the Railway Company contended that the ratchet and dog were in an ordinarily safe and fit condition to control the action of the throttle valve at the time of the accident, and that the collision was due to the carelessness of the engineer. The evidence further tended to show that the plaintiff's collar bone was fractured, and that he was disabled from pursuing his ordinary avocation for the space of about three months, but that he was not otherwise seriously hurt. The jury returned a verdict in favor of the plaintiff, and assessed his damages at the sum of \$12,500.

George R. Peck, Henry E. Asp, and Robert Dunlap, for plaintiff in error.

David Overmyer and W. A. Ledbetter, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, (after stating the facts as above.) The only questions presented by the record which we find it necessary to consider, concern the action of the trial court in admitting certain testimony. An exception was taken by the Railway Company because the trial court permitted the plaintiff to show by the defendant's general manager, and by other witnesses, that it was an imperative rule of the defendant company to either discharge, suspend, or reprimand its employees whenever a collision

or other serious accident was occasioned by their fault or negligence, and that the engineer who had charge of the switch engine at the time the plaintiff was hurt had neither been reprimanded, suspended, nor discharged by any of his superior officers by reason of his conduct on that occasion. It is insisted by the plaintiff in error that such evidence was irrelevant and immaterial, and that it should have been excluded. We think, however, that the testimony was relevant, in view of the fact that the main contention of the defendant appears to have been, that the collision was caused by the fault of the engineer. It may not have been very persuasive evidence that the engineer was blameless, but, so long as the defendant company undertook to shield itself from liability by the plea that the collision was due to the negligence of the engineer, who was a fellow servant of the plaintiff, we think it was permissible to show the existence of the rule, and the fact that the engineer had never been reprimanded by any of his superior officers whose duty it was to reprimand him if his conduct on the occasion of the accident was in any respect culpable. The testimony had a direct tendency to rebut one of the defenses on which the Railway Company evidently relied. It was in the nature of an admission on the part of the company that, prior to the trial at least, it did not regard the engineer as deserving of censure.

The next exception to the action of the lower court has greater force. The accident occurred on the 13th day of July, 1890. In the course of the trial the plaintiff's counsel produced and read in evidence, two reports made by the foreman of the defendant's repair shops at Topeka, Kan., showing that the switch engine in question had been extensively repaired during the months of September and December succeeding the accident. To the introduction of these reports the defendant's counsel duly objected and saved an exception. In recent years it has been repeatedly held that the introduction of such proof in cases of this character, for the purpose of establishing or helping to establish the charge of negligence, is reversible error, and the doctrine has lately been considered and approved by the supreme court of the United States. *Railroad Co. v. Hawthorne*, 144 U. S. 202, 208, 12 Sup. Ct. Rep. 591; *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. Rep. 358; *Nalley v. Carpet Co.*, 51 Conn. 524; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. Rep. 309; *Railroad Co. v. Clem*, 123 Ind. 15, 23 N. E. Rep. 965; *Shinners v. Proprietors*, 154 Mass. 168, 28 N. E. Rep. 10; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. Rep. 423; *Dougan v. Transportation Co.*, 56 N. Y. 1. The ground upon which the exclusion of such testimony rests is twofold: First, that the making of repairs to a piece of machinery after an accident has occurred, has no legitimate tendency to show that such piece of machinery was not in an ordinarily safe and fit condition for use before such repairs were made; and, secondly, because the admission of such evidence for the purpose of showing that a defendant has been negligent, has a strong tendency to discourage employers in making alterations or repairs, which would otherwise be made, and would render machinery more safe, and accidents less frequent. As was well said by the supreme

court of Indiana in the case above cited, "the effect of declaring such evidence competent is to inform a defendant that if he makes changes or repairs he does it under penalty; for, if the evidence is competent, it operates as a confession that he was guilty of a prior wrong." As an additional reason for excluding the proof of subsequent repairs, which was offered and received in the case at bar, it might be suggested that the greater portion of the repairs were made at a period so remote from the occurrence of the accident as to furnish no sufficient basis for a safe inference as to the actual condition of the switch engine when the injury was sustained. Notwithstanding all of the repairs that were shown to have been made in December, or even in September, 1890, it may well be that the engine was in an ordinarily safe and fit condition for switching purposes on the 13th of the previous month of July. The evidence certainly had no marked tendency to show the defective condition of the dog or ratchet at the latter date, and that was the particular defect on which the plaintiff relied. Viewed from any standpoint, therefore, the evidence in question was not very pertinent to the issue which the plaintiff had to maintain. But we prefer to base our ruling that the testimony was incompetent, and should have been excluded, upon the broad ground on which the cases above cited seem to rest,—that evidence of repairs or alterations having been made by the owner of a piece of machinery after an accident has occurred, should not be received to convict the owner of having been negligent in not having made such repairs or alterations at an earlier period. Other and more reliable evidence can usually be obtained to establish a fact of that nature.

Many other exceptions were taken to the action of the trial court, some of which have been argued before us; but, as the case must be reversed for the reason last indicated, we do not consider it necessary to notice the other assignments in detail or at much length. It will be sufficient to say that we regard much of the testimony which was admitted concerning the organization of the Santa Fe Railway Employe's Association as totally irrelevant to any issue which was presented by the pleadings. The plaintiff was entitled, no doubt, to show that one of the medical experts who testified in behalf of the Railway Company was in its employ as a salaried officer at the time he gave his testimony, but beyond that point the inquiry should not have extended. We also think that certain letters and memoranda which were produced by the witness W. E. Symons were so far irrelevant to the issues involved that they might have been properly excluded, and that they should be excluded, if the case is retried. This statement, however, does not include the letter written by the engineer, C. W. Stewart, to Mr. Courteny, under date of July 28, 1890, giving an account of the collision.¹ The members of this court are not fully in accord as to the admissibility of that letter,

¹ This letter was to the following effect: "In regard to the accident that happened July 13, while switching in the yard with engine 214, while backing up to the way car 4269, throttle flew open, and we struck said car. The reverse lever is all O. K., and the engine is generally in very good condition, except the throttle ratchet, and that is not very good."

and, as the present record does not disclose the exact circumstances under which it was written, we will not express an opinion at this time as to its admissibility. The statement made by the engineer, Stewart, to the witness E. H. German, concerning the condition of the ratchet, as testified to by the latter, was clearly hearsay, and should have been withdrawn from the consideration of the jury, in compliance with the motion made to that effect. The judgment of the lower court should be reversed, and it is so ordered, with directions to grant a new trial.

In re BOYD et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

CUSTOMS DUTIES—"ARTICLES OF WEARING APPAREL"—LACE APRONS.

Lace aprons are dutiable at 50 per cent. ad valorem as "articles of wearing apparel," under paragraph 349 of the tariff act of 1890, and not at 60 per cent., as "articles made wholly or in part of lace," under paragraph 373 of the same act. 49 Fed. Rep. 731, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Boyd, Sutton & Co. protested against an assessment by the collector of the port of New York, and the board of general appraisers sustained the protest, the collector appealed to the circuit court, which reversed their decision, (49 Fed. Rep. 731,) and the protestants appeal. Reversed.

W. Wickham Smith, for appellants.

Henry C. Platt, Asst. U. S. Atty., for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The firm of Boyd, Sutton & Co., on November 3, 1890, imported certain lace aprons, upon which the collector of customs at the port of New York assessed duty at the rate of 60 per cent. ad valorem, under paragraph 373 of Schedule J of the act of October 1, 1890, as "articles made wholly or in part of lace." The paragraph is as follows:

"Par. 373. Laces, edgings, embroideries, insertings, neck ruffings, ruchings, trimmings, tuckings, lace window curtains, and other similar tamboured articles, and articles embroidered by hand or machinery, embroidered and hemstitched handkerchiefs, and articles made wholly or in part of lace, ruffings, tuckings, or ruchings, all of the above-named articles, composed of flax, jute, cotton, or other vegetable fiber, or of which these substances, or either of them, or a mixture of any of them, is the component material of chief value, not specially provided for in this act, sixty per centum ad valorem: provided, that articles of wearing apparel and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed."

The importers protested, claiming that said aprons were dutiable at 50 cent. ad valorem, as "articles of wearing apparel," under paragraph 349 of the same act:

"Par. 349. Clothing ready made, and articles of wearing apparel of every description, handkerchiefs, and neckties or neckwear, composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, all of the foregoing not specially provided for in this act, fifty per centum ad valorem: provided, that all such clothing, ready made, and articles of wearing apparel, having India rubber as a component material, (not including gloves, or elastic articles that are specially provided for in this act,) shall be subject to a duty of fifty cents per pound, and, in addition thereto, fifty per centum ad valorem."

The board of general appraisers reversed the decision of the collector, and sustained the contention that the goods were dutiable as wearing apparel, under paragraph 349. Upon appeal the circuit court reversed the board, and sustained the collector. Appeal was duly taken to this court.

These aprons are "articles made wholly or in part of lace." They are also "articles of wearing apparel." Upon the argument we indicated that in our opinion the letter was the more specific designation, and that, therefore, "articles made wholly or in part of lace," which were also "wearing apparel," were not to be included with the other "articles made wholly or in part of lace," provided for in paragraph 349, being specially provided for in paragraph 373. The learned judge who heard the case below was of the opinion that articles made wholly or in part of lace, and which were also wearing apparel, were included in the enacting clause of paragraph 373, because the proviso at the close of that paragraph excepted wearing apparel of a certain kind from the operation of its enacting clause, it being "the effect of a proviso to carve an exception out of the enacting clause." In our opinion, this is too close an interpretation of the paragraph. Conceding that the object of the proviso was to carve an exception out of the enacting clause, it is manifest that it does not refer to all the classes of merchandise therein contained. Edgings, insertings, and trimmings are hardly wearing apparel, and lace window curtains certainly are not. The proviso deals with "articles of wearing apparel * * * when embroidered by hand or machinery," and finds its natural antecedent in the enumeration, "articles embroidered by hand or machinery;" the paragraph thus providing that, though an embroidered article was also an article of wearing apparel, and as such subject to a lower rate of duty, it should nevertheless pay at as high a rate as embroideries composed of the same materials. It is only to articles, whether made wholly or in part of lace or not, which are also embroidered, and which would thus be within the other enumeration of the enacting clause, "articles embroidered by hand or machinery," that the proviso applies, and the articles in controversy are not embroidered. The decision of the circuit court is reversed, and that of the board of appraisers affirmed.

NORTHERN PAC. R. CO. v. McCORMICK.

(Circuit Court, D. Montana. April 3, 1893.)

EJECTMENT—ANSWER—DENIALS—DEMURRER.

In an action of ejectment, where the answer contains a specific denial of the allegations of the complaint *seriatim*, sufficient to put in issue all the allegations showing title in plaintiff, this, under the Montana practice, will authorize defendant to show any facts tending to prove that plaintiff has no title; and therefore the fact that defendant also sets forth new matter for the purpose of showing title in himself does not render the answer bad on demurrer, even if these averments are insufficient.

At Law. Ejectment by the Northern Pacific Railroad Company against John McCormick. Demurrer to answer overruled.

Cullen, Sanders & Shelton and F. M. Dudley, for plaintiff.
Toole & Wallace and W. M. Bickford, for defendant.

KNOWLES, District Judge. This is an action to recover from the defendant the possession of a certain tract of land. Sufficient facts are set forth in the complaint to show that plaintiff received from the United States a grant of twenty-odd sections of public land, not mineral, on each side of the line of its railroad as definitely fixed through the state of Montana, when the same should not be sold, granted, reserved, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time of the said definitely fixing of said line. In the complaint it is alleged as follows:

"That the general route of said railroad extending through the territory of Montana was duly fixed February 21, 1872, and that the following described land, to wit, south half of northwest quarter, and north half of southwest quarter, of section 21, township 13 north, of range 18 west, P. M. Montana, was on and within forty miles of the general route of said railroad, so fixed as aforesaid, and that said land was on said February 21, 1872, public land, to which the United States had full title, not reserved, sold, granted, otherwise appropriated, and free from pre-emption or other claims or rights. That thereafter, to wit, on July 6, 1882, plaintiff definitely fixed the line of its said railroad extending opposite to and past said south half of northwest quarter and west half of southwest quarter of said section 21, township 13 north, of range 18 west, P. M. Montana, and filed a plat thereof in the office of the commissioner of the general land office. That said land is on and within forty miles of the said line of railroad so definitely fixed as aforesaid. * * * That said land was on said day public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. That by reason of the foregoing facts said plaintiff became on July 6, 1882, the owner and seised in fee simple of said land, and said land then became, and has ever since remained, and now is, the property of the plaintiff, to which the plaintiff is entitled without let or hindrance from said defendant. That the United States has neglected, failed, and refused to issue to said plaintiff a patent for said land, and that heretofore, to wit, May 1, 1889, the said plaintiff being possessed of the said premises, the said defendant did wrongfully and unlawfully, without consent and against the will of the plaintiff, entered thereon, and ousted plaintiff therefrom."

To those allegations, in his answer, the defendant made the following denials, to wit:

"First. That the land mentioned and described in said complaint * * * was on the 21st day of February, or at any date subsequent thereto, public

land, to which the United States had full title. That the land was not reserved, sold, granted, or otherwise appropriated, and that the same was free from pre-emption or other claims or rights. That the land mentioned in said complaint was on the 6th day of July, 1882, public land of the United States, to which the United States had full title. That by reason of the facts alleged in plaintiff's complaint, or any other facts, the plaintiff became on the 6th day of July, 1882, or at any other time, the owner, or seised in fee simple or otherwise, of the land described in said complaint; and also denies that said land then or at any other time became, or that the same has ever since remained, or that it now is, the property of the plaintiff, or that the plaintiff is entitled, either without let or otherwise, to have said land, or any part or parcel thereof. That on May 18, 1889, or at any time, the plaintiff was possessed of said land, or any part or parcel thereof."

It does appear to me that these denials in the answer of defendant do put in issue the allegations of the complaint showing title in plaintiff. When such is the case, the defendant can prove any facts which will tend to show that plaintiff has no title to the land in dispute. In the case of *Marshal v. Shafter*, 32 Cal. 177, the court said:

"It is proper at this point, however, to say that it is settled beyond controversy in this state that the defendant may, under the general denial, give in evidence title in himself, and it follows that the allegation of such title in the answer does not constitute new matter."

This doctrine was fully supported in the case of *Bruck v. Tucker*, 42 Cal. 346. It was there held that when the question of title is raised by general issue the setting up of title by defendant in himself in the answer amounts to nothing. The practice pertaining to an issue of title raised by a general denial was applied to such an issue raised by a specific denial under the code of practice prevailing in Montana, by the supreme court of the territory, in the cases of *Meyendorf v. Frohner*, 3 Mont. 282, 323, 324, and *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. Rep. 409. In this last case the question was fully considered, and there can be no doubt that this is the practice in this state upon this question at this time. The practice of the state courts must control that of this court in actions at law such as this.

The defendant set forth facts as new matter showing title in himself. Plaintiff demurred to the answer, and contends that the defendant is bound by these allegations, presented to show title in himself. Plaintiff has cited several cases to support his position that the defendant is bound by this new matter, and the court can consider them and determine therefrom which party is entitled to recover. In my opinion the cases are not in point. They refer to cases where the complaint states the particular title under which plaintiff claimed, and the sources of the same. In them it was held that plaintiff was confined to the title as alleged. It is a familiar maxim in ejectment that the plaintiff must recover on the strength of his own title, and not upon the weakness of that of the defendant. Where the plaintiff's title is denied it might turn out that the defendant would have no title, and yet the plaintiff not entitled to recover, owing to some defect in his own. I do not think it necessary to express any views upon the force and bearing of the facts set up as new matter in the answer, as, with my view

of the practice under the denials in the answer, the defendant would not be confined to the same, but could prove other or additional facts which would have a tendency to show that plaintiff has no title. For these reasons the demurrer is overruled.

KESTER v. WESTERN UNION TEL. CO.

(Circuit Court, N. D. Ohio. March 27, 1893.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—DAMAGES FOR MENTAL ANGUISH.

No damages are recoverable for mental anguish arising from the fact that the plaintiff was prevented by the delay in the delivery of a telegram from attending his father's funeral, and consoling his mother in her bereavement.

At Law. Suit by Henry J. Kester against the Western Union Telegraph Company for damages for negligence in transmitting a telegram to plaintiff. Defendant demurs. Demurrer sustained.

Tyler & Tyler, for plaintiff.

Henry Newbegin, for defendant.

TAFT, Circuit Judge. This is an action for damages for the negligence of the defendant in transmitting to plaintiff a telegraphic message, as follows:

"Bloomville, Jan. 4, 1892.

"H. J. Kester, Holgate, O.: Father dead. Send word to Brinkman. Funeral Wednesday, eleven A. M.
J. F. Kester."

J. F. Kester paid the usual tolls for the transmission of the message, which was delayed four days, instead of reaching the plaintiff the same day, as it should have done. No damages are alleged except mental anguish arising from the fact that the plaintiff was prevented by the delay in the message from attending his father's funeral, and consoling his mother in her bereavement. The defendant demurs to the plaintiff's petition, on the ground that it does not state facts sufficient to constitute a cause of action.

The question presented is whether mental anguish alone constitutes any basis for damages in such a case. The authorities are in conflict. Until 1880 there was no authority of any respectability whatever sustaining a cause of action for damages based upon mental anguish only. In 1880 a decision was made by the supreme court of Texas in a delayed telegram case sustaining the view that, though the injury sustained was solely mental pain, damages might be recovered. That case has not been consistently followed in Texas, and yet it is true that by the decisions of the supreme court of that state, as well as by those of the states of Indiana, Alabama, Kentucky, Tennessee, and North Carolina, damages may be recovered in a case like the one at bar. *Stuart v. Telegraph Co.*, 66 Tex. 580, 18 S. W. Rep. 351; *Railway Co. v. Wilson*, 69 Tex. 739, 7 S. W. Rep. 653; *Telegraph Co. v. Cooper*, 71 Tex. 507, 9 S. W. Rep.

598; *Telegraph Co. v. Broesche*, 72 Tex. 654, 10 S. W. Rep. 734; *Same v. Simpson*, 73 Tex. 423, 11 S. W. Rep. 385; *Same v. Adams*, 75 Tex. 531, 12 S. W. Rep. 857; *Wadsworth v. Telegraph Co.*, 86 Tenn. 695, 8 S. W. Rep. 574; *Reese v. Same*, 123 Ind. 294, 24 N. E. Rep. 163; *Beasley v. Same*, 39 Fed. Rep. 181; *Telegraph Co. v. Henderson*, 89 Ala. 510, 7 South. Rep. 419; *Thompson v. Telegraph Co.*, 106 N. C. 549, 11 S. E. Rep. 269; *Chapman v. Same*, (Ky.) 13 S. W. Rep. 880; *Young v. Same*, 107 N. C. 370, 11 S. E. Rep. 1044; *Thompson v. Same*, 107 N. C. 449, 12 S. E. Rep. 427; *Thomp. Elect.* § 378, and cases cited.

This line of authorities depends altogether on the case of *So Relle v. Telegraph Co.*, 55 Tex. 308, which was decided in 1881. No authority can be found to support the contention previous to that case, and that is founded on a mere suggestion of a text writer on the subject of negligence. The doctrine was vigorously attacked in an able dissenting opinion in the case of *Wadsworth v. Telegraph Co.*, 86 Tenn. 695, 8 S. W. Rep. 574, by Chief Justice Lurton, of the supreme court of Tennessee. We think the rule first laid down by the Texas court is a departure from the sound and safe principles of the common law. The difficulty of estimating a pecuniary compensation for mental anguish is itself a sufficient reason for the common-law rule in preventing a recovery for mental anguish in actions for simple negligence or breach of contract. The amount of litigation which would grow out of the adoption of such a rule would be intolerable. The measure of damages to be adopted would be so indefinite and so indefinable as to subject the defendant in such cases to the possibility of great oppression. The difficulty of securing evidence as to the actual mental suffering is another reason why it could not be made the sole basis of an action. It has generally been allowed to be considered as an element in fixing damages in two classes of cases. The first is where there has been a physical injury and physical suffering of such a character that it would be difficult to distinguish between the mental and physical suffering; and the second class of cases is where the injury complained of contains an element of malice, and the damages for mental suffering are left to the jury to be fixed as a kind of punitive or exemplary damages. This case of course comes under neither head. In slander and libel, the action cannot be founded solely on mental suffering. There must be some other damage alleged before a cause of action is stated.

Without a full examination of the authorities, it is sufficient to say that the federal authorities and a large number of others sustain the view here taken. *Wilcox v. Railroad Co.*, (4th circuit,) 52 Fed. Rep. 264, 3 C. C. A. 73; *Chapman v. Telegraph Co.*, 15 S. E. Rep. 901, (decision by the supreme court of Georgia, Lumpkin, J.) *Crawson v. Telegraph Co.*, 47 Fed. Rep. 544; *Chase v. Telegraph Co.*, 44 Fed. Rep. 554, where all the authorities are cited; *West v. Telegraph Co.*, 39 Kan. 93, 17 Pac. Rep. 807; *Russell v. Same*, 3 Dak. 315, 19 N. W. Rep. 408; *Telegraph Co. v. Rogers*, 68 Miss. 748, 9 South. Rep. 823; *Lynch v. Knight*, 9 H. L. Cas. 577; *Commissioners v. Coultas*, L. R. 13 App. Cas. 222.

The demurrer to the petition will be sustained, and if no amendment can be made introducing an element of actual pecuniary loss, which from the statements of the petition seems unlikely, judgment will be entered upon this demurrer.

UNITED STATES v. PATTERSON et al.

(Circuit Court, D. Massachusetts. February 28, 1893.)

No. 1,215.

1. MONOPOLIES—INDICTMENT—CONSPIRACY—ACT JULY 2, 1890.

St. U. S. 1890, c. 647, declares illegal contracts, combinations, or conspiracies in restraint of trade, and makes it a misdemeanor for any person to make or engage in them, or to monopolize, or attempt or conspire with others to monopolize, any part of the trade or commerce among the several states or with foreign nations. *Held*, that in an indictment under this chapter it is not sufficient to declare in the words of the statute, but the means whereby it is sought to monopolize the market must be set out, so as to enable the court to see that they are illegal.

2. SAME.

Allegations of what was done in pursuance of an alleged conspiracy are irrelevant in an indictment under this statute, and are of no avail either to enlarge or to take the place of the necessary allegations as to the elements of the offense.

3. SAME—SCOPE OF THE STATUTE.

The words "trade and commerce," as used in the act, are synonymous. The use of both terms in the first section does not enlarge the meaning of the statute beyond that employed in the common-law expression, "contract in restraint of trade," as they are analogous to the word "monopolize," used in the second section of the act. This word is the basis and limitation of the statute, and hence an indictment must show a conspiracy in restraint by engrossing or monopolizing or grasping the market. It is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise.¹

4. SAME—ACTS OF VIOLENCE.

Where counts in such indictment allege a purpose of engrossing or monopolizing the entire trade in question, acts of violence and intimidation may be alleged as the means to accomplish the general purpose.

At Law. Indictment in 18 counts against John H. Patterson and others for violating the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," (26 St. p. 209, c. 647.) Heard on demurrer to the indictment. Judgment overruling the demurrer as to counts 4, 9, 14, and 18, and sustaining it as to the others.

The sections of the statute immediately in question here are the following:

¹See, however, the case of *U. S. v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 994, decided in the circuit court for the eastern district of Louisiana by Judge Billings, March 25, 1893, in which it was held that the statute included combinations of workmen, who, by means of a strike, combined with threats, intimidations, and violence, caused a cessation of business, which resulted in delaying, interrupting, and restraining interstate and foreign commerce.

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The first ten counts of the indictment are for engaging in a conspiracy in restraint of trade and commerce among the several states in violation of the first section of the act. The last eight counts are for a conspiracy to monopolize a part of the trade and commerce among the several states, in violation of the second section of the act.

The first half of each set of counts allege the conspiracy, setting forth the means with various degrees of particularity, but without alleging overt acts. The second half of each set repeat the allegations of the first half, adding also allegations of overt acts.

In all the counts the conspiracy charged is described as being a conspiracy, (in the first set of counts in restraint of trade, and in the second set of counts to monopolize trade,) not by means of any contract or combination operating upon the parties to the conspiracy themselves, but by means of destroying or preventing the trade of others; so that the trade to be restrained was other people's trade, and the monopoly sought was to be secured by driving other people out of business.

The first count of each set charges that the object of conspiracy was to accomplish this end by fraud and misrepresentation, deceit, threats, intimidation, obstruction, and molestation, and other unlawful, oppressive, and vexatious means; the second charges that it was to be attained by preventing other persons from carrying on business; the third, that it was to be attained by preventing others from engaging in business by means of threats, intimidation, etc.; the fourth, that it was to be attained by preventing others from carrying on business by means of harassing and intimidating competitors, by threatening them, by causing them and their agents to be assaulted and injured, by inducing their agents and employees to leave their employment, by employing spies to obtain knowledge of their business secrets, by harassing and intimidating purchasers, by inducing purchasers to break their contracts and refuse to pay sums owing to competitors, by agreeing to maintain and maintaining persons so refusing to pay in the defense of suits against them, by delaying and impeding the progress of suits, by threatening prospective purchasers with annoyance, molestation, and injury in the event of their purchasing from competitors, by causing persons to call upon such purchasers repeatedly and unnecessarily to occupy their time, and dissuading and persuading them from buying from competitors, by causing great numbers of vexatious and oppressive actions for the infringement of patents to be brought against such

purchasers, by threatening intending purchasers from competitors with suits for infringement of patents, and thereby, and by other similar means, making it impossible for competitors to continue business; the fifth count of the first set gives the names of certain competitors who are engaged in interstate trade, and sets forth with still greater particularity the means by which it was the object of the conspiracy to destroy the business of those competitors.

Frank D. Allen, U. S. Atty.

First.

MEANING OF THE ACT.

In *Heydon's Case*, 3 Coke, 7, the barons of the exchequer lay down the following rules: "For the sure and true interpretation of statutes in general, be they penal or beneficial, restictive or enlarging of the common law, four things are to be discerned and considered: (1) What was the common law before the making of the act? (2) What was the mischief and defect against which the common law did n t p o v d ? (3) What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth, and (4) the true reason of the remedy."

These questions will be discussed in their order as relating to the statute now under consideration.

(A) STATE OF THE LAW BEFORE THE PASSING OF THE ACT.

Two questions naturally present themselves here: (1) What was the common law in regard to the subject-matter of the statute? and (2) what was the relation of the United States government and of the United States courts to that law?

The terms in the statute which naturally call for comment in this case, are the following: (a) "Contract," (b) "combination," (c) "conspiracy," (d) "restraint of trade or commerce," (e) "trade or commerce among the several states or with foreign nations," (f) "monopolize."

(a) "Contract." The meaning of this word is elementary, and it is not necessary to discuss it, except in connection with the following words, "in restraint of trade."

(b) "Combination." This word is used in the statute in a broader sense than the words "contract" on the one hand and "conspiracy" on the other. It has no technical, legal signification; and the words, "combination in the form of trust or otherwise," are intended to cover broadly any sort of a union of different persons, even though such union may not be sufficient to answer to the technical term "conspiracy," and may not include a binding contract. As modified by the subsequent words, "in restraint of trade," it refers to that class of cases where there is no binding contract, and perhaps includes certain cases in which there are no legal means contemplated so as to make it a conspiracy, and no sufficient union or agreement to make either a monopoly or a contract.

(c) "Conspiracy." This is a word of well-known legal signification. It is sometimes used to indicate simply the coming together and agreeing of persons, but in a penal statute is clearly to be construed as including the idea of illegality, created either by the illegal character of the ultimate object sought to be attained, or by the illegal character of the means by which it is contemplated that the desired result shall be accomplished, or both of these together. It is well settled at common law, and has been from early times, that conspiracies to accomplish a thing illegal in itself, and also conspiracies to accomplish a thing lawful in itself by unlawful means, are criminal. In *U. S. v. Lancaster*, 44 Fed. Rep. 896, the court say: "A conspiracy is an unlawful confederacy or combination of two or more persons to do an unlawful act, or have accomplished an unlawful purpose." *Com. v. Hunt*, 4 Metc. (Mass.) 123; *Rex v. Gray*, 3 Harg. St. Tr. 519; *Spies v.*

People, 122 Ill. 212, 213, 12 N. E. Rep. 865, 17 N. E. Rep. 898; 3 Greenl. Ev. § 189; Washb. Crim. Law, (2d Ed.) 42, etc. It is unnecessary to enter with nicety into the question of just what ends or means are sufficiently unlawful to render a conspiracy criminal, since it is quite clear that a conspiracy which includes in the means for its accomplishment threats and intimidation, the committing of assaults, the maintenance of actions, and the inducing of parties under contract to break their contracts, is criminal in character. Nor is it necessary to endeavor to discriminate carefully between conspiracies which are civilly actionable and those which are criminal, since it is obvious that a criminal conspiracy is also civilly actionable if anything is done under it resulting in injury to the party complaining.

(d) "Restraint of trade or commerce." These words modify each of the words "contract," "combination," and "conspiracy." Taken in connection with the word "contract," they point to a well-known legal conception, viz. "contract in restraint of trade." A contract, the total effect of which is to restrain trade, is void; but if the restraint upon the trade of one party to the contract be no greater than is necessary to protect some interest of the other acquired by the contract, it is evident that the contract encourages the trade of one party as much as it restrains that of the other, and hence the public is not injured and the contract is valid. Upon this general principle it may be laid down that—

(1) An agreement for the restraint of the trade of one of the parties thereto is valid if limited, as regards time, space, and the extent of the trade, to what is reasonable under the circumstances of the case.

(2) An agreement for the restraint of the trade of one of the parties thereto is invalid unless so limited.

Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. Rep. 553; *Navigation Co. v. Winsor*, 20 Wall. 64. See, also, *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658; *Craft v. McConoughy*, 79 Ill. 346; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. Rep. 1, and note; *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Mallan v. May*, 11 Mees. & W. 653; *Palmer v. Stebbins*, 3 Pick. 188, 193.

It will be obvious that in the case put the trade is restrained by the provisions of the contract itself, and is necessarily the trade of one or more of the parties to the contract. A contract between A. and B. cannot, in and of itself, restrain the trade of C. A. and B. may agree to restrain the trade of C., but such an agreement is a contract to restrain, not a contract in restraint of trade. As to such a contract three propositions may be laid down:

(1) If the parties to the contract have no business of their own similar to that to be restrained which the contract is intended to promote, the contract is illegal, and a conspiracy, not only because it restrains trade without the justification of promoting any other trade, but also because from the nature of the case it is an agreement to do another an injury maliciously and without cause.

(2) If A. and B. enter into an agreement for the principal purpose of promoting and extending their own business by none but lawful means, and without any intention to create a monopoly, such agreement is valid, although it have for its natural and expected result the injury and destruction of the business of C.

Such a contract, even when carried out, does not, on the whole, and viewed in its entirety, restrain trade at all, since it only operates to restrain C.'s trade in so far as it operates to promote the trade of A. and B.

(3) If A. and B. enter into an agreement for the purpose of promoting and extending their own business by restraining and destroying the business of C. by the use of unlawful means, such agreement is illegal, and a conspiracy, whether said unlawful means be of a criminal nature or not.

Such a contract is illegal and a conspiracy, both because of the illegal means contemplated, and because it does, when viewed in its entirety, contemplate a restraint of trade. The restraint of C.'s trade in this case is not simply the

result of the promotion of the trade of A. and B., and coextensive with it, but the extent of the restraint is wholly independent of the extent of the promotion, and may be absolute and entire, without any promotion at all. This must be true whenever the means are other than such as are intended and calculated to increase the trade of the contracting parties. Hence it was properly decided in *Mogul Steamship Co. v. Macgregor, Gow & Co.*, 15 Q. B. Div. 476, 23 Q. B. Div. 598, [1892,] App. Cas. 25, that an agreement to drive a competitor out of business by lowering prices is not illegal. In this case shipping companies formed an agreement by which they endeavored to get the business of a certain port in China by placing their rates so low that another company could not compete with them, and was obliged to give up the business. The house of lords held that this was not an unlawful restraint of trade; that a trader could not be prevented from charging what he pleased, although he did it with a view of getting the trade himself, and of driving a competitor out of the business; but it was also laid down as unquestioned law that any such restraint effected by unlawful means would make the restraint illegal, and that a conspiracy to enforce restraint by such means would be criminal. In the queen's bench division, *Bowen, L. J.*, (23 Q. B. Div. 614,) after stating that a merchant may lawfully compete with another by lowering his own prices to any extent, even with the intention of driving the other out of business, and then raising his own prices, says:

"No man, whether trader or not, can, however, justly damage another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden. So is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by a show of violence, the obstruction of actors on the stage by preconcerted hissing, the disturbance of wild fowls in decoys by the firing of guns, the impeding or threatening servants or workmen, the inducing persons under personal contracts to break their contracts,—all are instances of forbidden acts."

On page 616 he defines an "illegal combination" as "an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means," and cites two criminal cases in support of the proposition. On page 618, after stating that in cases where there is no intimidation, molestation, or other forms of illegality, acts may be done intentionally which will injure others in their business, provided they are done bona fide "in the use of a man's own property, in the exercise of a man's own trade," he continues: "But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights."

Particular attention is called to the cases cited by *Bowen, L. J.*, in support of that part of his opinion which has been quoted. These cases are all quoted again in the house of lords, and amply sustain the statements that have been quoted. These cases are: *Tarleton v. McGawley*, Peake, 270, (driving away customers by show of violence;) *Clifford v. Brandon*, 2 Camp. 358, and *Gregory v. Brunswick*, 6 Man. & G. 205, (preconcerted hissing of actors;) *Carrington v. Taylor*, 11 East, 571, and *Keeble v. Hickeringill*, Id. 574, note, (disturbance of wild fowl in decoys;) *Garret v. Taylor*, Cro. Jac. 567, (threatening to vex prospective purchasers with suits;) *Bowen v. Hall*, 6 Q. B. Div. 333, and *Lumley v. Gye*, 2 El. & Bl. 216, (injuring persons by inducing others to break contracts with them.)

It is fully recognized in the foregoing cases that a contract which contemplates the doing of any unlawful acts, either as a means or an end to the injury of another, is a criminal conspiracy. It is elementary law, however, that a conspiracy need not involve any binding contract. The mere agreement in a common purpose is sufficient. It is obvious, moreover, that the very fundamental idea of "conspiracy" involves the agreement in a common purpose to injure some one or something outside of the conspirators themselves. The conspiracy may contemplate the acquisition of a benefit by the conspirators, but this is not what makes it unlawful, but the fact that it also necessarily contemplates injury to another. A contract, or even a combination, may refer exclusively to the property or persons of the contracting or

combining parties, but a conspiracy necessarily involves contemplated action against the persons or property of some outside person.

It follows that, if the meaning of the words, "conspiracy in restraint of trade," is to be determined by the common-law meaning of the words separately considered, it means a conspiracy to restrain the trade of some person other than the conspirators. Such a conspiracy is illegal, and, under this statute, criminal, if it intends a restraint of such trade by any means which do not in the nature of the case tend to promote the trade of the conspirators in a degree equal to the restraint, especially if such means are in and of themselves unlawful. The existence of unlawful means is conclusive, both as to conspiracy and as to the restraint of trade being unjustifiable. Clearly, a conspiracy to restrain trade by threats, intimidation, molestation, violence, and the other means alleged in this indictment, falls within this definition.

The whole history of the law of conspiracies in restraint of trade confirms this conclusion. 3 Steph. Hist. Crim. Law, pp. 202-227, upon "Conspiracies in Restraint of Trade;" Wright, Crim. Cons. 144-181; Ray, Contract. Lim. 334-411. An examination of the statutes that have been passed upon the subject of conspiracies in restraint of trade shows that they are aimed at any and all restraint, whether by employes or employers, which is endeavored to be enforced by threats, intimidation, or other unlawful means. Thus 38 & 39 Vict. c. 86, § 7, makes it an offense to use violence or to intimidate to compel another to do or abstain from doing any act which he has a legal right to abstain from or to do. So in New York it is made a misdemeanor "to prevent another from exercising a lawful trade or calling, or doing any other lawful act by force of threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; and also to permit any act injurious to the public health, to the public morals, or to trade or commerce, or for the perversion or obstruction of justice or of the due administration of the law." See, also, the statutes of other states, collected in Ray, Contract. Lim., supra."

It is true that most of the cases in the books are cases of intimidation on the part of workmen against their employers or against other workmen, or of employers against their workmen. But the language of the statutes and the principles of decision apply with equal force to conspiracies by any persons against the trade of other persons.

(e) "Trade or commerce among the several states or with foreign nations." This subject will be discussed later.

(f) "Monopolize." "Monopolies are much the same offenses in other branches of trade that ingrossing is in provisions, being a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. They are said to differ only in this: that monopoly is by patent from the king, ingrossing by the act of the subject, between party and party, and have been considered as both equally injurious to trade and the freedom of the subject, and therefore equally restrained by the common law. By the common law, therefore, those who are guilty of this offense are subject to fine and imprisonment, the offense being *malum in se*, and contrary to the ancient and fundamental law of the kingdom; and it is said that there are precedents of prosecutions of this kind in former days. And all grants of this kind, relating to any known trade, are void by the common law." 1 Russ. Crimes, 350.

"It is said that all grants of this kind, relating to any known trade, are made void by the common law as being against the freedom of trade, and discouraging labor and industry, and restraining persons from getting an honest livelihood by a lawful employment, and putting it in the power of particular persons to set what prices they please on a commodity; all which are manifest inconveniences to the public." Hawk. P. C. c. 79, p. 203. *East India Co. v. Sandys*, Skin. 224.

"Hence, also, it seems that the king's charter empowering particular persons to trade to and from such a place is void, so far as it gives such persons an exclusive right of trading and debarring all others; and it

seems now agreed that nothing can exclude a subject from trade but an act of parliament." Hawk. P. C. 293, note 2.

In the Case of Monopolies, 11 Coke, 84, it was held that a grant by the crown of the sole making of cards within the realm is void; and it is said that "there are three inseparable incidents to every monopoly against the commonwealth, i. e.:

(1) "That the price of the same commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases.

(2) "That after the monopoly granted the commodity is not so good and merchantable as it was before, for the grantee, having the sole trade, regards only his private benefit, and not the commonwealth.

(3) "It is done to the impoverishment of divers artificers and others, who before, by the labor of their own hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary."

See, also, *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 11 Pet. 607; *Slaughterhouse Cases*, 16 Wall. 102.

As used in the statute, however, the word "monopolize" clearly does not refer to grants by the government, but to the accomplishment of the same result by private endeavor; and the word "monopoly," in the meaning it had at the passing of the act, and has now, is not confined to grants by the government. The essential idea of an unlawful monopoly is found not so much in the creating of a very extensive business in the hands of a single control as in the idea of preventing all other persons from engaging in such business, and thereby stifling competition. The evil of the grants from the crown lay not in the fact that they gave to the grantee a right to manufacture and sell, but in the fact that they prevented other persons from manufacturing and selling the same article. The evil is not the enlargement of one person's trade, but the destruction of the trade of all other persons in the same commodity.

(1) If A. and B. enter into an agreement to restrain trade for the purpose of creating a monopoly by destroying all competition, either by buying out all competitors or by driving them out of business, such agreement is illegal and void.

(2) A fortiori, an agreement to restrain trade for the purpose of creating a monopoly which looks to the crushing out of all competition by an unlawful means, whether criminal or otherwise, is invalid.

It is clear that monopolies have always been unlawful at common law. The difficulty is to distinguish between such unlawful monopolies and lawful rivalry in business. The following cases point out this line of distinction: *Stanton v. Allen*, 5 Denio, 434; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Craft v. McConoughy*, 79 Ill. 346; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102; *Hendy v. Railroad Co.*, 31 Fed. Rep. 689; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. Rep. 1; *Dolph v. Machinery Co.*, 28 Fed. Rep. 553; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. Rep. 798; *Manufacturing Co. v. Klotz*, 44 Fed. Rep. 721; *More v. Bennett*, (Ill. Sup.) 29 N. E. Rep. 888.

Second.

RELATION OF THE UNITED STATES GOVERNMENT AND OF THE UNITED STATES COURTS TO THE SUBJECT-MATTER OF THE STATUTE.

(1) The congress of the United States is invested by the constitution with the power to regulate commerce between the several states, and with foreign nations, and with the Indian tribes. It has no power over commerce, except such as is thus given to it by the constitution, and the United States courts have, and can have, no jurisdiction over any offenses against commerce, unless it be such as congress is given the power to regulate and control. In *re Greene*, 52 Fed. Rep. 104.

Interstate and foreign commerce being national in character, it has been

held that the power given to congress to regulate such commerce is exclusive, and implies a prohibition against any restraints upon such commerce. This prohibition has been enforced in many cases where the United States supreme court have held laws of the states unconstitutional and void, on the ground that they amounted to a restraint upon interstate or foreign commerce.

(2) There are no crimes at common law against the United States, and the criminal jurisdiction of the United States courts is limited to crimes created by statutes of the United States. Prior to the passage of the act here under discussion, there was no statutory provision of the United States making contracts, combinations, or conspiracies in restraint of or to monopolize interstate or foreign trade crimes against the United States, so that the United States courts could have no jurisdiction over that subject-matter even if such contracts, combinations, or conspiracies were criminal at common law or under state statutes.

(3) Prior to the passage of this act there was no provision giving to the United States courts even civil jurisdiction over contracts, combinations, or conspiracies upon the sole ground that such contracts, combinations, or conspiracies affected interstate or foreign trade or commerce; and such courts, therefore, had only such jurisdiction over these matters as might vest in them by reason of other circumstances, such as differences in citizenship.

(4) Under the power to regulate commerce among the several states it has been held that congress has the power to regulate the transportation of individuals, of property, and of communications, and also all instruments of such transportation and communication; and that transportation of property begins when the property is delivered to a common carrier for transportation to another state, and does not end until such property has completed its transportation, and has become a part of the general property of the state to which it is sent. And a state may not, even for the purpose of supposed self-protection, interfere with transportation into or through the state beyond what is absolutely necessary for its actual self-protection, and within the scope of its police power. See *Henderson v. Mayor, etc.*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 465, 472. The extent of this grant to the federal government is further seen in the following cases: *Gibbons v. Ogden*, 9 Wheat. 1; *Welton v. State of Missouri*, 91 U. S. 275; *Walling v. People of Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865; *Trade-Mark Cases*, 100 U. S. 96; *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118.

It seems clear that what would be a regulation of commerce within the implied prohibition of the constitution, if attempted by a state, would be a sufficient object of a conspiracy by individuals to make it "in restraint of trade among the states." Clearly it would be obnoxious to the prohibition of the constitution for a state to pass a law that certain nonresident cash-register companies should not be allowed to sell cash registers in the state. If this would be unconstitutional when done by a state, clearly it would be a restraint of trade among the states when attempted by individuals so as to make a conspiracy to accomplish it a conspiracy in restraint of trade among the states. The conspiracy in the present case was to prevent certain corporations from carrying on the business of manufacturing and selling cash registers; and it is alleged that said corporations were carrying on this business among the several states, so that the prevention would operate necessarily and directly to restrain interstate trade in such cash registers in the same way that the state regulation did in *Leisy v. Hardin* and *Robbins v. Taxing Dist.*, *supra*. This, however, is a question to be determined at the trial.

(B) EVILS TO BE REMEDIED.

Undoubtedly a prominent evil to be remedied in the minds of the framers of the statute was the concentration of the entire business of the country in certain articles in such a manner as to prevent others from engaging in the same business, and thereby to prevent and stifle competition. As stated in the

title, it aims to "protect trade and commerce from unlawful restraints and monopolies; and the evil of a monopoly lay in the prevention of others, either by prohibition from the sovereign power, or by power of individuals, from exercising the same trade. When, therefore, the statute made it criminal to conspire to monopolize, it did not intend to make it criminal for two or more persons to unite in developing their own business by lawful means, nor for one person to sell out his business to another or to others, provided that the prevention of others from engaging in the same business was not contemplated. It did, however, intend to make it criminal to conspire to obtain the sole control of any business by means of preventing others from engaging in that business, and, a fortiori, it is so intended where the means of prevention contemplated were of an unlawful character.

(C) THE REMEDY PROVIDED.

I. The most narrow effect that can be suggested for this act is that it makes certain acts which were criminal at common law crimes against the United States when such acts are directed to the restraint or monopolizing of trade or commerce among the several states or with foreign nations, and thereby gives to the United States courts jurisdiction of such crimes.

In this view the statute merely remedies the defect of the want of criminal jurisdiction at common law in the United States courts, which has been already pointed out. It is sufficient for the present case as regards several of the counts in the indictment, if this should be held to be the sole effect of the act. Thus a conspiracy to restrain trade by such unlawful means as are stated in this indictment would clearly be a criminal conspiracy at common law. *Crump's Case*, 84 Va. 927, 6 S. E. Rep. 620; *State v. Donaldson*, 32 N. J. Law, 157; *State v. Rowley*, 12 Conn. 112, 113; *State v. Crowley*, 41 Wis. 271. It is not necessary that each of the means alleged should be unlawful if taken alone, nor that they should all be proved. *Com. v. Meserve*, 154 Mass. 64, 27 N. E. Rep. 997.

Among the means set forth in the indictment that are clearly unlawful are the following:

(1) Personal violence and threats of personal violence against the agents of the Lamson Company. See *Crump's Case*, *supra*, and cases there cited; *U. S. v. Lancaster*, *supra*.

(2) Unlawfully inducing the employes of and purchasers from that company to break their contracts, and maintaining them in actions brought for such breaches. *Bowen v. Hall*, *supra*; *Lumley v. Gye*, *supra*; *Evans v. Walton*, 36 Law J. C. P. 307; *Smith, Mast. & S.* 155. As to maintenance, see *Ray, Contract. Lim.* 293 et seq., and cases cited.

(3) By bringing and threatening to bring vexatious suits against the purchasers and prospective purchasers of cash registers from the Kruse, Lamson, Boston, and Union Companies. *Garret v. Taylor*, Cro. Jac. 567; *Kelley v. Manufacturing Co.*, 44 Fed. Rep. 19; *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.*, 41 Fed. Rep. 51.

(4) By falsely and fraudulently representing that the registers manufactured and sold by the Kruse, Lamson, Union, and Boston Companies contained defects that they did not in fact contain. See *Mogul Steamship Co. v. Macgregor, Gow & Co.*, *supra*.

(5) By frightening such purchasers and prospective purchasers from said companies by means of the acts, threats, and misrepresentations aforesaid. *Tarleton v. McGawley, Peake*, 270; *Crump's Case*, *supra*.

It needs no argument to show that a conspiracy to restrain or to monopolize trade by such means would be criminal at common law.

That the statute must be construed more broadly than this, however, is clear from the fact that contracts and combinations in unlawful restraint of trade were not criminal at common law, and this act is clearly intended to make them criminal.

II. The statute was intended to, and does, go further. It makes certain acts which are the subject of civil actions at common law, when directed to the restraint or monopolizing of trade or commerce between the several states or with foreign nations, crimes against the United States, thereby giving the United States courts jurisdiction over them. This construction again, how-

ever, is not broad enough, since to suit the statute it also would practically eliminate the words "contract" and "combination," since neither a contract nor a combination in restraint of trade is civilly actionable at common law.

III. The act goes still further, and makes contracts and combinations which are illegal in the sense of nonenforceable at common law, crimes against the United States when directed to the restraint or monopolizing of trade or commerce among the several states or with foreign nations.

That all three of these effects were intended appears from the act itself, since in no other way can all the terms of the act be given effect, and may also be shown by a reference to the debates in congress when the bill was pending. In the debates in the senate a number of cases are cited as showing what was meant by "restraint of trade" and "monopoly," all of which were civil, and not criminal, cases, and include the principle of the third proposition above laid down. Among these cases were *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102; *Craft v. McConoughy*, 79 Ill. 346; *Handy v. Railroad Co.*, 31 Fed. Rep. 689; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658.

(D) THE TRUE REASON OF THE ACT.

It thus appears that the true purpose and effect of the act were to remedy the injurious effects of unlawful restraints and monopolies upon trade and commerce so far as congress had the power so to do; that is to say, so far as they were directed against interstate or foreign commerce, its purpose being correctly stated in the title of the act, namely, "An act to protect trade and commerce from unlawful restraints and monopolies."

SUFFICIENCY OF THE INDICTMENT.

I. So far as charging a conspiracy is concerned, the language follows the ordinary language used for that purpose, and is sufficient.

II. The general allegation of threats, intimidation, and molestation is sufficient. *Reg. v. Rowlands*, 17 Q. B. 671; *Com. v. Dyer*, 128 Mass. 70. When the charge was that the defendants "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud," it was held sufficient. *Rex v. De Berenger*, 3 Maule & S. 67; *Wood v. State*, 47 N. J. Law 461, 1 Atl. Rep. 509; *Com. v. Fuller*, 132 Mass. 563; *Com. v. Andrews*, Id. 263; *Rex v. Gill*, 2 Barn. & Ald. 204; *U. S. v. Stevens*, 44 Fed. Rep. 132; *U. S. v. Gardner*, 42 Fed. Rep. 829; *Sydserrf v. Reg.*, 11 Q. B. 245; *Latham v. Reg.*, 9 Cox, Crim. Cas. 516.

The gist of the offense is the conspiracy. The unlawful object or means merely give character to the conspiracy itself, and show it to have been unlawful. *Rex v. Journeymen Taylors*, 8 Mod. 11; *State v. Glidden*, 55 Conn. 46, 8 Atl. Rep. 890. Hence the offense is complete though nothing be done in execution of the conspiracy. *Rex v. Spragg*, 2 Burrows, 993; *Rex v. Rispal*, 3 Burrows, 1321; *Collins v. Com.*, 3 Serg. & R. 220; *Com. v. Warren*, 6 Mass. 74; *The Poulterers' Case*, (1611,) 9 Coke, 55, Moore, 813; *Rex v. Edwards*, (1795,) 2 Strange, 707; *Rex v. Eccles*, (1783,) 1 Leach, 274; *Rex v. Gill*, (1818,) 2 Barn. & Ald. 204. Hence, also, it is unnecessary to set out the means when the end itself is unlawful. *People v. Barkelow*, 37 Mich. 455; *Com. v. Eastman*, 1 Cush. 190; *State v. Stewart*, 59 Vt. 273, 9 Atl. Rep. 559; *Bish. Dir. & Forms*, § 301. In the present case the means are set out, and in some of the counts with the utmost particularity.

The unlawful means set out show—

(1) That the conspiracy alleged was unlawful, and even criminal, at common law.

(2) That the restraint of trade was real and unlawful, since clearly such unlawful acts would not tend to encourage the trade of one party while discouraging that of the other. That they would tend to enable the party committing them to afterwards monopolize the trade by independent acts clearly only aggravates the offense.

(3) That the conspiracy was unlawful, and even criminal, "conspiracy in restraint of trade" at common law.

They thus show that the conspiracy alleged was the conspiracy intended by the statute, even if the narrowest construction be given to the language

of the statute. If there was, as the government contends, an offense at common law known as "conspiracy in restraint of trade," it was clearly exactly the offense set forth in this indictment. If, as contended by the defendants, there was no common-law offense of that name, precisely the same result is arrived at by considering the words of the statute separately, and giving to them their lawful common-law meaning. The defendants' argument that the words "conspiracy in restraint of trade" are to be limited so as to read "conspiracy in restraint of trade by contractual means," is wholly unwarranted by any principle of construction. In this view the word "conspiracy" adds nothing to the word "combination." The rule that every word of a statute is to be given effect, where possible, is too familiar to need a full citation of authorities. *U. S. v. Hartwell*, 6 Wall. 385-395, 396; *Montclair v. Ramsdell*, 107 U. S. 147, 152, 2 Sup. Ct. Rep. 391.

III. The indictment sufficiently alleges that the object of this unlawful conspiracy was in restraint of trade.

It not only alleges this in all the counts, in the language of the statute, but in certain of the counts also alleges broadly that this object was to hinder and prevent certain named corporations from carrying on the business of manufacturing and selling cash registers; and in certain other counts alleges that it was the object of the conspiracy to ruin and destroy the business of said corporations, then being carried on by them; and in other counts that it was the object to hinder and prevent all corporations other than the National Cash Register Company from carrying on said business, and to ruin and destroy the business of such other corporations then being carried on by them. That the successful accomplishment of such objects as these would result in not only restraint of such trade, but also in the monopolizing of it, is clear; and such objects are sufficient to make the conspiracy criminal, even at common law, especially when, as is alleged in this indictment, they are intended to be accomplished by unlawful and criminal means.

IV. The indictment sufficiently charges that the trade or commerce which it was the object of the conspiracy to restrain and monopolize, was "trade or commerce among the several states." This is specifically alleged in the words of the statute in all the counts. In all the counts, also, it is either specifically alleged or necessarily implied that there was in existence at the time of the conspiracy a trade or commerce in cash registers among the several states, that the defendants knew this, and that the object of the conspiracy was to restrain this specific existing trade. Some of the counts go still further, and give the names of the corporations which were engaged in such trade, and charge that the object of the conspiracy was to restrain the trade then carried on by said named corporations in cash registers among the several states. This language is clear, and as definite as the nature of the case will allow.

The statute was intended to cover a conspiracy the object of which was a general restraint or monopolizing of any trade which was of an interstate character. The conspirators would not naturally in such a case specify, even to themselves, the specific interstate transactions which it would be their object to restrain or monopolize, but would formulate the general intention and plan to restrain and monopolize all the trade among the states in a certain given subject-matter; for example, cash registers. The allegations are sufficient to show that the restraint and monopolizing contemplated were unlawful; that is, that they contemplated the prevention and destruction of trade by means which would not involve the corresponding encouragement of the trade of others. It is not material whether it appears on the face of the indictment that the means alleged are naturally calculated to affect interstate trade or not. It is distinctly alleged that it was the intent of the conspiracy to restrain and monopolize interstate trade. The means are only alleged to show the unlawful character of the restraint contemplated, not to show the object of the conspiracy to have been against interstate trade. It is submitted, however, that the means alleged are such as would naturally affect interstate trade when directed, as in this case, against corporations engaged in interstate trade, and that the fact that they would also affect domestic trade is immaterial; and this upon the same principle upon which it is held that a state cannot tax interstate commerce even though at the same time it tax domestic commerce to the same extent. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup.

Ct. Rep. 681; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592. The means alleged are such as would necessarily prevent the corporations engaged in said cash-register business from transporting said registers from one state into another, and selling them in the latter state.

All the elements required by the statute are therefore sufficiently alleged.

Elihu Root and John D. Lindsay, (also in support of the indictment,) in the interest of certain private individuals.

First.

In conspiracy the gist of the offense is the combination; and, when conspiring to do a particular thing is made criminal by statute, a charge of a conspiracy to do that thing is a complete and sufficient description of the offense. Neither the means by which the conspirators intend to do the thing nor overt acts towards the doing of it need to be alleged. Neither means nor overt acts enter into the description of the offense unless expressly made an element of the offense by the statute. If the statutory description of the crime is conspiring to do a thing by unlawful means, then the unlawful means must be set out. If the statutory description is a conspiring to do a thing and an overt act, then the overt act must be set out. In the one case the unlawful means, and in the other the overt acts, are elements of the offense which necessarily enter into its description, and must be averred; otherwise they need not be averred. The rules upon this subject are very fully discussed in *Com. v. Barger*, 37 Leg. Int. 274, July 2, 1880, by Hare, P. J. See, also, *Com. v. Hunt*, 4 Metc. (Mass.) 125; *Rex v. Gill*, 2 Barn. & Ald. 204; 2 Whart. Crim. Pl. (4th Ed.) 625, 628; *U. S. v. Donau*, 11 Blatchf. 168; *Carew v. Rutherford*, 106 Mass. 1; *Com. v. Dyer*, 128 Mass. 70; *Reg. v. Rowlands*, 17 Adol. & E. (N. S.) 671; *U. S. v. Dennee*, 3 Woods, 47; *U. S. v. Milner*, 36 Fed. Rep. 890; *U. S. v. Dustin*, 2 Bond, 332; *Com. v. Eastman*, 1 Cush. 190; *Com. v. Shedd*, 7 Cush. 514.

It is also the rule, as shown by the foregoing authorities, among many that, where the character of the means to be employed is an element of the offense, only a general description of the means bringing it within the statutory requirement is necessary, and not a specific enumeration of particular means, e. g. false pretenses need not be set out.

Second.

It has been held, however, that this act does not describe the offenses which it denounces with such certainty and precision as to make a description of the offense charged in the bare words of the act sufficient. There must be included in the description of the offense such further averments of fact as to show that the conspiracy charged was, indeed, the conspiracy which congress intended to make criminal. See various decisions upon the indictment in *U. S. v. Greenhut*, in the northern district of Ohio, (51 Fed. Rep. 205); in the southern district of New York, (Id. 213); in the southern district of Ohio, *In re Greene*, (52 Fed. Rep. 104.)

This necessity of further averment, in addition to the words of the statute, arises from the fact that congress used in the statute terms which, taken in their most general sense, would include acts of the most innocent character, so conformable to the general principles of law that congress could not have intended to declare them criminal. Thus there is a great variety of contracts which are essential to the legitimate conduct of business, and which are uniformly enforced by our courts, both of law and of equity, and yet which are to some extent in restraint of trade. It is not to be supposed that congress intended to make them criminal. Thus, also, the essential element of private property is monopoly. Our whole system of law relating to property is designed to maintain and protect that monopoly. Congress, of course, did not intend to make it criminal.

In describing offenses under this statute it is, therefore, necessary to include such averments as will show that the restraint of trade, or the monopoly which is the object of the conspiracy, is the kind of restraint or the kind of monopoly which congress intended to denounce. To thus make apparent

the character of the object of the conspiracy and bring it within the class of objects which congress intended to make criminal is the sole function of all averments in the indictment in addition to the charge in the words of the statute; and, if the object thus described is the object which congress intended to include within the words used in the statute, the indictment is sufficient.

Third.

The fundamental question upon the first set of counts is whether the destruction of a competitor's trade in the manner described is a restraint of trade within the intent of the provision of the first section of the act which makes a conspiracy in restraint of trade criminal.

I. To ascertain what constitutes a contract, combination, or conspiracy in restraint of trade, recourse must be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. In re Greene, 52 Fed. Rep. 104.

II. The statute enumerates three distinct facts, viz.: (a) Contracts in restraint of trade; (b) combinations in the form of trusts or otherwise in restraint of trade; (c) conspiracies in restraint of trade.

Each one of these points to a separate and distinct class of cases in which, prior to the passage of the act, the courts of England and America had condemned acts injurious to the public interest, because of their effect upon trade. In all three the principle of decision and the ground of condemnation had been that they interfered with the public's right to have trade and competition in trade free and unrestricted.

(1) The first class of acts included the ordinary contracts which were declared to be void as against public policy, because some of the contracting parties thereby prevented themselves from pursuing their occupations, and the public was thus deprived of their contribution to the competition therein.

Judge Bradley states the rule regarding these cases in *Navigation Co. v. Winson*, 20 Wall. 64, in these words:

"There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy: One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases, and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy."

(2) The second division of the statute, viz. combinations in the form of trusts or otherwise in restraint of trade, points to a class of cases which, while it may include the first class, includes also a great number of combinations distinguished from ordinary contracts in restraint of trade by a broad line of demarcation. These are combinations in which there is no contract, which either by its express terms or by implication binds the contracting party not to exercise his trade, or not to compete freely with others, but which are declared by the courts in violation of public policy, because they accomplish the effect of preventing freedom of trade and competition. As a rule the agreements and arrangements by which these combinations are formed are themselves, in their terms and requirements, of the most harmless and innocent character. It is the effect, and the effect alone, upon the public interest which causes them to be declared against public policy. The following are illustrations of this class: *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Arnot v. Coal Co.*, 68 N. Y. 558; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Clancey v. Manufacturing Co.*, 62 Barb. 395; *People v. North River Sugar Refinery Co.*, 54 Hun, 354, 7 N. Y. Supp. 406; *People v. North River Sugar Refinery Co.*, 121 N. Y. 582, 24 N. E. Rep. 834; *Hilton v. Eckersley*, 6 Ll. & Bl. 47; *Craft v. McConoughy*, 79 Ill. 346; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102; *U. S. v. Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep. 432; *Biscuit & Manuf'g Co. v. Klotz*, 44 Fed. Rep. 721; Hoff-

man v. Brooks, 11 Wkly. Law Bul. 258; State v. Standard Oil Co., (Ohio Sup.) 30 N. E. Rep. 279.

So long as the arrangements or agreements in regard to trade made by a combination produce the injurious effect, no form of contract or devise to produce that effect indirectly avails to escape the consequences.

(3) The third division of section 1—"conspiracies in restraint of trade"—refers us to a class of cases in which the effect upon trade is produced, not by contract obligations binding the parties not to compete, not by pooling arrangements which make it against the party's interests not to compete, but by preventing others from carrying on trade.

An essential element in these cases is that the prevention shall be, not by means of competition itself in the ordinary course of business,—one competitor driving out another by fair competition,—but that the prevention shall be by unfair means, which are themselves private injuries to the person whose trade is interfered with. Conspiracies to destroy or injure another's business by such means have always been actionable because of the private injury, and indictable because of the public injury, upon the same grounds and for the same reasons which have led the courts to declare contracts and combinations accomplishing the same effect void as against public policy. The law upon the subject is very fully presented in *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q. B. Div. 598, 605, (1892,) App. Cas. 25.

Conspiracies among laborers to boycott, to coerce their employers, to prevent other laborers from working, are familiar illustrations of this principle. See *Rex v. Eccles*, 1 Leach, 274; *Rex v. Bykerdike*, 1 Moody & R. 179; *Reg. v. Hewitt*, 5 Cox, Crim. Cas. 162; *Reg. v. Duffield*, Id. 404; *Reg. v. Druitt*, 10 Cox, Crim. Cas. 592; *Reg. v. Rowlands*, 5 Cox, Crim. Cas. 426; *People v. Fisher*, 14 Wend. 11; *People v. Melvin*, 2 Wheeler, Crim. Cas. 262; *Master Stevedores' Ass'n v. Walsh*, 2 Daly, 1; *People v. Wilzig*, 4 N. Y. Crim. R. 403; *State v. Stewart*, 59 Vt. 273, 9 Atl. Rep. 559; *Crump's Case*, 84 Va. 927, 6 S. E. Rep. 620; *State v. Donaldson*, 32 N. J. Law, 157; *State v. Glidden*, 55 Conn. 76, 8 Atl. Rep. 890; *People v. Walsh*, 15 N. Y. St. Rep. 17; *Steph. Dig. Crim. Law*, 390; *People v. Everest*, 51 Hun, 19, 3 N. Y. Supp. 612.

(4) It appears from the foregoing review that at the time the act now under consideration was passed restraint of trade, as known to the law, was preventing any one from freely exercising his trade. That this prevention was held to be against public policy, because it deprived the public of the benefit of the prevented industry and of its competition with others; that all contracts which had that effect were held to be void, because they produced that public injury; that all combinations which had that effect, directly or indirectly, were held to be unlawful, because they produced that injury; that all conspiracies to produce that effect upon others by threats, intimidation, fraud, and other similar means were held to be criminal, because they produced that same public injury.

Clearly these were the conspiracies intended and aptly described in the language of the first section of the statute.

(5) The means described in general terms in the first count of the indictment, and particularly enumerated in the fourth and fifth counts, are the very means which have always been held to make interference with business unlawful, and to make a conspiracy to interfere with business through other instrumentality a criminal conspiracy. *Mogul Steamship Co. v. McGregor, Gow & Co.*, supra.

(6) The prevention of competition by unlawful interference with the business of competitors was one of the ways of producing this kind of public injury, which was at the time this act was passed well known through judicial decisions, and it was present in the mind of congress when it passed the act. See 21 Cong. Rec. pt. 3, pp. 2456-2458, 2598. It is part of the judicial history of the country that, prior to the passage of the act, several of the directors of the Standard Oil Company had been convicted in the state of New York of a conspiracy to drive one of its competitors out of business by violent and dangerous methods, the conspirators going so far as to attempt the destruction of the competitor's property. See *People v. Everest*, 51

Hun, 19, 3 N. Y. Supp. 612. The indictment in that case was for a conspiracy (under section 168 of the New York Penal Code) to commit an act injurious to trade.

It will be observed from the foregoing extracts and the cases therein referred to that congress had in mind as one of the evils at which this act was aimed the suppression of competition as well by means operating upon other persons than the guilty combiners as by the direct means of the agreement entered into between those combiners.

(7) Counsel for the defendants has referred to many state statutes which he says were designed to apply only to offenses by way of contract operating only upon the persons combining. He omits to observe that in all these states combination to produce the same effect by unlawful means operating upon others were already criminal at common law, and by already existing statutes; e. g. the statute of New York, making it a criminal "conspiracy to do any act injurious to trade or commerce." It was, therefore, unnecessary for the states which had existing statutes of this description, and which had a common law, to include in their acts designed for the protection of free competition in provisions affecting such conspiracies as are shown in the present indictments.

But when congress undertook to assert over interstate commerce the same protection which the common law and the statutes of the several states gave to commerce within their respective limits, there is no warrant whatever for saying that congress did not mean to cover the entire field as broadly as the whole body of common law, and legislation in the respective states covered it within their respective limits. The word "conspiracy" is appropriately added to the words "contract" and "combination in form of trust or otherwise," to accomplish this complete design.

(8) The idea that there is any distinction in substance between what counsel for the defendant calls "contractual restraint of trade" and the restraint charged in this indictment is wholly illusory, for conspiracy is a contract just as much as any illegal combination. The only element of contract in either is the agreement of the parties to accomplish a given result. That agreement may or may not include specifically the means by which they intend to accomplish it. This element of agreement is, indeed, common to all the offenses denounced in the first section of the act. It is to be found in the contracts, in the combinations, and in the conspiracies there described. It is, however, the only contractual element which is essential to any of the offenses described in that section, and this same contractual element must necessarily be shown in every case of criminal conspiracy. All the authorities which had declared the law of trusts and trust combinations at the time the act was passed agreed that in declaring that the illegal object to accomplish which the minds of the parties met together, made their agreement illegal, wholly irrespective of its form, or of the means by which they intended to accomplish the object. It seems quite absurd to contend that when congress struck at an evil which the courts had declared rendered every combination which produced it illegal, entirely irrespective of its form or avowed purpose, congress nevertheless meant to except combinations which produced that same evil by means already recognized as unlawful. The court is asked by the defendants to deprive an express substantive provision of the statute of all meaning whatever, to say that it adds nothing to the other provisions of the statute, for the purpose of inferring that congress meant to make it criminal to produce the given result of preventing competition by means otherwise lawful, and not to make it criminal to produce the same result by means otherwise unlawful.

Fourth.

The fundamental question upon the second set of counts is whether a monopoly acquired by destroying the trade of competitors in the manner described is a monopoly within the intent of the provision of the second section of the act, which makes a conspiracy to monopolize criminal.

In the debate upon this act in the senate, Mr. Edmunds quoted from Webster's Dictionary the following definition of the verb "to monopolize:" "To engross or obtain by any means the exclusive right of, especially the right of trading to any place or with any country or district; as to monopolize the

India or Levant trade." 2 Pike, *Hist. Crime*, p. 102. And see St. 23, James I. cc. 331-333; 4 St. at Large, p. 734; *The Case of Monopolies*, 11 Coke, 85a.

The words of the statute are broad enough to include all appropriation of trade to the exclusion of others. It is equally manifest, however, that from the application of those words must be excluded all appropriation of trade to the exclusion of others which is done under warrant of law, such as the obtaining of a monopoly by letters patent, the obtaining of a monopoly by the ordinary purchase of property, the obtaining of a monopoly by the ordinary process of fair competition and trade as the result of superior intelligence, industry, or activity. Starting with the original well-understood and commonly received meaning of the word, and applying this process of exclusion, we find that there remains a class of monopolies with which the courts have of recent years become very familiar, which are created wholly without warrant of law, which have all the characteristics and all the injurious effects of the famous monopolies of Queen Elizabeth's time, and which are accomplished by a more or less direct violation of the rules above considered against restraint of trade. The judicial condemnation of such monopolies is an extension of the principles relating to restraint of trade. The monopoly is treated as the extreme evil resulting from restraint of trade upon a large scale.

This view of monopolies is illustrated and fully shown in the cases relating to combinations cited under the third head of this brief. Whatever else may or may not be included within the term "to monopolize," as used in the statute, it is safe to say that it does include the accomplishment of the effects above described by any acts which constitute an unlawful restraint or prevention of trade.

Fifth.

The counsel for the defendants says that, unless the construction for which he contends is put upon the act, its range is almost unlimited; and he goes so far as to assert that, under the theory upon which this indictment is drawn, a very large proportion of all the serious crimes within the states could be brought within the federal jurisdiction. His argument for this assertion rests upon certain propositions of law relating to criminal responsibility for crimes resulting unintentionally from unlawful confederacies.

A conspirator is held equally guilty with his confederate for a murder (or other higher offense than the one contemplated) committed by the latter in the perpetration of a preconcerted offense by both only when the higher offense is the natural result of the crime intended, or is committed as a means of successfully effecting the intended purpose. So, where one of the conspirators deviates from the original plan, or undertakes to do something out of the range of the purpose contemplated, the other is not criminally responsible for this result. Our only purpose in referring to these propositions is to express our dissent from the view taken by the counsel for the defendants,—that, upon our construction, the commission of any act, however remotely affecting or interfering with interstate commerce, would render the perpetrator of such act liable to prosecution under the act of congress, no matter whether the interference was intentional or otherwise. It is not necessary to discuss this point.

We allege a conspiracy to do certain things which we contend do restrain trade. The question of whether the acts committed by the conspirators are intentional or not is one for the trial. If the acts the government proposes to prove as evidence of the conspiracy were unintentionally done, or were committed without any design of accomplishing a result that, in contemplation of law, would constitute a restraint of trade or monopoly, within the meaning of the act, proof to that effect would be proper matter of defense.

In answer to the remaining portion of defendants' argument on this head, it is only necessary to say that the jurisdiction of the federal courts is not necessarily exclusive. An act may be a violation both of the laws of the United States and of the state where it is committed; and it does not affect the question of federal jurisdiction that the defendants intended to use means themselves the subject of prosecution under the state laws.

Sixth.

It is necessary that the restraint of trade charged should be a restraint of trade among the several states.

Upon that point it seems sufficient to say that it is so charged. There is no doubt, uncertainty, or question in the language of the statute which describes that element of the offense. "Trade among the several states" has been described and defined by the supreme court of the United States in numerous cases. *Gloucester Ferry Co. v. State of Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725; *Picklen v. Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. Rep. 810. The language of the statute obviously and clearly applies to all trade coming within that description. There is not one kind of trade among the several states to which the statute was intended to apply, and another kind to which it was not intended to apply. As there is no uncertainty or indefiniteness in regard to this element of the offense, the charge, which states this element of the offense in the words of the statute, is sufficient.

In some of the counts, however, the indictment does go beyond the necessities of pleading, and charges not only that the conspiracy was in restraint of trade and commerce among the several states, but that it was to destroy that trade, and that it was to destroy that trade by practices which, under the principles above stated, would constitute the destruction,—the very kind of restraint of trade which congress had in mind.

There can be no question under this statute whether the means which the conspirators had in mind were adequate or appropriate to accomplish the destruction of trade among the states. As we have seen, the means are not an essential element of the offense. They have no relevancy to the charge, except as they may serve to characterize the nature of the restraint proposed by the conspirators, and show that it is the kind of restraint which congress had in mind. So long as the restraint was of the kind which congress had in mind, then it is immaterial whether it was in fact possible that interstate trade could be destroyed by it. The offense of conspiring to destroy interstate trade by that particular kind of restraint was committed when the agreement of the conspirators took place, whether they ever have or ever can or could accomplish their object.

Each of the three elements of the offense is clearly and definitely charged. First, the conspiracy; second, the restraint, which is shown to be the kind of restraint which congress had in mind; and, third, the thing to be restrained, which is charged to be the thing which the act clearly and definitely described. 2 Bish. St. Crimes. (8th Ed.) § 202.

H. W. Chaplin, for defendants.

COMMERCE AMONG THE SEVERAL STATES.

This act must rest on the constitutional power to regulate commerce with foreign nations and among the several states, and those sections which are pertinent to the present controversy must rest upon the power to regulate commerce among the states. The matter with which we are dealing is "commerce among the several states." It is important, at the outset, to consider, in a general way, the conventional meaning of that phrase in federal jurisprudence, the outline of the field, as fixed by federal decisions, and the way in which, and the extent to which, the federal government can deal with it.

The meaning of the phrase, "commerce among the several states," in the federal constitution, is a meaning quite different from the meaning of those words as mere English words. The word "commerce," it is not necessary here particularly to discuss. It includes intercourse of many, if not all, lawful kinds, and is broader than the word "trade." The constitutional phrase, however, "commerce among the several states," has a highly artificial, conventional, and refined meaning, fixed by principles of public policy and statesmanship, and in view of the complex character of our government, and the relative rights and duties of the states and the general government.

Lewis, *Federal Power Over Commerce*, p. 10; *Paul v. Virginia*, 8 Wall. 168, 182; *Mobile v. Kimball*, 102 U. S. 691, 702; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; *Gibbons v. Ogden*, 9 Wheat. 1, 4; *Kirkland v. Hotchkiss*, 100 U. S. 491; *Slaughterhouse Cases*, 16 Wall. 36, 75, 79; *License Tax Cases*, 5 Wall.

462; *Mugler v. State of Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6.

Moreover, it is true of most, if not all, of the grants of power in the federal constitution, that the definition of them is not only arbitrary, and fixed by principles of public policy, but that it is not fixed even by any generic distinction, even an arbitrary one, but is fixed merely by degree of proximity or remoteness to state and federal rights. *U. S. v. Dewitt*, 9 Wall. 41; *U. S. v. Fox*, 94 U. S. 315; *Trade-Mark Cases*, 100 U. S. 82; *Ficklen v. Taxing Dist.*, 145 U. S. 1, 12 Sup. Ct. Rep. 810; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 163; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475; *U. S. v. Hall*, 98 U. S. 343.

Every citizen of our states has a dual political status. In one aspect, he is a citizen of the United States. In another aspect, he is a citizen of his state. It does not follow from the fact that he is a citizen of the United States that congress can protect him against all forms of fraud or violence or other wrong; nor, from the fact that he is a citizen of the state, that the state can so protect him. Congress can protect him only in that range and field of his life and affairs in which he presents himself as a citizen of the United States, and not as a citizen of his state. His state can protect him only in that range and field of his life and affairs in which he presents himself as a citizen of the state, and not of the United States. The line between his federal and his state citizenship is an arbitrary line, and often a hazy and indefinite line, and it is always a line of degree of proximity or remoteness. Nevertheless, it is a constitutional line, which neither the federal government nor the state can cross. *U. S. v. Reese*, 92 U. S. 214; *U. S. v. Harris*, 106 U. S. 629, 1 Sup. Ct. Rep. 601; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Fox*, 94 U. S. 315; *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. Rep. 617.

CONTRACTUAL CHARACTER OF THE STATUTE.

Trade statutes have at different times been passed in various jurisdictions. Some of them have been aimed at labor, some at capital, but the distinction between legislation against labor and legislation against capital has always been patent upon the face of the statutes. The ancient legislation against monopolizing and engrossing was legislation against capital.

The act of July 2, 1890, is directed at capital. It aims at dangers very generally supposed to have lately arisen out of enormous aggregations of capital. It aims at results effected, or to be effected, by combinations of capitalists and aggregations of capital. The evil aimed at in legislation against capital is evil of a contractual character, not an evil of mere fraud or violence. There was no general call for federal protection against an evil of the latter character. The act of 1890 was aimed at a growing tendency to combination by voluntary contract, in derogation of public right and public safety. It was at this, only, that the legislation was aimed; and it is this, only, which its words are to be construed to cover. Attacks upon commerce by mere fraud and violence, it is thus far left to the states to punish. This statute is not a Ku-Klux act. The "restraint" and the "monopolizing" of the statute are contractual restraint and monopolizing,—not mere interference with commerce, as by robbery, assault, champerty, bringing of suits, or other forms of violence, fraud or vexation.

The indictment proceeds upon the theory that the restraint and monopolizing of the statute, at least in the penal aspect of the act, are substantially equivalent to interference with trade, or at least to interference with the trade of rivals. Some of the counts allege conspiracy to interfere with or injure or ruin the business of persons apparently intended to be described as rivals, by mere fraud, violence, or other noncontractual means. The other counts do not specify the means. They therefore fail to allege contractual means. The pleader has completely missed the true scope and effect of the statute.

CONTRACT CRIMES.

The defendants' counsel think it proper to discuss, at the outset, the place which contract occupies in the criminal law, and to consider the characteristics of those crimes which may aptly be designated as contract crimes.

A familiar instance of crimes of contract is the unlawful selling of intoxicating liquors. To make the offense, an actual contract of sale must have been made, and the questions where, when, and whether an alleged contract of sale was in fact made are determined, not by any rules of criminal law, but by the ordinary principles of the law of contracts. The questions of locus contractus, of principal and agent, of delivery, for example, are discussed and settled in liquor prosecutions precisely as in civil actions. *Com. v. Eggleston*, 128 Mass. 408; *Com. v. Burgett*, 136 Mass. 450.

A cash sale of liquors to a minor is not, under an ordinary selling statute, a "sale" to him, if in fact, although without the vendor's knowledge, he is buying for an adult. *Com. v. Lattinville*, 120 Mass. 385; *Com. v. Finnegan*, 124 Mass. 324; *St. Goddard v. Burnham*, Id. 578.

The element of true contract, in contract crimes, is well illustrated by cases upon English statutes aimed at the "putting off" of counterfeit money to a confederate. The offense of "putting off" is distinguished from the crime of uttering, in that an uttering, to be criminal, must be made to an innocent person, and does not necessarily imply a contract, while a "putting off" of forged paper implies a true contract of sale, gift, or barter, to be established like any other sale, gift or barter. In *Rex v. Joyce*, (MS., O. B.,) Car. Supp. 184, the indictment (framed on St. 8 & 9, Wm. III. c. 23, § 6, for "putting off" counterfeit money) charged that five counterfeit shillings were paid and put off for two shillings. The proof was that five bad shillings were sold for half a crown. "Thompson, C. B., and Heath, J., held that, as this was a contract, it must be correctly proved as laid, and directed an acquittal." See, also, *Rex v. Hedges*, 3 Car. & P. 410; *Rex v. Wooldridge*, 1 Leach, 307; 1 East P. C. 180.

The crime of "obtaining goods by false pretenses" is a crime of true contract. If I secure goods by false statements, my crime will be "false pretenses" or larceny, according as I do or do not effect a meeting of minds, which actually passes title. If, on the one hand, I represent to a vendor that I am rich, and thereby induce him to sell me goods upon credit, there is a true contract of sale between us,—voidable, indeed, at the vendor's option, for the fraud, but none the less a true contract until avoided,—and my offense is "obtaining goods by false pretenses." If, on the other hand, I get goods by representing that I am A.'s servant, and that A. has commissioned me to buy the goods for him, and get them as upon a sale upon credit to A., there is no meeting of minds between the vendor and A. There is no meeting of minds between the vendor and me, to the effect that I am to be the purchaser on credit. There is therefore no meeting of minds at all, in true contract, and the offense is larceny. It is immaterial, in such case, that the supposed vendor intends to pass title, or thinks that he is passing title. The question is, not what he or the supposed purchaser intends or thinks, but is there, or is there not, a meeting of minds in contract? No contract, no crime. No reported cases pursue into greater refinement the question of contract or no contract than false pretense and larceny cases, close on the dividing line.

THIS STATUTE A STATUTE OF CONTRACT CRIME.

The act of 1890 is a statute of contract crime. Neither in its restraint nor in its "monopolize" provisions does it aim to punish anything else than (a) the making of contracts; or (b) the combining, conspiring, or attempting to make or to effect the making of contracts; or, possibly, (c) the combining or conspiring or attempting to support or enforce contracts. It is essential to guilt under it that a contract be made, or that contract results be the aim.

This is, in substance, the view which has been taken of the act in the judicial decisions which have thus far been made upon it, and is the logical result of the reasoning on which they are rested. If this were a small matter, the defendants' counsel would be quite well content to rest their argument upon those decisions. Since, however, no one of those cases is a decision of a court of last resort, or is a binding precedent upon this court, or is on all fours with the case at bar, the defendants' counsel, particularly in view of the importance of the present case, will proceed to consider various lines of

reasoning and authority which seem to them, independently of those cases, to require an exclusively contractual reading of the statute. The decided cases upon the statute will also be referred to at proper points in the discussion.

TECHNICAL TERMS IN THE STATUTE.

The use of technical words and phrases in the statute is such as necessitates the contractual construction. It is a familiar principle of statutory construction that, where a new statute uses words or phrases already having a settled technical signification in the law, these words or phrases in the statute are to be taken in such technical sense, unless the context makes such a reading impossible. E. g.

"Law of nations." U. S. v. Smith, 5 Wheat. 153.

"Utters." U. S. v. Carll, 105 U. S. 611.

"Embezzles." U. S. v. Britton, 107 U. S. 655, 669, 2 Sup. Ct. Rep. 512.

"Steal, take, and carry away." Id.

"Murder." Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. Rep. 761.

"Negotiable;" "indorsement and delivery." Shaw v. Railroad Co., 101 U. S. 557.

This principle is but an application of a broader principle, which finds expression, also, in the rule that statutes are to be presumed to depart as little as possible from the common law. Shaw v. Railroad Co., 101 U. S. 557; Brown v. Barry, 3 Dall. 365.

A similar conservative principle is found in the rule that statutory expressions borrowed from the statutes of another jurisdiction are to be taken in the meaning of their original domicile, as defined there by judicial construction. Railroad Co. v. Moore, 121 U. S. 558, 7 Sup. Ct. Rep. 1334. This latter rule has just been applied to the interstate commerce act. Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 282, 284, 12 Sup. Ct. Rep. 844.

Such legislation is extremely common with congress, and is, indeed, a distinguishing peculiarity of its legislation. The greater part of what may be called federal "lawmaking" legislation consists in the adoption, from time to time, and upon different subjects, by a mere summary reference, and often by terse and elliptic designation, of a complete title or head of the common law, civil or criminal, or of some other body of jurisprudence. The chief part of the federal criminal law exists only in this way. See cases cited above, and Moore v. U. S., 91 U. S. 270, 273, 274; Smith v. Alabama, 124 U. S. 465, at page 478, 8 Sup. Ct. Rep. 564, at page 569.

It is a feature of the operation of this principle that the summary adoption by a federal statute of a particular head or title of law, civil or criminal, brings in that head of law, with all its details and all its exceptions, and that the statute has in law precisely the same reading which it would have, should it, as would a detailed Code, rehearse at length, and minutely, all those details and exceptions. In U. S. v. Carll, cited above, a statute punishing, in terms, the "uttering" of forged federal paper, "with intent to defraud," was held to incorporate into the federal jurisprudence the common law of uttering, with all its limitations, and to require, therefore, as an element of the crime, (although not expressed in the statute,) knowledge that the paper was forged.

It is an equally well-settled principle that where a word has a well-known, settled, and technical (though recent) meaning,—not in the law, but in the language of a trade, or in common speech,—the word, in a new statute, will be given that meaning. Arthur v. Lahey, 96 U. S. 112; Arthur v. Morrison, Id. 108; Greenleaf v. Goodrich, 101 U. S. 278.

EFFECT OF WORD "TRADE" IN THIS STATUTE.

The word "trade" would seem, in its meaning as an individual word, to be a narrower word than "commerce." (Marshall, C. J., Gibbons v. Ogden, 9 Wheat. 1, 189; Miller, Const. c. 9.) and therefore to be embraced within the meaning of the word "commerce." Even if it were a broader word than "commerce," it could not operate more broadly than "commerce" in this statute, for the constitutional power of congress stops with "commerce."

The word "trade," therefore, in this statute, is either synonymous with "commerce," or narrower than it, and in either view it is, as a mere individual word, surplusage in the statute. The word "trade" must, however, be given effect, if possible. *Platt v. Railroad Co.*, 99 U. S. 48; *Market Co. v. Hoffman*, 101 U. S. 112.

It will be unnecessary here to discuss the question how far the "restraint of trade" of the common law is enlarged in its field of operation by its application in this statute to "commerce," in so far as "commerce" may be broader than "trade;" for, if anything in this indictment comes under the head of "commerce," it also comes under the head of "trade." Nothing set forth in this indictment lies in those outlying zones, if any, of commerce, which extend beyond the confines of trade.

TECHNICAL MEANING OF "RESTRAINT OF TRADE."

The phrase "restraint of trade," therefore, upon the principles discussed above, operates to evoke from the common law, and to introduce into the federal jurisprudence, a complete head or title of the common law. We come, then, to the question of what is meant in the common law by "restraint of trade."

This phrase, like many others, has at the common law two technical meanings,—a broader and a narrower. The broader is generic, and includes all technical "restraint of trade." The narrower is specific, and includes only unlawful "restraint of trade." The broader conveys no obnoxious suggestion. The narrower is of obnoxious signification. In both its senses the phrase means contractual restraint, and only contractual restraint,—restraint by contract, and only by contract. Both the broader and the narrower meaning are well set forth by *Greenh. Pub. Pol.* 683.

The phrase, "in restraint of trade," is almost always used in the common law in connection with the word "contract," or, less frequently, "combination." In its less common connection with the word "combination," the phrase merely indicates the joinder of a considerable number of persons in a contract; limiting one or more, but usually all of them. When, as often happens, the parties to a considerable combination in "restraint of trade" do not trust each other, and do not wish to have the burden of suing each other to enforce the contract, they often put their trade assets and plants into the hands of a stakeholder, who is to carry out the restraining contract, either according to a detailed scheme, or according to his discretion, and so make the operation of the restraint, as it were, automatic. The stakeholder, in such case, becomes, by operation of law, a trustee. The result of the proceeding is, within the meaning of the law word, a "trust;" and to this peculiar form of trust the common speech now applies, in an exceptional sense, and with a hostile signification, the word "trust." As to combinations in restraint of trade, see *Id.* 442-459.

CONSPIRACY IN RESTRAINT OF TRADE IN THE CRIMINAL LAW.

It remains to be considered whether the phrase "in restraint of trade," either alone or in connection with the word "conspiracy," or any other word, had in the criminal law a technical meaning broader than, or different from, its technical meaning in the civil law.

Such separate technical meaning in the criminal law, to be effectual here, would have to be a meaning generally recognized, and not merely a matter of personal or occasional nomenclature. If such a meaning existed in the criminal law, it would appear in the approved text-books,—old and new. In the following text-books the words and phrases, "restraint of trade," and "conspiracy in restraint of trade," do not appear (unless in some editions which the defendants' counsel have not seen) in the index, nor does the title "Conspiracy," although it covers conspiracies dealing with trade, allude to "restraint of trade." No one of these books, it is believed, uses the phrase, "conspiracy in restraint of trade." 4 *Bl. Comm.*; *Hawk. P. C.*; *Archb. Crim. Pr. & Pl.*; *Chit. Crim. Law*; *Rob. Crim. St.*; *Woolr. Crim. Law*; *Paley, Conv.*; *Carr. Crim. Law*; *Bish. Crim. Law*; *Bish. Crim. Proc.*; *Whart. Crim. Law*; *Whart. Crim. Pl.*; *Russ. Crimes*; *Davis, Crim. Law*; *Maugh. Law*; *Lewis, v.55f.no.5—40*

Crim. Code; Washb. Crim. Law; May, Crim. Law; Lewis, U. S. Crim. Law; Lipp. Crim. Law; Heard, Crim. Law; Gabb. Crim. Law; Fish. Crim. Dig.; Pike, Hist. Crime.

The only instances of the use of the phrase, "conspiracy in restraint of trade," or "restraint of trade," in criminal law books, as far as the defendants' counsel can learn, are in the seventh edition of Roscoe's Criminal Evidence, in Steph. Dig. Crim. Law, (1877,) and Erle, Trade Un. The chapter in Roscoe on "Conspiracies in Restraint of Trade" was prepared by Sir James Fitzjames Stephen, as he tells us in his "Digest of the Criminal Law," (1877, note 18, p. 383.) Sir James Stephen had then been engaged for more than 10 years in the study of the criminal law from a scientific point of view, and chiefly with reference to legislation. Steph. Hist. Crim. Law, (1883,) preface. What he wrote in Roscoe was subsequently elaborated by him in his "History of the Criminal Law," without material change. The nomenclature, "Conspiracies in Restraint of Trade," in Roscoe, is therefore a personal nomenclature of a broad and scientific student of criminal law, looking more to the future than to the present or the past, and of such public and scholarly position as to be entitled, if he so desired, to make a slight change of nomenclature. The propriety, however, of his change of nomenclature, if there was such, does not make his phrase a technical nomenclature of the common law.

In his "Digest of the Criminal Law," (1877,) all that he says in the text upon this head is included in articles 390-392, and note 18. But what he there says begs the question how far violence is to be considered in the matter of "restraint of trade."

Erle on the Law Relating to Trade Unions is not a text book at all. It does not profess to be written peculiarly for lawyers, and is perfectly at liberty to use popular nomenclature. Moreover, it is a book written in support of a theory as to freedom of trade at the common law,—a theory which, as Mr. Justice Stephen shows, is erroneous.

An examination of the English Statutes relating to offenses against trade fails, with the exception of one preamble, to detect the use, in a criminal sense, of the phrase, "in restraint of trade."

(1720,) 7 Geo. I. St. 1, c. 13; (1725,) 12 Geo. I. c. 34; (1749,) 22 Geo. II. c. 27; (1772,) 12 Geo. III. c. 71; (1777,) 17 Geo. III. c. 55; (1795,) 36 Geo. III. c. 111; (1800,) 39 & 40 Geo. III. c. 106, repealing 39 Geo. III. c. 81; (1824,) 5 Geo. IV. c. 95; (1825,) 6 Geo. IV. c. 129; (1844,) 7 & 8 Vict. c. 24.

Preamble: "Whereas, it is expedient that such statutes, [forestalling and regrating,] and other statutes made in hindrance and in restraint of trade, be repealed." (1859,) 22 Vict. c. 34; (1875,) 38 & 39 Vict. c. 86. Here "restraint" is plainly contractual.

TECHNICAL MEANING OF "MONOPOLIZE."

The word "monopolize," and its noun, "monopoly," have in the law, and had at the time of the passage of the act, a technical meaning. In so far as they implied any exclusive privilege not resting upon a government franchise, or upon individual ownership of property, they involve the idea of contract. 4 Bl. Comm. 159; Ray, Contract. Lim. 210-245; Greenh. Pub. Pol. 670 et seq; Ricks, J., In re Corning, 51 Fed. Rep. 205.

It is not, in the legal sense, "monopolizing," to raise upon one's own ground all the corn or wheat for the subsistence of a community. Like the terms, "restraint of trade," and "contract in restraint of trade," "monopoly" has, in the common law, a broader and favorable sense, including just and rightful monopolies, such as patents or copyrights, and a narrower and obnoxious sense, embracing only monopolies counter to law or public policy. "Monopoly" is limited, in its broader or favorable sense, to public franchise, private ownership, or contract. In its narrower and obnoxious sense, it is limited to unlawful contractual means. It is not monopolizing for a band of desperadoes to invade an isolated community, and rob it of its winter's store. He only monopolizes, in the invidious legal sense of the word, who with wrongful intent buys up, or attempts to buy up, the whole, or substantially the whole, of a given commodity in a given locality, or at least contracts, or attempts to contract, for the control of it. Cases cited above. Section 2 of the statute, therefore, undertakes to punish nothing but the making of a particular form

of contract,—usually a contract of purchase,—and conspiracies, and attempts to make, or to promote the making of, or perhaps to enforce, such contracts. This effect of these technical words in the statute has been repeatedly recognized. *U. S. v. Greenhut*, 50 Fed. Rep. 469; *In re Corning*, cited above; *U. S. v. Greenhut*, 51 Fed. Rep. 205; *In re Greene*, 52 Fed. Rep. 104; *In re Terrell*, (*U. S. v. Greenhut*,) 51 Fed. Rep. 213.

The mere fact that England and the several states have varied in details, or upon the shades of meaning and the precise scope of technical expressions, does not make it improper for congress to employ them. At the times of enactment of the various federal penal statutes, England and the several states have differed somewhat upon the details of the various offenses. None the less, there was a generally understood crime of "murder," "forgery," "robbery," "piracy," etc., settled in its outlines, and in most of its details, to such a degree that the federal courts could have no difficulty in fixing by its definition the meaning of those words in the federal statutes. *Ball v. U. S.*, cited above; *Moore v. U. S.*, 91 U. S. 270.

CONTRACTUAL CHARACTER OF THE STATUTE SHOWN BY SECTION 6.

Section 6 of the statute in question provides: "Any property owned under any contract, or by any combination, or pursuant to any conspiracy, (and being the subject thereof,) mentioned in section 1 of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law." The phrase, "property owned * * * pursuant to any conspiracy," does not refer to property of the character of burglars' tools or counterfeiters' dies; that is, mere vulgar implements of crime. It means commercial property. By the procedure referred to in the section, it is not property to be destroyed, like gaming implements, but property to be sold. Nor is it property merely in the possession of conspirators; that is, property which they may have got by intimidation or robbery or assault. It is property "owned" pursuant to a conspiracy; that is, title has vested pursuant to a conspiracy. The conspiracy in the statute, therefore, is conspiracy aiming to operate by the making or the furtherance of limiting contracts, or contracts of aggregation, or monopolizing contracts.

NARROWER MEANING OF "RESTRAINT OF TRADE" AND "MONOPOLIZE," THE MEANING OF THE STATUTE.

It has been remarked above that the phrases, "restraint of trade" and "monopolize," have each two significations in the common law,—a broader, including legal and illegal restraint and monopoly, and a narrow and invidious and highly elaborated meaning, including only certain forms of restraint and monopoly obnoxious to public policy. Such broader and narrower uses of a term in the law is very common. According to the case the court will apply the one or the other.

It is really immaterial to the defendants in this case to consider whether the broader or the narrower sense of these terms in the law is to be taken; whether the statute contemplates all restraints and all monopolies,—lawful or unlawful at the common law,—or only such restraint or monopoly as was unlawful at the common law,—since in either sense of the term the restraint or monopoly was contractual, and there is nothing of the sort in the indictment, and since the adoption of the broader meaning would justify, as will shortly be shown, the widespread popular suspicion of unconstitutionality of the act. The defendants could ask nothing better. They propose, however, to present their view of the statute. Their view is that the terms "restraint" and "monopolize" are used in the statute in their narrower and obnoxious meaning, and that the sole operation of the act, therefore, is to import into the federal jurisprudence, civil and criminal, the technical condemnatory principles of the common law (civil and criminal, respectively) in respect of restraint of trade and monopoly, in the narrower and invidious sense of those words, and pos-

sibly to extend those principles slightly beyond the realm of "trade" into the outlying zones of "commerce," or, in other words, that the statute operates precisely like most other federal illegalizing or penal statutes, merely to bring within the federal jurisdiction, to the extent of the federal constitution, principles of illegality and criminality already in full operation in the states and in the state courts.

THE FOREGOING THE ONLY PRACTICAL CONSTRUCTION.

The statute, read literally, punishes all combinations, all contracts, in restraint of interstate or international commerce, without exception; all conspiracies in restraint of such commerce; all monopolizing, all attempts at monopolizing; all combinations and all conspiracies to monopolize any part of such commerce. Its language is sweeping and unqualified. But at the date of the passage of the act there existed, under constitutional protection, vested rights of property and of personal liberty, dependent for their existence upon a complete interstate monopoly and restraint. There were vested patent and copyright rights, not only the rights of patentees and copyright holders, but, as necessarily incident thereto, countless derivative rights of absolute monopoly and restraint. *Gayler v. Wilder*, 10 How. 477, 494; *Machine Co. v. Morse*, 193 Mass. 73; *Gray, J., Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 53, 11 Sup. Ct. Rep. 478.

Existing rights of this character, both principal and derivative, although born of federal statute, are none the less rights which congress cannot disturb. *U. S. v. Burns*, 12 Wall. 246; *Cammeyer v. Newton*, 94 U. S. 225; *James v. Campbell*, 104 U. S. 356. There are also common-law contract rights which it is beyond the power of congress to impair. *Railroad Co. v. Richmond*, 19 Wall. 589.

An attempt to disturb such rights would be unconstitutional; and a statute ought, if possible, to be so construed as to make it constitutional. *Presser v. State of Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 589; *Parsons v. Bedford*, 3 Pet. 433; *Brewer v. Bloughier*, 14 Pet. 178; *Supervisors v. Brogden*, 112 U. S. 261, 5 Sup. Ct. Rep. 125; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235, 6 Sup. Ct. Rep. 1038.

Congress could not, therefore, have intended to use the words of the statute in their broad, literal sense.

But a further exclusion must be made. Even in matters not protected by the constitution, as rights of property or liberty, there are nevertheless many forms of restraint of trade, and many forms of monopoly, which the law recognizes. Under this head come many legal and partial restraints, which, by reason of their legal and partial character, are viewed as not in conflict with the policy of the law, and therefore were, at the time of the passage of the act, legal. For example, traders may lawfully allot themselves exclusive territory, (*Wickens v. Evans*, 4 Car. & P. 359,) or otherwise agree to "equalize" business, (*Collins v. Locke*, L. R. 4 App. Cas. 674,) or to restrain an unreasonable and ruinous competition, (*Mogul Steamship Co. v. McGregor, Gow & Co.*, L. R. [1892] App. Cas. 25.)

The test, always, is whether a given restraint is reasonable or not. Assuming that congress had power to change this, and to make all such restraints and monopolies, in so far as they were not constitutionally protected rights of property, illegal and penal, it is perfectly plain that congress meant no such thing. If congress had power to make it illegal and penal for a small trader engaged in local interstate commerce to sell out his little business, and to bind himself not to renew it within 20 miles, congress certainly did not intend to do anything of the sort. Nor did congress intend to interfere at all with most of those restraints and monopolies which in the statutes have always been regarded as right and legal, such, for example, as an agreement of the publisher of an edition de luxe to limit the number of copies; or of an author not to publish a rival text-book; or of a partner, to give his exclusive attention to firm business; or of the owner of a trade secret, looking to the preservation of his secret. These and many other similar agreements would be prohibited by this statute if the broad construction were given to the term, "restraint of trade or commerce." It is patent that congress meant nothing of the sort.

It is plain, then, that congress did not intend to cover all restraints and monopolies of interstate trade. Certain restraints and monopolies must be eliminated as being vested rights; and others, as plainly outside the intention of congress. But how is the line of elimination to be drawn? Not arbitrarily, by the courts, but by rules of law, if at all. The only rules of law that can be invoked are the foregoing rules of interpretation, limiting the statute (a) to contractual restraint and monopoly; and, (b) further, to such contractual restraint and monopoly as were already illegal or criminal at the common law.

THIS CONSTRUCTION ADOPTED IN THE LEGISLATION OF MANY STATES.

The act in question is the result of a popular agitation against the development of the modern "trust,"—an agitation which, since 1888, has led to the passage of similar statutes in many states. It is proper to refer to these statutes, as throwing light upon the probable intent of congress in the passage of this act. *Platt v. Railroad Co.*, 99 U. S. 48. An examination of these statutes shows that they are in the main declaratory of the common law. As we have seen, at common law, contracts to limit competition, unduly raise prices, or reduce production, were illegal. These statutes, in terms, simply extend this principle to combinations or conspiracies to make such contracts, the object being to get around the practical difficulty of proving an actual binding contract to do these acts. In view of the secrecy surrounding "trusts," this difficulty had become a great obstacle in the way of justice. These acts simply make illegal any combination organized for the purpose of making such contracts, whether the contracts are completed or not. But in almost all it is expressly stated or implied that it is combinations proceeding by way of contract, not combinations using fraud or violence, that are within the contemplation of these statutes. The conspiracies to commit frauds or crimes were punishable by the common law of such states. The statutes referred to are: Laws Ala. 1890-1891, c. 202; Laws Ill. 1891, p. 206; Laws Iowa, 1890, c. 28; Laws Kan. 1889, c. 257; Laws La. 1890, No. 86; Laws Me. 1889, c. 266; Laws Mich. 1889, c. 225; Laws Minn. 1891, c. 10; Laws Miss. 1890, c. 36; Laws Neb. 1889, c. 69; Laws N. Y. 1892, c. 688, § 7; Laws N. C. 1889, c. 374; Laws S. D. 1890, c. 154; Laws Tenn. 1891, c. 218; Laws Tex. 1889, c. 117.

The act of July 2, 1890, intends, in its concise wording, to accomplish what the above statutes set forth at length, i. e. not to extend the range of contracts already illegal at common law, as in restraint of trade, but to punish combinations aiming to restrain interstate trade by similar contracts.

EXCEPT ON DEFENDANTS' CONSTRUCTION, RANGE OF STATUTE ALMOST UNLIMITED.

It is a general rule of criminal law that one who is engaged in an undertaking unlawful in itself is criminally liable, not only for direct results of his action, but for results naturally flowing therefrom, indirect and un contemplated. If A. joins B. in robbery, and B. uses such violence as to cause death, A. and B. are both liable for murder.

It is another general rule of criminal law that, where persons are guilty of a given offense, they are also guilty of a criminal conspiracy to commit that offense, and that the conspiracy is not merged in the completed offense.

It follows from these two principles that, if two or more persons join in the commission of an act of an intrinsically unlawful character, they are criminally liable—First, for the act which they intend, and which they commit; second, for a conspiracy to commit that act; third, for indirect results; and, fourth, for a conspiracy to commit natural, although unintended, results. It follows that if two or more persons commit an act of murder, robbery, forgery, shop-breaking, store-burning, champerty, or maintenance, which in fact has a natural, although unintended, result of interference with interstate commerce, they are liable criminally for a conspiracy to interfere with interstate commerce, if the statute broadly covers conspiracy merely to interfere with it.

In most serious offenses, more persons than one are involved, and a large proportion of the serious crime, more or less directly, and often quite closely, affects interstate commerce. If, therefore, "restraint" of interstate trade and commerce in this statute means broadly interference with it, it follows that this statute operates to bring within the federal jurisdiction, in the guise of "conspiracy," a very large proportion of all the serious crime within the states.

Furthermore, where congress takes jurisdiction of a given range of crimes, its jurisdiction is exclusive of that of the states. Where it takes jurisdiction, not strictly of the crimes, but of a federal aspect of the crimes, then acts may be punished twice,—once, as a breach of state law; again, as a breach of federal law. It follows, therefore, from the government's theory of this statute, either that this statute has divested the states of jurisdiction of conspiracy in a great field of the criminal law, relating to murders, etc., or else that ordinary offenders are now liable to be punished twice,—once in the state courts, for the completed act, or for conspiracy to commit it; a second time, under this statute, in the federal courts, for conspiracy to commit it.

These singular results of the government's theory of the statute sufficiently condemn that theory. For a similar course of reasoning by the supreme court upon a question of constitutionality, see *U. S. v. Harris*, 106 U. S. 629, 642, at page 643, 1 Sup. Ct. Rep. 601, at pages 612, 613.

QUESTION OF CONSTITUTIONALITY.

THE DEFENDANTS' FOREGOING CONSTRUCTION ESSENTIAL TO CONSTITUTIONALITY, FROM SEVERAL POINTS OF VIEW.

If a federal statute undertakes to include, in one indiscriminate condemnation, classes of acts which congress can constitutionally punish, and classes of acts which congress cannot constitutionally punish, it is unconstitutional and void as to both classes of acts. *U. S. v. Reese*, 92 U. S. 214; *U. S. v. Harris*, 106 U. S. 629, 642, 1 Sup. Ct. Rep. 601; *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. Rep. 656, 763; *Trade-Mark Cases*, 100 U. S. 82; *Virginia Coupon Cases*, 114 U. S. 270, at page 304, 5 Sup. Ct. Rep. 921, 922; *Leloup v. Port of Mobile*, 127 U. S. 647, 8 Sup. Ct. Rep. 1380. "It would certainly be dangerous," say the supreme court, by Waite, C. J., in *U. S. v. Reese*, 92 U. S. 214, at page 221, "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside, and say who could be rightfully detained, and who should be set at large."

In other words, when congress enters a given field of legislation, over which it has partial power, it must specify in its legislation what part of the field it proposes to occupy, and the part so specified must be wholly within its constitutional reach.

It goes without saying that a statute cannot be saved from the operation of this rule by construction, merely by reading into it the words, "this statute to operate so far only as it can constitutionally operate." Such a construction would nullify the rule.

It is true that there may be a federal statute, in part constitutional, in part unconstitutional, of which the constitutional part may stand, while the unconstitutional part falls. It is necessary, however, to the operation of this rule, that the constitutional and the unconstitutional parts be capable of verbal separation, so that each may be read by itself. *Baldwin v. Franks*, 120 U. S. 678, at page 686, 7 Sup. Ct. Rep. 656, 763; *U. S. v. Reese*, 92 U. S. 214, at page 221.

At the date of the passage of this act, there existed numerous vested rights, of lawful restraint and monopoly, constitutionally protected,—among them, patent, copyright, and other monopoly rights, and their derivative rights of lawful restraint, particularly referred to above,—all requiring for their existence an interstate operation. The letter of the statute covers all these rights. If, when properly construed by the rules of statutory interpretation, it still covers them, it is unconstitutional and void. It cannot be construed down, as we have seen, by the easy device of reading into it the words, "this act to operate only so far as it is constitutional." Some other narrowing rule of construction must be invoked to save it. But the only rules which can

be invoked are the rules suggested above. The only way, therefore, to make this statute constitutional, is to read its words and phrases as including, in their civil aspect, only acts already unlawful in the states, and, in their criminal aspect, only acts already criminal in the states.

The defendants' counsel have no call to argue that the statute is constitutional. But it is familiar law that, when a statute lacks literal sufficiency merely by being terse and elliptical in expression, the courts may read words into it to narrow or enlarge it. *U. S. v. Kirby*, 7 Wall. 482; *U. S. v. Carll*, 105 U. S. 611, cited above. And a statute ought, of course, if possible, to be so construed as to make it constitutional. *Presser v. State of Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 589; *Parsons v. Bedford*, 3 Pet. 433; *U. S. v. Coombs*, 12 Pet. 72; *Brewer v. Blougher*, 14 Pet. 178; *Supervisors v. Brogden*, 112 U. S. 261, 5 Sup. Ct. Rep. 125; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235, 6 Sup. Ct. Rep. 1038.

The defendants' foregoing construction is essential to constitutionality from another standpoint.

Throwing out of consideration, for the moment, those lawful monopolies and restraints which are vested, and constitutionally protected, there are, we have seen, numberless lawful restraints of trade, necessarily involving interstate trade and commerce, all of which it is absurd to suppose that congress intended to cut off. To interpret the statute as cutting them off would be to make a new statute. If, among those restraints, not all of which congress intended to cut off, the statute provides no line between those which it does and those which it does not mean to cut off, the statute is unconstitutional for vagueness in undertaking to delegate its legislative powers to the courts. *U. S. v. Cruikshank*, cited above.

From still another point of view the statute, except upon the defendants' foregoing construction of it, is unconstitutional.

Congress cannot punish all acts of interference with interstate commerce, however remote. It is only acts having a proximate relation to a head of constitutional power that congress can take cognizance of. But, as has been stated, the line between federal and state power is in almost every direction an arbitrary line. The question of proximity or remoteness to the federal right is a matter of degree. This is peculiarly true in interstate commerce. The line between the federal and the state jurisdiction is an arbitrary and fluctuating line, and the highest courts are constantly divided upon it. The line fixed by the breaking of an original package, although a practical line, is a purely arbitrary line. The constitutional power of congressional legislation in interstate commerce begins with a vanishing line which ends in state commerce. At some point upon that line, in each class of transactions, must be fixed an arbitrary point between interstate and state commerce. Technical "restraint of trade" and "monopoly," in the unfavorable senses of those words, would be within the interstate power of congress; but not all interference with interstate trade or commerce would be within the constitutional power of congress, because it would be at the state end of the vanishing line. If the statute, when properly construed, itself provides no way of fixing the field within which it proposes to act, but undertakes to cover all interference with interstate commerce, then it covers such interference as is too remote for federal action, as well as that which is proximate. It embraces, therefore, with matters which congress can constitutionally deal with, matters which it cannot constitutionally deal with, and therefore follows under the constitutional principle now being discussed. The statute can be interpreted out of vagueness, and too great generality of reach, into constitutionality, only by restricting it to technical, contractual restraint of trade, and technical monopoly, in the unfavorable senses of those words.

It is further essential to the constitutionality of the statute that there be read into it the requirement of a specific intent to invade interstate commerce, as such, and knowledge of its character as interstate commerce, in so far as such knowledge is essential to this conscious intent.

It has been stated above that, by the ordinary rules of the criminal law, persons are criminally liable, not only for direct, but for indirect, and even un contemplated, natural results of their action, and also for conspiracy to commit such indirect and un contemplated results. A mere provision in a statute, or allegation in an indictment, therefore, of a conspiracy to do a certain thing,

does not necessarily require or imply actual knowledge, or a conscious, specific intent to do that particular thing. If two men, engaged in a plan of robbery, commit murder, without intending to commit it, and murder is a natural, although un contemplated, result of their plan of robbery, they are guilty, within the meaning of the law, of a conspiracy to commit murder. This statute, therefore, taken literally, covers all cases where persons (at least when engaged in an act *malum in se*) reach, without knowing it, and without contemplating it, a result which amounts to restraint or monopoly of interstate trade or commerce, in whatever sense "restraint" and "monopoly" be taken. But most acts of serious wrongdoing are committed by two or more participants, and a large proportion of the serious crime more or less closely affects interstate commerce. It follows, therefore, that unless there be read into the statute a requirement of a specific intent of discrimination or attack upon federal rights, as such, every instance of robbery, burglary, murder, theft, shop-burning, store-breaking, champerty, or other act *malum in se*, in which there are two or more participants, which has the result, although un contemplated, of restraining or monopolizing interstate commerce, is brought, by the act within the federal jurisdiction, under the guise of conspiracy, since every such joint act implies a conspiracy to commit it, and the conspiracy is not merged in the completed act. Without the requirement of intent and knowledge, therefore, a large proportion of the serious crime of the country may be punished under this statute, and possibly is brought by it within the exclusive jurisdiction of the federal courts. Such a range of the statute would be enormously extended by the government's theory of the loose meaning of the phrase, "restraint of trade," and "monopoly." Under that meaning, and under the principles stated above, no limits could be set to the extension of federal criminal jurisprudence effected by this act.

This reasoning forces us to the conclusion, either that the statute is unconstitutional, or that a requirement of knowledge and specific intent to invade federal rights must be read into it. *U. S. v. Harris*, 106 U. S. 629, 1 Sup. Ct. Rep. 601; *U. S. v. Fox*, 94 U. S. 315; *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35; *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. Rep. 617.

In order to save the act in question, we must then read "conspiracies in restraint of trade," etc., as if written, "conspiracies to restrain trade," etc., making an essential element of the crime an intention on the part of the criminal to restrain interstate commerce. It is evident that such was the intention of congress. Section 2 of the act reads, "conspiracy to monopolize," showing that an intention to monopolize is an element of the crime. It is not probable that congress intended to give a wider scope to section 1. The natural expression would be "conspiracy to restrain." The fact that congress has departed from this natural form of words, and has used the term, "conspiracy in restraint of trade," etc., is accounted for by the reasoning of the first part of this brief, namely, that the words, "in restraint of trade," were used because of their well-known technical meaning.

ASIDE FROM QUESTION OF CONSTITUTIONALITY, KNOWLEDGE ESSENTIAL.

A fifth limitation must be put upon the words of the statute. In terms, it covers acts of the character described, whether done with guilty knowledge or not. There are, indeed, petty police offenses in which a knowledge of the facts is not an essential to criminality, and occasionally a statute creating a serious crime has been held to dispense with the requirement of knowledge. Cases of the latter class, however, are few and exceptional, and have been made, as a rule, against a strong dissent, and against the weight of authority upon similar statutes; and invariably, where the requirement of guilty knowledge is held to be dispensed with by a statute, the decision is rested, not upon any principle of criminal law as to dispensing with knowledge, but upon a mere construction of the particular statute, in view of supposed requirements of public policy, and in all cases upon the feasibility, in the particular matter in question, of obtaining all necessary knowledge, and the propriety, therefore, in that particular field of action, of imposing upon one about to act the responsibility of inquiring into the facts, and of acting at his peril. See, in illustration of this, the decisions and the opinions in *Com. v. Mash*, 7 Metc. (Mass.) 472, as compared with *Squire v. State*, 46 Ind.

467, and *Reg. v. Tolson*, 23 Q. B. Div. 168, 16 Cox, Crim. Cas. 629. See, also, *Reg. v. Bishop*, 5 Q. B. Div. 259, 14 Cox, Crim. Cas. 404, and the curious series of recent English cases upon the subject of knowledge of age in abduction. *Reg. v. Olifier*, 10 Cox, Crim. Cas. 402; *Reg. v. Hibbert*, L. R. 1 Cr. Cas. 184, 11 Cox, Crim. Cas. 246; *Reg. v. Mycock*, 12 Cox, Crim. Cas. 28; *Reg. v. Prince*, L. R. 2 Cr. Cas. 154, 13 Cox, Crim. Cas. 138; *Reg. v. Packer*, 16 Cox, Crim. Cas. 57.

The opinions, and the conflicts of opinion, in most of the cases cited above, afford a striking illustration of the subtleties into which one is necessarily drawn in contending for an exceptional dispensation from the general common-law requirement of at least constructive knowledge of fact. The foregoing cases (which are all exceptional, and avowedly stand upon highly exceptional grounds) only serve to emphasize the fact of the general, and almost universal, requirement in the criminal law of knowledge of the facts. Opinions in support of a dispensation with the requirement of knowledge are invariably apologetic in language.

To the effect that the common law (unless possibly in certain forms of nuisance, *Rex v. Medley*, 6 Car. & P. 292; *Reg. v. Stephens*, L. R. 1 Q. B. 702) invariably requires knowledge of the facts as an essential of guilt, and that in statute offenses, whether adoptive of common-law offenses, or creative of new crimes, a requirement of knowledge is to be read into the statute, if not there, see *U. S. v. Carll*, 105 U. S. 611; *Com. v. Filburn*, 119 Mass. 297, (cited with approval in *U. S. v. Carll*, cited above;) *Com. v. Stebbins*, 8 Gray, 492; *Reg. v. Twose*, 14 Cox, Crim. Cas. 327; *Rex v. Hall*, 3 Car. & P. 409; *Levet's Case*, 1 Hale, P. C. 42; *Reg. v. Langford*, Car. & M. 602, 605.

This statute was never intended to punish persons who join together, under an innocent mistake of fact, to enforce what they believe to be a rightful exclusive title in them. If the purchaser of an alleged trade secret believes it to be in fact a secret, and believes that an executor or trustee who sold it to him had a right to sell it, and, if he attempts thereunder to restrain trade by a limiting contract, or to monopolize it, he is not within this statute, even though mistaken in his facts. If he is within it, then an indictment will lie against every patentee who attempts to enforce his patent, if in fact his patent is invalid through priority or some other fact unknown to him; and no patentee can attempt to enforce his rights except at his peril, and at the risk of an infamous punishment in case he turns out to have been ignorant of some prior use, which he could not by the strictest diligence have ascertained, or have supposed to have been made.

It is to be observed that if the knowledge required under the statute now in question is almost necessarily a knowledge of a conclusion of fact, or of mingled law and fact, namely, a knowledge of right and title, or of a lack of right and title, knowledge of this character comes as fully within the general rule as to knowledge as does knowledge of pure and simple fact. In *Com. v. Stebbins*, *Reg. v. Twose*, *Rex v. Hall*, *Levet's Case*, all cited immediately above, the matter of "fact" was a conclusion of law and fact; namely, a question of title.

It is to be further observed that the knowledge required is not knowledge that the defendants are combining and acting in concert, but knowledge of the facts which make their combining or acting in concert penal. Persons acting in concert, but acting innocently, by reason of ignorance of facts, necessarily know that they are acting in concert; but that is not the knowledge which the law requires.

Knowledge, furthermore, under this statute, must comprise knowledge, also, that the trade or commerce proposed to be restrained or monopolized is of a lawful character, and lawful in the hands of the rivals who carry it on, or are to carry it on, and knowledge that the commerce to be interfered with exists, or is to exist.

ON GENERAL PRINCIPLES, WRONGFUL INTENT ESSENTIAL.

One thing more must be read into this statute; namely, intent to fix, control or raise prices to the injury of the public, or in some way to injure or defraud the public.

In the case of the monopoly counts, the requirement would seem to flow from the very meaning of the word "monopolize," for that word, as used in the criminal law, it would seem, involves a wrongful intent, just as "uttering."

As to the requirement of an intent to injure and defraud the public, and by raising of prices, in all trade offenses, see authorities.

Indeed, the requirement of a guilty intent, or, as it is technically characterized, the "mens rea," in all serious offenses, (not of a highly exceptional character, like *Rex v. Ogden*, 6 Car. & P. 631; *Reynolds v. U. S.*, 98 U. S. 145; *Reg. v. Downes*, 13 Cox, Crim. Cas. 111.) is so nearly universal, whether specified in a statute publishing the offense or not, that it is to be read, as a matter of course, into every statute, unless there are highly exceptional grounds of public policy, in a particular offense, for dispensing with it.

AN INTENDING BENEFICIARY ESSENTIAL.

It is a further essential, under the statute, that the contemplated restraint should be a restraint operating and intended to operate, by the very terms and operation of the restraint, to the benefit of some specific person or persons. The statute punishes, not interference with trade, but a "restraint" of trade, and "restraint of trade," ex definitione, implies a conscious beneficiary. So the crime of monopoly implies a person who is consciously to monopolize. He does not monopolize who exterminates trade, but only he who contractually gathers trade into his own hands, or into the hands of some one in concert with him. There can be no monopolizing without an intentional monopolizee.

SUMMARY OF THE ESSENTIALS OF THE CRIME.

The statute, when properly construed, requires, therefore, in conspiracy under it:

1. That the trade or commerce aimed at be technically interstate commerce.
2. That the persons or things dealt with consciously be dealt with in their federal, and not in their state, aspect.
3. That a contemplated restraint or monopoly be a contractual restraint or monopoly; that is, that the conspiracy must consist in contract, or aim at the making or the enforcement or the furtherance of contracts.
4. That the contemplated restraint or monopoly be a restraint or monopoly, excessive in degree, and unlawful at the common law.
5. That the trade or commerce proposed to be restrained or monopolized be a lawful trade or commerce.
6. That the defendants have (a) knowledge that they or their privies have no patent or other exclusive title or right to the trade or commerce proposed to be restrained or monopolized; (b) knowledge that the trade or commerce proposed to be restrained or monopolized is unlawful, and lawful to those carrying it on in the given instance; (c) knowledge that the commerce in question is interstate commerce.
7. An intent, by unduly raising prices or otherwise, to injure and defraud the public by the contemplated restraint or monopoly, and an intent to restrain interstate commerce, as such.
8. An intending and conscious beneficiary of the contemplated restraint or monopoly.

THE INDICTMENT.

The indictment avers none of the essentials of crime above set forth, and violates every one of the rules of pleading above cited.

1. The alleged contemplated restraint and monopoly was not contractual restraint or monopoly, but a mere rude and vulgar attack upon trade or traders by force, fraud, libel, and slander.

2. No count sets forth such means of effecting the proposed conspiracy as, if carried out, would be, in any reading of the statute, a restraint or monopoly of interstate trade or commerce. Some of the counts set forth no means at all, or set forth means so vaguely and generally as to be patently

bad in this respect. Those counts which undertake to set forth means entirely fail to bring the persons, matters, and things alleged to have been proposed to be dealt with within the definition of "interstate commerce," or its subjects or instruments, or within the federal or interstate aspect of those persons, matters, or things, as distinguished from their state aspect. It does not follow, because one is engaged in interstate commerce, that every attack upon him, or upon any part of his business, is an attack upon interstate commerce. The attack may be upon him in his aspect as a subject of the state, and upon his matters or things only in so far as they are matters of mere state commerce. The indictment assumes that a person engaged in interstate commerce is exclusively engaged in it, and has no other aspect than that of a person engaged in interstate commerce, and that an interference with him, or with any part of his matters or things, is an interference with interstate commerce. Assuming it to be true that interferences with a person, or with matters or things, concerned in local commerce, may, by their necessary connection with certain interstate commerce, be proximate attacks upon interstate commerce, the connection must be established by specific allegations of the indictment. It is not to be inferred. The indictment in this respect is entirely based upon a fallacy upon which the statutes and indictments were based in *U. S. v. Cruikshank*, *U. S. v. Harris*, and *U. S. v. Fox*; namely, the fallacy that the having a federal aspect brings a person and his matters and things within federal protection in all their aspects.

3. It does not appear by any count of the indictment but that the defendants had, or were acting under some one who had, an exclusive right to all trade and commerce, or all interstate trade and commerce, among the states, at least as against the alleged rivals. The defendants may have had a patent covering the cash registers, if any, in which the corporations named as proposed to be attached dealt, if they did deal, or the defendants, or some one privy with them, may have had exclusive patent license for interstate trade in such registers from the various corporations, or from a patentee under whom all claimed title, or the defendants, or some one privy with them, may have bought out a good will or a trade secret from these corporations, or from some one under whom all parties claimed, covering the cash registers, if any, dealt in by said corporations. An indictment in the same terms as this indictment would lie to-day against every patentee in the country, and his agents; and against Emerson's publisher and legatees; against every one who has bought out a local good will; against every owner of a trade-mark; in fact, against everybody who owns anything which is the subject of interstate commerce.

4. It is not averred that the commerce, if any, being carried on, or proposed to be carried on, by said corporations, other than the National Company, was a lawful commerce. It may have been in violation of a limited and lawful contract made by them, of restraint, or of division of territory.

5. The interstate commerce (an essential of this crime, and a jurisdictional essential) is alleged only as a conclusion of law. It leaves it for the prosecutor, and not for the court, to decide whether what the prosecutor considers interstate commerce is "interstate commerce," and of the statute's character, or not. But that "is a question of law, to be decided by the court, not the prosecutor." *Waite, C. J., U. S. v. Cruikshank*, cited above.

6. It is in no count alleged, even as a conclusion of law, that the "trade and commerce * * * between and among the several states" alleged to have been aimed at (granting that it was such) was within that limited class of commerce among the several states which alone the statute covers. As has been suggested above, the phrase, "commerce among the several states," as an expression of language, accurately includes a great deal of commerce which is not within the meaning of the phrase, as used in the constitution, and is even less within the still more restricted meaning of the phrase in the statute. The indictment, therefore, runs counter, in this respect, to the rule of pleading that where a statute covers, in terms, a whole class of things, but really intends only a subdivision of the class, the indictment must bring the things which it alleges within the subdivision. The only way to allege interstate commerce in an indictment is the way attempted in the

first four counts of an indictment previously found in this district against these defendants, (No. 1,209,) viz. by describing in detail the operations supposed to constitute interstate commerce. In that former indictment the pleader was in this particular on the right track, although his pleaded facts were insufficient to make out interstate commerce.

It is not open to the government to contend that the court can judicially know that there was, or was proposed to be, a commerce "among the several states," of the statutory character, in "cash registers." There are articles in which the court may, perhaps, be said to know, as matter of law, that there is at all times such commerce. With "cash registers" it is different. It is very doubtful if the court can be said to know what a "cash register" is. It is certainly difficult to see how the court can know in what sense the term is used in this indictment. Until lately the only meaning which the phrase would suggest is that of an account book for cash entries. Now, in so far as the indictment may be deemed to refer to books of cash entry, the court cannot know that there was at the time in question interstate commerce, or expected or proposed interstate commerce. Blank cash books may be all manufactured and sold within the legal limits of state commerce. The absence of a specific allegation of interstate commerce, therefore, in this meaning of the term "cash register," would be fatal. If the court should take the expression "cash register" in the indictment in a broader sense, as including both account books and also mechanical contrivances, then the indictment, as will be more particularly contended below, under an appropriate head of this brief, would fail, for indefiniteness; for the defendants ought certainly to be apprised whether it is a commerce in machinery, or a commerce in blank books, that they are charged with attacking. If the court should find, upon the face of the indictment, that the "cash registers" referred to in the indictment are the mechanical devices recently introduced into the market, the court will surely apply, as judicial knowledge, not a fraction, but the whole, of its actual knowledge, and will judicially know that these new mechanical devices profess to exist under letters patent; that the different manufacturers claim under patent rights; and that the questions of free or restricted commerce, and of monopoly or no monopoly, are mere questions of patent controversy,—a field of controversy never contemplated by the act of 1890.

If an indictment were to allege, on the part of the Bell Telephone Company and its officers and agents, a conspiracy to restrain the trade and commerce of all other persons, and to monopolize to themselves and their company the trade and commerce in "Bell telephones," would not the court, if it applied to the indictment judicial knowledge that there are such telephones, and that there is commerce of the statutory character in them, also apply judicial knowledge of the fact of a lawful monopoly, and an exclusive right to commerce in them, or at least a bona fide claim thereto, not to be tried under a penal statute?

These counts present also the defect (which exists in the other counts) of failing to allege that the commerce was proposed to be continued. It is future transactions which a conspiracy contemplates, and there is no allegation that the commerce of these counts was proposed to be continued from and after the time of the alleged conspiracy. It is fatal to a conspiracy indictment that the object of the conspiracy may have been a myth.

7. No count of the indictment has any averment of knowledge or intent. If the offense necessarily involve knowledge and intent, they must be alleged. An indictment, for example, for conspiracy to commit burglary, must aver a conspiracy, not merely to break and enter a dwelling house in the nighttime, but a conspiracy to break and enter with intent to steal.

8. No count alleges a proposed contractual beneficiary of the contemplated restraint or monopoly. It does not appear that the defendants were in the business, or had any control of the business, or that the National Cash Register company was a party to the conspiracy, or knew of it, or would consent to profit by it. It is not made a defendant, although the statute contemplates corporations. It stands, upon the restraint counts, (counts 1 and 2,) as a mere unconscious, passive, proposed beneficiary, without whose acceptance and co-operation and indorsement there can be no restraint. It

is not alleged that the defendants conspired merely to extinguish the trade of the other corporations. It appears that they combined, if at all, merely to subordinate their trade to that of the National Company; but, in the absence of averments bringing in the National Company as a willing beneficiary, this restraint would be impossible. The averments of the restraint counts are therefore, in this respect, imperfect, absurd, and impossible.

The crime of monopoly implies a conscious monopolizing. A conspiracy of several men, without any knowledge, to drive all the trade in town into my shop, out of love for me, or out of hatred of my rivals, but without my knowledge, and without benefit to the conspirators, is an unlawful conspiracy, under state laws, against the right of my neighbor to live a peaceful life, but it is not a conspiracy to monopolize. It is not averred here that the defendants were in a position to or expected or intended to monopolize into their own personal pockets. There is a faint hint that the intended monopolizer was the National Company, but only a hint.

Acceptance of a benefit may indeed sometimes be presumed by law; but a corporation, any more than an individual, will not be presumed to have accepted itself into a criminal combination.

It is a universal rule, as to those crimes which consist in contract, or combination, or meeting of minds, that there must be, not a mere fictitious appearance of a meeting of minds, but an actual contract, or other meeting of minds, as in civil transactions.

Where the statute speaks of monopolizing "a part of the trade," it must mean the whole of a specific part; for while the word "monopolize" is not to be taken in a mathematically exact sense, requiring that a monopolist of flour should have, or intend to have, every teaspoonful of flour in the United States, it does mean a substantial control of a great part of any one given article, or enough to enable him to dictate to the market. The monopoly alleged in counts 5 to 11 and 15 to 18 is merely a monopoly of the business of five corporations named. It does not appear how much business they did, or what proportion it bore to the whole business of the country in cash registers. It is consistent with the indictment that it was extremely trifling, and that to secure the whole of it would not constitute the offense of monopolizing. Men cannot be indicted for combining to monopolize wheat by a mere averment that they combined to monopolize certain wheat when owned by A. B. Nothing essential is to be assumed, in a criminal case. The names of the rival companies sound well, but the court does not know that they did any appreciable amount of business. The defendants, for all that appears in the indictment, are Mrs. Partingtons attempting to sweep back the Atlantic ocean. It should have been shown that the monopolizing the business of the alleged rival companies would have amounted to a monopolizing of the business in cash registers. Moreover, upon the language of these counts, a monopoly may well have been impossible. There is no averment that the National Cash Register Company was to be interfered with, and, for all that appears, it was not known to the transaction. It may well have been entirely vain for the defendants, if they left the National Company free, to attempt to monopolize the cash register business, even if they monopolized the business of the other companies. Perhaps it had 99 per cent. of the whole business. If so, without its co-operation, monopoly would be impossible.

9. This is a patent suit. Congress never intended, under this statute, to try patent controversies to a jury, in a criminal court. An indictment might undoubtedly be so drawn as properly to bring into a criminal case a plain and simple issue, to the effect that the defendants claimed under a patent, but had no pretense, color, or show of a patent, and held no letters patent, and no license under any letters patent. But here some of the counts aver that the defendants justify under letters patent. There is no averment that the patent claim is not valid, and the question raised by these counts must therefore resolve itself into a question of validity, or the construction, or both, of the letters patent. These counts, therefore, seem calculated to launch the court into a controversy before a jury over a complicated tissue of patent questions, which might occupy a long time in trial. This was never intended. When patents appear in an indictment, as an invalid pretense or justification, it

should be alleged that the claim set up under them is a mere sham claim, and only colorable.

10. The indictment is bad for vagueness and uncertainty. In no count does it approximate to the particularity and certainty required by the courts of the United States, and emphasized particularly in *U. S. v. Simmonds*, 96 U. S. 360; *U. S. v. Cruikshank*, cited above.

In some of the counts the defendants are simply charged with conspiring to restrain or to monopolize certain commerce. Among what states it was, by whom carried on, or proposed to be carried on, or where or how to be restrained or monopolized, these counts do not disclose. The other counts specify the trade or commerce as being carried on by four corporations named, but where, and among what states, these counts do not disclose. Nor does the character of the "cash registers" appear. Were they machines, or tally boards, or books? Tested by the requirement that the defendants must be sufficiently apprised of the details of the charge against them to enable them to prepare for trial, all the contents are bad. In *U. S. v. Simmonds*, cited above, one was charged having "caused and procured" a still to be used. It was held that he was entitled, under the requirements of criminal pleading, to know whom he was charged with having caused or procured to use the still.

10. It is not averred in any count to what extent trade was carried on. Can the court assume, in a criminal case, an appreciable amount of commerce of the statutory character?

PUTNAM, Circuit Judge. I do not think there is any constitutional question in this case upon any view of this statute, or upon the face of the indictment. The right of free commerce granted by the constitution (*Crandall v. Nevada*, 6 Wall. 35, and the Case of State Freight Tax, 15 Wall. 232) permits broad legislation; and in no sense is this statute as broad as the Revised Statutes (section 5508) on the principle of construction applied to the latter in *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35. See *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. Rep. 617. There may be practical difficulties in applying the statute in such way as to prevent conflicts with state jurisdictions, but these can only arise on the development of the facts at the trial of a particular case, and even then the court will have the guidance of the supreme court in *Re Coy*, 127 U. S. 731, 8 Sup. Ct. Rep. 1263; *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. Rep. 47; and *In re Green*, 134 U. S. 377, 10 Sup. Ct. Rep. 586. Those cases show that there need not necessarily be a conflict of jurisdiction.

This statute is not one of the class where it is always sufficient to declare in the words of the enactment, as it does not set out all the elements of a crime. A contract or combination in restraint of trade may be not only not illegal, but praiseworthy; as, where parties attempt to engross the market by furnishing the best goods, or the cheapest. So that ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market. And by the well-settled rules of pleading it is not sufficient to allege the means in general language, but, if it is claimed that the means used are illegal, enough must be set out to enable the court to see that they are so, and to enable the defense to properly prepare to meet the charge made against it.

I regard the rule laid down by the supreme court in *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. Rep. 571, as applying to this case; and I

think the case of *U. S. v. Simmonds*, 96 U. S. 360, is easily distinguished. If it is not, the later case will, of course, control. In reference to the suggestion of the counsel for the United States, as to cases at common law alleging conspiracy to prevent a man from pursuing his trade, it is sufficient to say that to conspire to prevent a man from pursuing a trade which he is entitled to pursue is in itself illegal. But the case at bar is not at common law, and the proceedings under this statute are peculiar to the statute. I think the rules laid down in *U. S. v. Hess* distinguish this indictment on this point from all the cases and principles of law relied on by the United States. The allegations of what was done in pursuance of the alleged conspiracy are under this particular statute irrelevant, and cannot be laid hold of to enlarge the necessary allegations of the indictment, and are of no avail. I think it was so conceded at the argument. If not, there is no question about the law. The foregoing considerations dispose of counts 1, 2, 3, 6, 7, 8, 11, 12, 13, 15, 16, and 17.

That the means are alleged with "reasonable precision" in the remaining counts, appears from the practical application of the rules of pleading appropriate to this case made in *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35. Some of the allegations in each count may be insufficient, but these are only surplusage.

Counts 14 and 18 seem sufficient under the second section of the statute, as will appear from what I have to say hereafter. The remaining counts, 4, 5, 9, and 10, are laid under the first section. Counts 4 and 9 allege an intent to hinder and prevent all persons and corporations, except the corporation controlled by the defendants, from engaging in the trade and commerce described in the indictment, while counts 5 and 10 only allege a purpose to destroy the competition of the four corporations named, without setting out any purpose of engrossing or monopolizing the business as a whole, or any like purpose.

The court does not feel at all embarrassed by the use of the words "trade or commerce." The word "commerce" is undoubtedly, in its usual sense, a larger word than "trade," in its usual sense. Sometimes "commerce" is used to embrace less than "trade," and sometimes "trade" is used to embrace as much as "commerce." They are, in the judgment of the court, in this statute synonymous. The court is well aware of the general rule which has been several times (twice certainly) laid down by the supreme court of the United States, that in construing a statute every word must have its effect, and the consequent presumption that the statute does not use two different words for the same purpose; but this rule has its limitations, and it is a constant practice for the legislature to use synonyms. A word is used which it is thought does not perhaps quite convey the idea which the legislature intends, and it takes another word, which perhaps has to some a little different meaning, without intending to more than make strong the purpose of the expression in the statute.

In the legislation of congress analogous to this under consideration there is a marked case of the use of synonyms. Rev. St. § 5438,

uses the words "false, fictitious, or fraudulent;" then the words "any false bill, receipt, voucher;" then the words "agreement, combination, or conspiracy;" then the words "charge, possession, custody, or control," mainly synonyms; while section 5440 uses simply the word "conspire." There would be no question that the word "conspire," in section 5440, means all that the three corresponding synonyms, "agreement, combination, or conspiracy," mean in section 5438. Rather as a matter of curiosity than because they particularly impress my mind, I have taken off some other instances. The Massachusetts statute cited in *U. S. v. Britton*, 107 U. S. 670, 2 Sup. Ct. Rep. 512, uses the words "secular labor, business, or employment." The words "false, forged, and counterfeited" are used over and over again in *U. S. v. Howell*, 11 Wall. 436, 437; "peddler and hawker" are in constant use in criminal law; "drinking house or tippling house" is of frequent use in the statutes; so are "goods and chattels." These are all referred to in Bishop on Statutory Crimes as synonymous. There is also the very special case where the criminal statute contained the words "ram, ewe, sheep, and lamb;" and it was held in *Reg. v. McCulley*, 2 Moody, Cr. Cas. 34, that the word "sheep" covered the two preceding words, and they might be rejected as surplusage. Sutherland on Statutory Construction says that words which are meaningless have sometimes been rejected as redundant or surplusage. So in this statute I think the words "trade or commerce" mean substantially the same thing. But the use of the word "trade" nevertheless is significant. In my judgment, it was probably used because it was a part of the common-law expression, "in restraint of trade," as has been carefully pointed out by the counsel for the defense. This has become a fixed, well-known, common-law expression; and by the rule of interpretation as given again in Sutherland on Statutory Construction (section 253) it has been here used in the sense in which it has been used generally in the law. And these words, "in restraint of trade," lead up directly to what I think is the true construction of this statute on this point.

I think it is useful to analyze the statute. Separating it into parts, we have—First, contract in restraint of trade; second, combination in restraint of trade; and, third, conspiracy in restraint of trade. There can be no question that the second and third parts, as thus put, receive color from the first. Moreover, it is important to note the rule that this whole statute must be taken together. The second section is limited by its terms to monopolies, and evidently has as its basis the engrossing or controlling of the market. The first section is undoubtedly in *pari materia*, and so has as its basis the engrossing or controlling of the market, or of lines of trade. The sixth section also leads in the same direction, because it provides for the forfeiture of property acquired pursuant to the conspiracy. Undoubtedly the word "conspiracy" in that section has reference to the same subject-matter as in the first. If the intention of the statute was that claimed by the United States, I think the natural phraseology would have been "to injure trade," "to restrain trade."

We are now at the point where the paths separate. Careless or inapt construction of the statute as bearing on this case, while it may seem to create but a small divergence here, will, if followed out logically, extend into very large fields; because, if the proposition made by the United States is taken with its full force, the inevitable result will be that the federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, by strikes, boycotts, and by every method of interference by way of violence or intimidation. It is not to be presumed that congress intended thus to extend the jurisdiction of the courts of the United States without very clear language. Such language I do not find in the statute. Therefore I conclude that there must be alleged in the indictment that there was a purpose to restrain trade as implied in the common-law expression, "contract in restraint of trade," analogous to the word "monopolize" in the second section. I think this is the basis of the statute. It must appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market, and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise.

Something has been said in this connection touching the debates in congress. It is apparently settled law that we cannot take the views or purposes expressed in debate as supplying the construction of statutes. In *U. S. v. Union Pac. R. Co.*, 91 U. S. 72-79, and elsewhere, the supreme court has laid down this rule. But this does not at all touch the question whether or not one can gather from the debates in congress, as he can from any other source, the history of the evil which the legislation was intended to remedy. The debates on this point are very instructive; but they fail to point out precisely what incidents or details of the great evil under consideration were to be reached by this legislation.

What I have already said disposes of counts 5 and 10, which do not allege any purpose except to destroy the competition of four corporations named; and they leave for consideration only the counts 4 and 9, which do allege a purpose of engrossing, monopolizing, or grasping the trade in question. Such being the case, acts of violence and intimidation may be alleged as means to accomplish the general purpose. Instead of lying outside of the statute, they may aggravate the offense. They are within the logic and spirit of the statute, which are not to be defeated by distinctions which its letter does not suggest to the ordinary mind. Violence and intimidation are as much within the mischief of the statute as negotiations, contracts, or purchases. The former are often used to compel the latter. This line of reasoning applies to both the first and second sections, and finds a sufficient place for every word in each. I find in all the counts which I allow to stand, allegations of an intent to engross, monopolize, and grasp, and of means clearly unlawful, and adapted to accomplish this intent.

I have examined all the cases which have been cited to me as referring to this statute, and I believe that counsel have cited me every case which has been decided in connection with it; but none of them meet the issue which is raised here. Therefore all the expressions in them supposed to touch this case are to be regarded as mere dicta. The result is that counts 4, 9, 14, and 18 stand, and the others are quashed.

In re GLAENZER et al. In re STERN. In re MARQUAND.

(Circuit Court of Appeals, Second Circuit. May 5, 1893.)

1. CUSTOMS DUTIES — CLASSIFICATION — COLLECTION OF ANTIQUITIES — TARIFF Act Oct. 1, 1890.

Where a known and acknowledged collection of antiquities was purchased abroad, and sent to this country, the fact that a single vase of such collection chanced to be sent with a separate invoice, and without its companions, does not disturb its character as a "collection of antiquities," admissible free of duty under Tariff Act Oct. 1, 1890, par. 524, (26 Stat. 604, c. 1244.)

2. SAME.

Four tapestries, of different sizes, each belonging to a period prior to 1700, and purchased for the purpose of being added to a collection of curiosities and bric-a-brac, constitute a "collection of antiquities," within Tariff Act Oct. 1, 1890, par. 524.

3. SAME.

A single bronze statuette, imported for the purpose of being added to, and becoming a part of, a pre-existing collection, is not a "collection of antiquities," within Tariff Act Oct. 1, 1890, par. 524, but is dutiable at 15 per cent. ad valorem, as statuary wrought by hand, under paragraph 465.

Appeals from the Circuit Court of the United States for the Southern District of New York.

Thomas Greenwood, Asst. U. S. Atty., for collector.

Edwin B. Smith, for appellee G. A. Glaenzer & Co.

W. Wickham Smith, for appellant Louis Stern.

Frederic H. Betts, for appellant Henry G. Marquand.

Before SHIPMAN, Circuit Judge, and TOWNSEND, District Judge.

SHIPMAN, Circuit Judge. These three appeals involve the question of the construction of paragraph 524 in the free list of the tariff act of October 1, 1890, which is as follows:

"Cabinets of old coins and medals, and other collections of antiquities. But the term 'antiquities,' as used in this act, shall include only such articles as are suitable for souvenirs or cabinet collections, and which shall have been produced at any period prior to the year seventeen hundred."

The facts in each of the cases are as follows:

In May, 1890, Mr. Glaenger, as agent of Mr. George A. Baker, who has a collection of antique Chinese porcelain in his house in New York city, purchased in Paris, among other things, an entire collection of Chinese curios, which were to be shipped to this country for Mr. Baker, and to be added to the articles which he already possessed. The vendor shipped a portion of the collection at one time, and a portion at another; and for some reason, which did not appear, the article hereinafter mentioned happened to come by itself in November, 1890. It was one of the collection which had been purchased from the same owner, and is a Jade Chinese vase, about 12 inches high, of the invoiced value of 2,000 francs, the product of a period prior to 1700, and suitable for a cabinet collection. The vase became a part of Mr. Baker's collection. The collector assessed upon it a duty of 45 per cent., as a manufacture of metal not otherwise provided for, under paragraph 215 of the tariff act of October 1, 1890. The importer protested that the article was upon the free list, by virtue of paragraph 524. The board of general appraisers reversed the action of the collector, and their decision was sustained by the circuit court. From the latter judgment the United States appealed to this court.

In May, 1890, Louis Stern, of New York, was traveling in Europe, and, among other things, bought two small tapestries, each about 2 feet in width by 5 feet in length, and two large tapestries, of 12 by 21 feet, each of which belonged to a period prior to 1700. They were bought for the purpose of adding them to a collection of curiosities and bric-a-brac, which he owned, and had in his house in New York. A part of this general collection consisted of antiquities. The articles were miniatures, watches, enamels, and bric-a-brac of all sorts. The two small tapestries were shipped by themselves to this country, and were entered April 27, 1891. The collector assessed them for duty under paragraph 392, as manufactures of wool. The importer protested upon the ground that they were free from duty, under paragraph 524. The board of general appraisers sustained the action of the collector, and the circuit court upon appeal, affirmed the decision of the board of appraisers. 49 Fed. Rep. 730. From the latter judgment the importer has appealed to this court. The two large tapestries were shipped in a different vessel, with other articles belonging to Mr. Stern; were entered in the customhouse by his firm April 28, 1891; and form the subject of another appeal, not now before the court.

On October 13, 1890, Mr. Henry G. Marquand, of New York, imported a bronze statuette of Eros, 10 or 12 inches high, valued at £220 and nearly 2,000 years old. It is suitable for a souvenir or cabinet collection. This antique was bought by Mr. Marquand for his own use, for the purpose of being added to, and it has been added to, a collection of antique bronzes which he has been gathering for years, and now has in his house in New York, designed, among other objects, to advance the knowledge of art and its history, and for the benefit of, and to be enjoyed by, scientists, and those interested in art. The collection of bronzes forms a part

of a large collection of antiquities. The collector assessed the statuette for duty under the provision of paragraph 215 as a manufacture of metal. The importer protested upon the ground that it was free of duty, or, if not free, it was dutiable at 15 per centum ad valorem, as statuary, under paragraph 465 of the tariff act of 1890. The board of general appraisers reversed the action of the collector, and upon appeal the circuit court reversed the decision of the board, and adjudged that the article was dutiable at the rate of 15 per cent. ad valorem, as statuary wrought by hand from metal, and the professional production of a sculptor, under the provision contained in paragraph 465. From this judgment Mr. Marquand appealed to this court.

The facts in the Glaenzer Case demand but little comment. The Glaenzer vase was bought as one of an acknowledged collection, to be sent to this country with the rest of the articles so purchased. For some reason it was actually sent by itself. The mere fact that through forgetfulness, accident, or perhaps for supposed safety, a single member of a known and acknowledged collection of antiquities chances to be sent to this country with a separate invoice, and without its companions, does not destroy the character which it would have had if it had been included in the same invoice with the rest of the article.

The vital facts in the Stern Case do not seem to us to differ in kind from those which control the Glaenzer Case, although they do differ in degree. Stern bought four tapestries, each of which possesses the statutory requisites which constituted the group a collection of antiquities. The fact that these tapestries differed from each other in size is not controlling. The statute which speaks of articles as suitable for cabinet collections does not imply that they must be kept in the drawers of a chest, or in the shelves of a case. A cabinet may be a room set apart and devoted to the preservation of articles of antiquity. Cent. Dict. Each was useless to the purchaser as household furniture in his New York house, and neither was bought or used for that purpose, but each was bought to be added to the purchaser's New York collection of curiosities. Two of them reached this country on April 27, 1891, and the others on the next day. Under the uncontroverted finding of the board of general appraisers and under the testimony of Mr. Stern, we cannot say that these four tapestries, useless for anything but as a collection of antiquities, did not constitute a collection. If Mr. Stern, instead of buying tapestries, had purchased four bronzes, each 2,000 years old, at an expense of \$4,000 or \$5,000, it would hardly be denied that they constituted a collection.

No question can be made that Mr. Marquand's antique bronzes constitute a "collection of antiquities," within the most rigid meaning of the term. It is most attractive to students and scholars, and has an especial educational value, because it illustrates the history of art. The sole question is whether a single article imported for the purpose of being added to, and becoming a part of, a pre-existing collection, is within the terms of paragraph 524. The circuit court answered this question in the negative, upon the ground that the

paragraph related to cabinets of coins and medals, and other collections of antiquities, and not to an importation of a single coin or medal, or other article of antiquity. It is said that this construction makes the paragraph entirely inapplicable to collections of the class which Mr. Marquand is making. Articles of that class must be obtained singly,—one by one,—and cannot be bought in lots. And it is furthermore said that a single article, when imported, becomes, by accretion, part of an existing collection, and therefore falls within the terms of the paragraph. We would willingly yield assent to this reasoning if the paragraph did not indicate the manifest intent of congress that the importation, in order to be duty free, should in fact consist of a collection. It could hardly be contended that an importation of one medal, although designed to become part of a pre-existing cabinet, was, unless in the exceptional circumstances of the Glaenzer Case, an importation of a cabinet. The use of the term, “cabinets of coins or medals,” necessarily presents to the mind the idea of a group or assemblage of specimens; and so, also, the phraseology, “other collections of antiquities,” was apparently intended to refer to an importation of a collection or group, and not to the importation of a single article. Paragraph 712 of the free list is in the following words: “Specimens of natural history, botany, and mineralogy, when imported for cabinets, or as objects of science and not for sale.” This language shows very clearly that single specimens of the named classes, when imported for cabinets, and not for sale, are not dutiable, and also shows that the legislature recognized the distinction between “collections,” and single specimens imported for an existing collection. The absence of this language, or something akin to it, in the clause relating to antiquities, when it was used elsewhere in the free list, is somewhat significant. The judgments of the circuit court in *Re Glaenzer* and in *Re Marquand* are affirmed, and the judgment of the circuit court in *Re Stern* is reversed.

MUDGETT et al. v. THOMAS et al.

(Circuit Court, S. D. Ohio, W. D. April 28, 1893.)

No. 4,421.

PATENTS—REPUDIATION OF LICENSE—ESTOPPEL TO DENY VALIDITY OF PATENT.

If the exclusive licensee, under a license which contains no recitals as to the validity of the patent, repudiates and abandons the license, he is not estopped from setting up the invalidity of the patent, for lack of invention and want of novelty, as a defense to an action for royalties alleged to have become payable subsequent to the repudiation.

At Law. Action by Mudgett & Mudgett against Thomas & Sons and the Thomas Manufacturing Company for royalties under an exclusive license to manufacture under letters patent. Motion to strike out certain defenses. Denied.

Gunckel & Rowe and Parkinson & Parkinson, for complainants.
Bowman & Bowman, for defendants.

SAGE, District Judge. This is an action at law to recover royalties under an exclusive license issued by the plaintiffs to the defendants Thomas & Sons for the manufacture of hay tedders under a patent granted December 18, 1877, to John Mudgett,—one of the plaintiffs. The defendants filed separate answers. In the fifth and sixth defenses, which are substantially the same in both answers, they incorporate, by reference, the second defense, to wit, that the defendants Thomas & Sons executed the license dated January 10, 1882, which purported to grant them the exclusive right to make and sell hay tedders under the plaintiffs' patent, for the royalty set forth in the petition, and that by the terms of the license such tedders were to be sold under the name, "The Mudgett Tedder." That said contract did not oblige them to make or sell said tedders, but, on the contrary, provided that plaintiffs could terminate the contract whenever defendants failed to manufacture and sell sufficient to supply a reasonable demand therefor. Said defenses also incorporated, by reference, the averments of the fourth defense: That, prior to the season and year of 1885, said Thomas & Sons notified the plaintiffs that they could no longer manufacture under said license, on account of defects in the pretended patented improvement therein described, the close competition with other tedders, on which no royalty was payable, and the heavy royalties stipulated, and that they abandoned said contract of license, and would no longer manufacture under it. That plaintiffs acquiesced in such abandonment, entered into a new contract with the defendants John H. Thomas & Sons, whereby they undertook to grant them the right to manufacture under a later patent held by them, at the royalty of one dollar per tedder; settled with said Thomas & Sons on November 26, 1885, for 100 tedders sold by them under the latter contract, as in full of their account for royalties to that date; and never—then or at any other time—demanded of any of the defendants any account of or royalties on the tedders for which royalty is now sought to be recovered until about October 18, 1889, although they knew that Thomas & Sons, from 1884 to July 29, 1886, and thereafter the defendant the Thomas Manufacturing Company, were making and selling the same.

It is further averred, by adoption from the fourth defense, that Thomas & Sons, during the season of 1884, sold certain tedders under the name "Thomas Tedder" at the same time that they sold said Mudgett tedders under the name "Mudgett Tedder," as plaintiffs at the time well knew, which Thomas tedders were made in strict accordance with the terms of certain letters patent granted John H. Thomas, and sold under the protection of such patent, and that all tedders made or sold by any of the defendants, excepting those for which Thomas & Sons paid royalty to the plaintiffs, were said Thomas tedders, placed on the market under that name, and made and sold under the protection of the John H. Thomas patents, as the plaintiffs at all times well knew. That on September 14, 1889, the plaintiffs notified the defendants, in accordance with the terms of said license, that they terminated the said license of January 10, 1882. The fifth defense also avers that the plaintiffs'

patent is void for lack of invention; and the sixth, that it is void for want of novelty.

The plaintiffs move to strike out these defenses as incompetent, irrelevant, and impertinent. The license contains no statement, by way of recital or otherwise, touching the validity of plaintiffs' patent; and under the averments of the answer it must be taken to be true, in considering the motion, that the defendants Thomas & Sons notified the plaintiffs, prior to the season and year of 1885, that they would no longer manufacture under the license, for reasons above stated, and that they abandoned the contract with plaintiffs' acquiescence. It must further be taken to be true that the new contract under a later patent was completed by a full settlement on the 25th of November, 1885, and from that time until the 18th of October, 1889, almost four years, although the plaintiffs knew that the defendants were manufacturing and selling tedders under their own patent, and under the name of "Thomas Tedder," they never made any demand for royalties, or claimed that said tedders were made or sold under the contract. And, lastly, it must be taken to be true that on the 14th of September, 1889, the plaintiffs themselves notified the defendants that they terminated said contract. In this state of the pleading, the fifth defense (that the plaintiff's patent is void for lack of invention) and the sixth defense (that it is void for want of novelty) must be recognized as valid defenses. The authorities cited by counsel for plaintiffs in support of the motion are not in point. *Wilder v. Adams*, 2 Woodb. & M. 329; *Sargent v. Larned*, 2 Curt. 340; and *Marsh v. Dodge*, 6 Thomp. & C. 568,—are cited for the rule that in an action of covenant, to recover the royalty for machines actually sold thereunder, the covenantor cannot set up the defense of the invalidity of the patent. The distinction is that in this case the machines were not sold under the license, but after the license had been abandoned by the defendants. For the same reason, *Gaylord v. Case*, 1 Cin. Law Bul. 382; *Magic Ruffle Co. v. Elm City Co.*, 13 Blatchf. 151; *Birdsall v. Perego*, 5 Blatchf. 251; and *Marsh v. Dodge*, *supra*,—are inapplicable; for they hold that if the licensee avail himself of the invention, so as to earn the royalty, without offering to surrender his license, he is estopped to impeach the validity of the patent. In this case the defendants not only offered to surrender, but did actually abandon, the license. It was held as long ago as *Hayne v. Maltby*, 3 Term R. 438, that the doctrine of estoppel is not applicable where the license does not, by stipulation or recital, affirm the validity of the patent. In that case the plaintiffs, pretending to derive a right under a patent, assigned to the defendant the right to use the patented machines on certain terms, to which he agreed. There was no statement in the license that the patent was valid. Lord Kenyon said that the plaintiffs, pretending to derive a right under a patent, assigned to the defendant part of that right on certain terms, and, notwithstanding the facts disclosed at the trial showed that they had no such privilege, still insisted that the defendant should be bound by his covenant, although the consideration for it was fraudulent and void.

He said, further, that the doctrine of estoppel was not applicable, and that the person supposed to be estopped was the very person who had been cheated and imposed upon, and that the case did not resemble the case of landlord and tenant; for the tenant is not, at all events, estopped to deny the landlord's title. The estoppel only exists during the continuance of his occupation, and if he be ousted by title paramount he may plead it. In the same case, Ashhurst, J., in his concurring opinion, said that a void patent was a fraud on all mankind. The true rule is stated in *Marston v. Swett*, 82 N. Y. 526, 533, 534,—that if the patent is apparently valid, and in force, the party using it, and receiving the benefits of its supposed validity, is liable for royalties agreed to be paid, and cannot set up as a defense its actual invalidity, for the reason that he has got what he bargained for; that he cannot be allowed at the same time to affirm and disaffirm the patent, nor can he in this way force the patentee into a defense of his right, and compel him to try it in a collateral action. The court further said that if the manufacturer did not intend to go on under the license, but chose to make the patented article, not under the patent, but in hostility to it, he must give notice of that intention, in order that the presumption might not attach, or the patentee be misled. To the same effect is *Lawes v. Purser*, 6 El. & Bl. 930, and *White v. Lee*, 3 Fed. Rep. 224, where Lowell, J., says that if a licensee has renounced the license, he may, on the one hand, defend against the agreement, and set up the invalidity of the patent, and, on the other hand, be sued as an infringer. In *Brown v. Lapham*, 27 Fed. Rep. 77, Wheeler, J., says that when a licensee stands out from under the license, and claims nothing from it, with full knowledge by the licensor of his position, he would appear to be at as full liberty to contest the patent as any one. See, also, *Sherman v. Transportation Co.*, 31 Vt. 162, where defendant had taken a license to use three machines made under a certain patent by plaintiff. Two of these machines were made by plaintiff, and delivered by him to defendant, under the contract of license. The defendant did not receive the third machine from the plaintiff, but made it for itself under the contract. After paying the license fees for some years, it notified the plaintiff that it repudiated the license, and would no longer pay royalty, and continued the use of the three machines. To an action for license fees, the defendant pleaded the repudiation of the contract, and the invalidity of the patent. As to the two machines which had been made by the plaintiff, and delivered to defendant, under the contract of license, the court held that the defendant was estopped, by retaining them, to plead the invalidity of the patent as a defense, and that it should have redelivered them to the plaintiff, in order to put itself at liberty to dispute the plaintiff's patent. As to the third machine, however, which was not delivered to the defendant by the plaintiff, the court held that the repudiation of the license was all the defendant could possibly do to put the plaintiff in the position he occupied before the making of the license, and, as to the royalties sought to be recovered on that machine, that the invalidity

of plaintiff's patent was a perfect defense. It would be against public policy to extend the doctrine of estoppel beyond the strict letter of the rule, for in *Manufacturing Co. v. Gormully*, 144 U. S. 234, 12 Sup. Ct. Rep. 632, Justice Brown says: "It is as important to the public that competition be not repressed by a worthless patent, as that the patentee of a really valuable invention should be protected in his monopoly." Of course it will be understood that the defenses involving the validity of the patent will be available only for the period subsequent to the abandonment of the license by the defendants, and notice thereof to the plaintiffs.

The motion will be overruled.

DAYTON LOOP & CRUPPER CO. v. RUHL et al.

(Circuit Court, N. D. Ohio, W. D. April 15, 1893.)

No. 1,022.

1. PATENTS—PATENTABILITY—LACK OF NOVELTY—CRUPPER MACHINES.

The fourth claim in letters patent No. 238,446, issued to Joseph Shafer, March 1, 1881, for a process of, and machinery for, making cruppers for harness, is "for a clamping and bending lever provided with a gutter and channel, and carrying a stretching plate, whereby the crupper is given its final shape." *Held*, that the claim is without patentable novelty, as the device of the recessed stretching plate is a common one in the history of the general art of leather stretching and forming, and as it has long been known that leather, when wet, may be stretched in any former so that, when dry, it will retain the shape given it in the former.

2. SAME—ACTION FOR INFRINGEMENT—EVIDENCE.

In an action for infringement of the patent, evidence introduced by defendants as to the use of such formers in the saddlery business, for making cruppers, before the date of plaintiff's patent, was admissible, as illustrating the state of the art, though the particular cases of such use were not mentioned in defendants' answer.

In Equity. Bill by the Dayton Loop & Crupper Company against Ruhl Bros. to enjoin the infringement of letters patent No. 238,446, issued March 1, 1881, to Joseph Shafer, and for damages. Bill dismissed.

H. A. Toulmin, for complainant.

James Moore, for respondents.

TAFT, Circuit Judge. This is a suit in equity to restrain the infringement of a patent, and for damages. The defenses are want of novelty, nonpatentability, and noninfringement. The patent sued on was conveyed to the complainant by Joseph Shafer, the original patentee, and was for an improvement in the process of, and machinery for, making leather cruppers for harness. The process consists in first pressing or swaging or stretching the leather to be used, in a die, to give it the proper form; then trimming the edges, while stretched in the die, which serves as a die for the cutting tool; then laying it over the mandrel or male die; then filling the tube with proper filling matter, such as flax seed; and finally bend-

ing and stretching the filled crupper to its proper shape in a clamping former.

The only part of the process in respect to which the infringement is claimed is the final bending and stretching of the filled crupper to its proper shape in the clamping former. Before the crupper is subjected to the former, it is a tube curved like a horseshoe. The former involved in this suit is used to impart to the crupper the permanent curves in its arms, which fit them to the back of the horse, just in front of the tail, and make them bend down so that the thick or back part of the crupper will rest comfortably under the tail. The process is described in the specifications as follows:

"The crupper is now ready to bend to the shape shown in Fig. 6, (that is, the final shape,) and I employ the device represented in Figs. 4 and 5, which consists of a lever arm, L, pivoted in bearings, M, extending from a base plate, N. The rear end of the arm, L, is connected to a treadle, O, by a link, P, as represented. The front end of the lever, L, is enlarged, and has a channel or gutter, f', formed in it to receive the crupper, the loop of which is slipped under the lever until it rests in the channel, f', and its ends are then brought up along the sides of the lever in the channel, and are clamped on a recessed sliding plate, R, by a screw, h, carrying a serrated jaw, I, as shown. The front end of the plate, R, is bent down, and has a threaded aperture in it to receive a thumbscrew, j, whose inner end is recessed in the end of the lever, as represented. By turning the screw, j, the crupper is stretched and bent so as to lie closely to the channel, f'; and, to prevent its slipping, I form a recess, l, in the base plate, to receive the upper portion of the loop of the crupper, which is clamped by pressing with the foot upon the treadle, O, and thus prevented from slipping while being bent and stretched."

The fourth claim, which is the only one relied on, is:

"(4) In a machine for the manufacture of leather cruppers, the clamping and bending lever, L, provided with a gutter or channel, f, and carrying a stretching plate, R, whereby the crupper is given its final shape, substantially as specified."

The tool of the defendants is quite like the former described in the complainant's patent, except that there is no lever, treadle, and base plate with a recess by which the thick part of the crupper is clamped, and prevented from slipping out of the forming channel.

The first question arises on the proper construction to be given to the claim. It is contended for complainant that though the claim is for clamping and bending lever, L, it only refers to that end of the lever in which the forming channel is cut, and the clamping screw and recessed sliding plate are fixed, i. e. the part of the lever at one side of the fulcrum. If the claim includes, not only that part, but the other end of the lever, together with the base plate and the link and the treadle, then the defendants do not infringe; but if the claim is wider than this, as contended for by the complainant, the infringement is quite clear.

My impression is that the words, "clamping and bending lever, L," in the claim, indicate that the patentee intended thereby to describe a lever which was capable of not only bending the leather, but of clamping it in the channel by the means described,—that is, with the link and treadle; otherwise, it would not be a lever at all, but would be described simply as a former. It could not act as a lever

unless it were attached to the base plate. It could not clamp without the base plate and treadle. But it is not material whether this is the correct view or not, for I am quite clear in the opinion that the claim, as construed by complainant, for a mere former, with a recessed stretching plate, is a claim for a device which contains no patentable novelty. It has long been known that leather, when wet, may be stretched in any former so that, when dry, it will retain the shape given it in the former. The device of the recessed stretching plate is a very common one in the history of the general art of leather stretching and forming. A number of very similar devices in the shoemaking and currier trade were produced. It does not require invention to prepare a former or mold which shall produce a given shape in the material to be formed or molded. It is not the inventive, but only the imitative, faculty which is involved in producing such a tool. This is fully established by the authorities. In *Mahon v. Manufacturing Co.*, 61 O. G. 1015, 51 Fed. Rep. 681, Judge Blodgett decided that a patent for a bending block, consisting of a block or former adopted to the bending or shaping of the loop in guide rods for grain-car doors, was void for want of patentable invention. He said:

"It seems to me nothing can be more obvious than that only mechanical skill is called into action in making a core or former, around which an iron rod is to be bent to bring it to some desired shape. The shoemaker bends his leather around the last to adapt it to the wearer's foot. The farmer bends a tough, flexible piece of wood around a former shaped like the neck of his ox to make an oxbow for his yoke."

And in the well-known *Bretzel Case*, (*Butler v. Steckel*, 137 U. S. 21, 11 Sup. Ct. Rep. 25,) the supreme court approve Judge Blodgett's language in the court below, which was as follows:

"It is true, I doubt not, that it requires considerable mechanical skill to make a die which would cut a bretzel from dough so as to imitate a hand-made bretzel, because a hand-made bretzel is somewhat clumsily shaped, as the parts are bent, twisted, and laid upon each other, and it is undoubtedly a matter requiring some study, effort, and experiment to make the shape of the die correspond to the external formation of the bretzel. This, however, seems to me not to involve invention, but merely mechanical skill. A cutter might be compelled to experiment some,—that is, cut several dies,—but that is not invention."

In this case the patentee did not invent the crupper. The form was a well-known one. He knew, also, that leather would retain its shape in bending when wet. What he had to do was exactly what the shoemaker has to do when he stretches leather upon the last, and that is all that he did.

A question was made about the right of the defendants to introduce evidence as to the use of such formers in the saddlery business for making cruppers before the date of the patent, and objection was made to the use of the evidence on the ground that the particular cases of such use were not mentioned in the answer. None of the cases testified to showed the exact device here in question, but they were relevant as illustrating the state of the art. In my view of the case, it is not necessary, in order to make the evidence rele-

vant, to have an amendment filed, and leave for the same will not, therefore, be granted.

It should be said that there were two patents produced for forming the horse collar, which involved all the elements present in defendants' tool, and in the fourth claim of the patent as construed by the complainant. Each had the stretching apparatus and the forming channel.

For the reason, therefore, that the claim, as it must be construed in order to make defendants' device an infringement, is void for want of novelty and invention, the bill will be dismissed.

VAILE et al. v. BUCKEYE IRON & BRASS WORKS.

(Circuit Court, S. D. Ohio, W. D. April 14, 1893.)

No. 3,932.

PATENTS FOR INVENTIONS—NOVELTY—OIL-MEAL COOKING.

Letters patent No. 308,112 were granted November 18, 1884, to John H. Vaile for the process and apparatus for cooking oil meal. In this device two steam-jacketed cooking tanks were arranged over a storage tank, from which the cooked meal was drawn to send to the press, and into which the contents of the cooking tanks were alternately discharged, so that the storage tank was kept constantly supplied without any loss of time or hastening or retarding of the cooking process, as might be necessary if the meal was cooked in a single tank. It was shown that long before the patent was granted two cooking tanks had been used, the one above and discharging into the other, and each having separate steam connections; and, as against the patentee's claim that cooking in two successive tanks failed to produce the best results, it was shown that a single cooking tank had been used long before his device was patented. *Held*, that the patent was void for want of novelty.

In Equity. Suit by John H. Vaile, the Smith & Vaile Company, and the Southern Cotton-Oil Company against the Buckeye Iron & Brass Works for the infringement of a patent. Bill dismissed.

Chas. M. Peck, for complainants.

Parkinson & Parkinson, for respondent.

TAFT, Circuit Judge. This is a bill to restrain the infringement of a patent, and for the recovery of damages, and for an accounting of profits. John H. Vaile, November 18, 1884, was granted letters patent No. 308,112 for the process and apparatus for cooking oil meal. Vaile by a license gave to the Smith & Vaile Company the exclusive right to manufacture, use, and sell the improvements patented. Subsequently Vaile transferred, through a mesne conveyance, to the Southern Cotton-Oil Company, the exclusive right to make, use, sell, and dispose of the patented improvement for the treatment of cotton seed, and the manufacture of all the products of cotton seed, but for no other purpose. The Southern Cotton-Oil Company, by supplemental bill, was made a party. The defenses upon which the case has been tried are that the complainant's patent is wanting—First, in novelty; second, that it does not involve patentable invention; and, third, that the invention is not useful.

The patent in controversy is for that step in extracting oil from seeds which is described as cooking. The meats or kernels of the seed are first separated from the hulls. They are then crushed by crushing rolls, and reduced to a fine meal. Then comes the cooking, which is for the purpose of expanding and bursting the minute oil cells; and the final process is to subject the cooked meal to pressure in hydraulic presses to extract the oil. The patentee says in his specifications:

"My invention relates to an improvement in and apparatus for cooking and preparing oil meal preparatory to subjecting the same to pressure to form the cakes from which the oil is afterwards expressed. As hitherto conducted, the cooking of the meal was carried on in a single tank or reservoir, properly heated by steam, in which the meal was cooked, and from which it was directly drawn into the filling hoppers as needed, until the tank was empty, so that considerable time was lost in refilling the tank and cooking a second supply."

"The objects of my invention are to prevent the loss of time in cooking, and to insure the thorough and equal cooking of the meal; and the first object of my invention I accomplished by having one or more cooking tanks combined with a storage tank, into which latter the meal, when cooked, can be instantly drawn from either of the cooking tanks, while the cooking tanks can be at once refilled with a second charge, which is being cooked while the meal is being taken from the storage tank."

Devices are also described and claimed in the patent for distributing the meal while in the tank, but, as these devices are not infringed, it is not necessary to notice them. The patentee proceeds:

"The cooking tanks described in the specifications are cylindrical, heated in any suitable manner, but preferably surrounded by a steam jacket, to form a steam space on the sides or bottom, or both, in which the live steam is introduced to heat or cook the meal. These cooking tanks have suitable traps in the bottom, opening into the storage tank, through which the meal, when cooked, is drawn from the cooking tanks into the storage tank. The storage tank has a trap at the bottom, from which the cooked oil meal is removed automatically onto a former, and conveyed to the press, where the oil is expressed."

The patentee states:

"From this arrangement it will be understood that when the contents of either of the cooking tanks are cooked, they are at once drawn off into the storage tank, to the jacket of which only a sufficient amount of steam is admitted to keep up the proper degree of heat without cooking, and the cooker is again filled. In the mean time the meal is being drawn off from the storage tank and supplied to the forming press, and thus the storage tank would be emptied before a second supply of meal would be cooked, if it were not for the other cooker, which is by this time ready to be emptied into the storage tank; and so the storage tank is kept constantly supplied, while the cookers are intermittently discharged into it, and so loss of time and danger of improperly cooking the meal is absolutely prevented."

A modification of this arrangement is also stated in the patent, as follows:

"It consists merely in locating the cookers, A, so that they discharge through traps, M, closed by slides, N, into a conveyor chamber, P, surrounded by a steam jacket to form a steam space, and supplied with any suitable conveyor, preferably a constantly revolving substantially horizontal screw conveyor, R. This conveyor chamber extends over and opens into the storage tank, D. By this means the cooked meal is conveyed from the cookers, A, into the storage tank, as will be readily understood."

The claims in controversy are as follows:

"(1) The herein-described process of treating oil meals for pressure, consisting in cooking said meal in one or more cookers, connected with a storage heater, and in removing the meal from the storage heater, and in drawing the same, when cooked, from the cookers intermittently into the storage heater, and in removing the meal from the storage heater directly to the forming press, whereby the meal reaches the forming press in a properly heated condition, and whereby a constant supply of cooked meal for the forming press is kept up. (2) The combination and relative arrangement of one or more cookers, A, and storage heater, D, substantially as described. (3) The combination with one or more cookers, A, and storage heater, D, of a conveyor, R, for conveying the meal from either of the cookers to the storage heater, substantially as described." "(6) The combination with one or more oil-meal cookers and a storage heater of an intermediate conveyor, substantially as described."

The defendant's apparatus, as shown by the exhibit, consists of four steam-jacketed cooking heaters arranged in a horizontal line, from which, by means of a conveyor, which is not steam jacketed, the meal is conveyed to a steam-jacketed storage heater placed at a lower level, from which the meal is withdrawn into a press former, and taken to an hydraulic press to extract the oil. The worm used in the defendant's conveyor to carry the meal from the cookers into the storage heater is quite different from that suggested in the complainants' patent, and is so constructed as to break up any water balls which may have formed in the cookers. Water balls, it may be said, are formations caused by the lint surrounding the shell of the cotton seed, which ought to be, but is not always, removed from the meats before they are placed in the cookers. The lint, with the moisture and the heat, produce balls of mixed lint and meal, which interfere with the oil-producing capacity of the mass.

Steam-jacketed oil-cooking tanks are admitted to be old. They were used extensively, and are still, in the manufacture of linseed oil. It had been common, also, before the complainants' patent was issued, to construct what were called "two-high heaters." These consisted of one steam-jacketed tank placed directly above another of the same size and kind, each of which had in them revolving radial knives or blades keyed to a central turning shaft running up through both tanks, for the purpose of stirring and properly cooking the meal. There was a slide in the bottom of the upper tank, through which the meal was discharged into the lower tank, and a slide in the lower tank from which the meal was discharged into bags or some other former to be placed under the press. The steam which furnished the heat was carried to both tanks from the same source, but the steam pipes had valves upon them, by means of which the steam in one tank could be regulated independently of that in the other. After these two-high heaters had been in use, a patent was issued to Dover, January 9, 1883, which consisted of three cooking tanks arranged vertically, the one over the other, with a central shaft running up through the center of the three tanks, and revolving the meal stirrers in each tank. The meal was discharged into the first tank either continuously or all at once. After being cooked it was dropped through a trap in the bottom of the upper tank into the middle tank, and so on down to the lower tank,

from which it was removed to the press. The steam connections were so arranged that the heat of each tank could be separately regulated. Conveyors of the kind used by the complainants are admitted to be old, at least when used without the steam jacket, and the defendant does not steam-jacket its conveyor.

The contention on the part of the complainants is that the benefit of Vaile's invention is in furnishing a storage tank, whereby the meal can be properly and completely cooked in one cooking tank, and then removed to the storage tank, and kept at a proper temperature until it can be pressed, whereas in former systems the cooking was done partly in one tank and partly in another, which failed to give the meal the right taste, just as the interrupted cooking of meat makes it less palatable. Then it is also said that with the two and three high heaters, the time given to the cooking of one tank full of the meal was dependent on the time taken for cooking the one just before and the one just after, and, as the proper time for cooking cotton seed varies very much with each tankful, the result was that many tankfuls were cooked too much or too little.

I am of opinion that this patent is void for want of novelty and for want of patentable invention. It had long been the custom with single heaters to do the cooking all in one tank, and this system prevails largely to-day, so that excellence of taste from continuous working cannot make the device patentable. Nor can it be claimed that the combination of continuous cooking in one tank with a storage heater is new. So far as I can see, the only real difference between this patent and the two-high heater is that here we have two cooking tanks, so arranged that each shall be partly above the storage heater, whereas in the two-high heater there was only one cooking tank, placed immediately over a storage tank. It is said that in the two-high heater the lower tank also cooked. It may have done so, and it may not have done so. The supply of steam to each tank was capable of separate regulation, and the evidence is quite clear that the heat in the lower tank was never what it was in the upper tank. It was quite possible to use the lower tank as a storage heater, and there is no doubt whatever from the evidence that it was frequently so used long before the patent of complainants was issued. If this be true, then the opportunity for varying the time of cooking to suit each tankful of seed was just as complete in this two-high as either in complainants' system or in the old style single heater. The only new advantage in "the triple system," as complainants' device is called, which defendant imitated, is the use of one storage heater for two cooking tanks. Clearly, this is not invention. It is an economical rearrangement, which would have suggested itself to any one with slight knowledge of the process. After reading with care all the evidence, I do not find it established by a preponderance of it that the triple system has increased the yield of oil per ton of seed, or that the reduction in the labor, if any, is due to that part of complainants' system which defendant imitates. The substitution of an automatic former to catch the meal from the storage heater for the old hand mode of taking the meal in bags will fully explain any reduced cost in labor. No

infringement of this feature of complainants' system is averred or proven. The increased production of oil per ton is mainly due to the marked improvement in the crushers and the presses. The claims of complainants' patent, in so far as defendant infringes them, are void, and the bill will be dismissed.

KINGSLEY v. UNION BRIDGE CO.

(Circuit Court, N. D. New York. May 2, 1893.)

No. 5,824.

PATENTS FOR INVENTIONS—NOVELTY—INFRINGEMENT—REISSUED LETTERS PATENT No. 11,001.

In reissued letters patent No. 11,001, dated April 30, 1889, for improvements in dies for making eye bars, a lower die section is employed, which is triangular in cross section, and is rigidly supported on a base. The upper die section is recessed upon its under side, to coincide with the angular face of the lower section. The heated bar coming from the rolls is laid on the lower section. Power is then applied to the upper section, causing the metal to be bent into angular form, so as to lap the angular faces of the lower triangular section, the angular bend being made for the purpose of keeping the bar straight during the process of upsetting. *Held* that, in view of the state of the art, the patent must be confined to the only novel feature, viz. the triangular die section for bending the bar into angular form for the purpose mentioned; and that, as so construed, a die which forms a longitudinal rib for the purpose of holding the bar straight during the process of upsetting does not infringe.

In Equity. Bill by John F. Kingsley against the Union Bridge Company for an alleged infringement of a patent. Dismissed.

Thomas J. Johnston, for complainant.

Walter D. Edmonds, for defendant.

COXE, District Judge. This action is founded upon reissued letters patent No. 11,001, dated April 30, 1889, for improvements in dies for making eye bars. The application for the reissue was filed February 11, 1889. The original, No. 357,833, was applied for October 26, 1886, and was granted February 15, 1887. The invention "consists in a die of peculiar construction, and also a frame provided with rollers upon which bears the former-head or other agency used for bringing the desired pressure upon the upper die section." In carrying out the invention a lower die section is employed which is triangular in cross section. This lower section is rigidly supported upon any suitable base. The upper die section is recessed upon its under side to coincide with the angular face of the lower section. The bar, as it comes from the rolls, is heated and laid upon the lower section of the die. Power is then applied to close the upper section upon the lower section, causing the metal to be bent into an angular form so as to lap the angular faces of the lower triangular section. This angular bend is for the purpose of holding the bar straight during the process of upsetting. It is this which is the marked feature of the patented structure, distinguishing it from the upsetting dies of the prior art.

The original patent had three claims. The reissued patent has thirteen claims. Of these all but the second and eighth are alleged to be infringed. Many defenses are urged, but it will be only necessary to consider one: The defense of noninfringement. The court is clearly of the opinion that a broad construction of the claims is impossible in view of the previous contributions made to the art by Webster, Cook and Carlough, and others. If the claims are confined to the single novel feature before alluded to, viz. the triangular die section for bending the bar into an angular form for the purpose of holding it straight during the process of upsetting, they may be sustained; but if expanded sufficiently to cover the defendant's structure, which does not bend the bar, they will be anticipated by several prior structures. The claims must be restricted to the invention which Kingsley actually made, and, when this is done, the defendant does not infringe.

It is unnecessary to examine the claims in detail for the reason that none of them contains sufficient novelty and ingenuity, apart from the special feature above alluded to, to support invention. Certainly a claim whose only novel feature is the application of a frame of antifriction rollers to an upsetting die cannot be sustained, as such rollers had long been used for similar purposes in many analogous arts. Regarding the seventh claim it should be noted—First, that there is no corresponding claim in the original for the special feature therein described, viz.: "The surfaces of the dies diverging from each other from the center outward;" second, that there is a claim for this feature, in combination with dies triangular in cross section, in patent No. 369,014, (reissue No. 11,025;) and, third, that Webster shows divergence in dies whose meeting faces are slightly convex. Assuming the claim to be valid it is clear that, like the others, it must be limited to the Kingsley die. The defendant does not use this die.

It is idle, in view of the facts disclosed by this record, to contend that Kingsley was a pioneer. He may have made an improvement, but this is all. His die does its work upon the old principle and in, substantially, the old way. It performs no new function and accomplishes no new result. If cheaper and better than the prior dies the record fails to disclose it. Kingsley may be entitled to protection for the advance made by him, and the claims of the reissue, if confined to the invention of the original, may be upheld. If, however, a construction broad enough to cover the defendant's die is placed upon the claims they will necessarily cover also several preceding dies. Such a construction is, of course, unwarrantable. The defendant's die resembles the Cook and Carlough and Webster dies more closely than the die of the patent. The defendant does not bend the bar into an angular form so as to lap the angular faces of the lower die section. In the defendant's die the lower section is not triangular in cross section. The upper section is not concave to coincide with the lower section, but both sections are slightly convex. The indentation of the bar upon the rib of defendant's lower die section, even though preliminary to upsetting, is not the equivalent for the bending of the bar by

the die of the patent. Such ribs were old when Kingsley entered the field, and he has taken pains to point out in his testimony the advantages of bending the bar by his process over the prior methods of holding the bar straight upon a longitudinal rib.

The bill is dismissed.

KERR v. HOYLE et al.

(Circuit Court, E. D. Pennsylvania. April 24, 1893.)

No. 74.

1. PATENTS FOR INVENTIONS—ANTICIPATION.

Letters patent No. 353,790, issued December 7, 1886, to David B. Kerr, were for a "woven fabric," the object of which is the production "in a woven fabric of a variety of shades of color in the pattern or figure, by a new way of interweaving the warp and weft threads, avoiding the expense of extra colors in the warp and weft threads," by "the combination of two warps of the same color with two or more colored weft threads; the warp threads being so arranged in loom harness as to work in pairs, with a binder warp thread between the two figuring warp threads of each pair." *Held* not to have been anticipated by certain fabrics made some years before the date of the patent.

2. SAME—VALIDITY—RESULT OF ACCIDENT.

The patent is not invalid as covering merely the result of an accident, but is sustainable as showing patentable invention.

In Equity. Bill by David B. Kerr, as administrator, etc., against Hoyle, Harrison & Kaye, for the infringement of letters patent. Decree for complainant.

John Dolman, for complainant.

George J. Harding, for respondents.

BUTLER, District Judge. The plaintiff charges infringement of patent No. 353,790, issued to David B. Kerr, December 7, 1886, for a "woven fabric." The specifications state the object of the invention to be the production "in a woven fabric of a variety of shades of color in the pattern or figure, by a new way of interweaving the warp and weft threads, avoiding the expense of extra colors in the warp and weft threads." The invention is stated to "consist in the combination of two warps of the same color, with two or more colored weft threads; the warp threads being so arranged in loom harness as to work in pairs, with a binder warp thread in the center of each pair." The claim is stated as follows:

"The combination of two or more wefts each of a different color, with figuring warp threads, and a binder warp thread between the two figuring warp threads of each pair, as shown and described, and for the purpose specified."

The effect of this arrangement of threads in the loom, and the described method of working them, is to produce a peculiar fabric, which is acknowledged to be new in the art, if not anticipated by either of the three specimens of old fabric produced by the defendants. The defenses set up are, first, anticipation; second, an implied license; third, "that the matter claimed was not the invention of Kerr, but the result of an accident." The second was not

urged on the argument, and I understand is abandoned. Infringement is not denied—if the patent is valid.

In support of the first ground of defense three specimens of fabric made several years before the date of the patent—two of them designated as Brooks Fabric Nos. 1 and 2, and the third as Stead & Miller's Fabric No. 1. A careful examination of these exhibits and comparison of them with the plaintiff's fabric, in the light of the expert testimony, has not satisfied me that they show the invention described and claimed in the patent. It may be admitted that the question is not entirely free of difficulty; but my judgment, after patient examination, is as stated. A discussion of the subject here, which must consist in a written comparison of the elements of the several fabrics, and an analysis of the conflicting testimony of the witnesses called, would be useless.

The conduct of the defendants respecting the patent is entitled to weight in considering the question of its validity. The patentee was in their employment, and they encouraged him in securing the invention, apparently that they might enjoy the monopoly thus afforded. After the patent issued they manufactured the fabric extensively for some years, paying a small royalty for the privilege. They were intelligent in the art, and of large experience; and yet they did not seem to doubt the validity of the patent until the patentee had left their employment, and the license had expired.

The third ground of defense—"that the fabric was not the result of invention, but of accident"—presents less difficulty. The clear weight of the evidence, as well as the admissions arising from the defendants' conduct, just adverted to, is in my judgment against it.

I do not find, therefore, anything in the proofs sufficient to repel the presumption of novelty and invention which attaches to the action of the patent office in granting the letters.

The bill is sustained, and a decree may be prepared accordingly.

JOHNSON v. HERO FRUIT-JAR CO.

(Circuit Court, E. D. Pennsylvania. May 9, 1893.)

No. 30.

PATENTS FOR INVENTIONS—VALIDITY—SEALING GASKETS.

The claims of letters patent No. 408,177, issued July 30, 1889, to Daniel W. Johnson, for sealing disks for jars, covered "a sealing gasket for jars, having a base of waterproof material backed with and secured to a felted material," and also "a sealing gasket consisting of a body of felted material having waterproof material secured to its opposite faces." Long prior to the application for this patent there were in use sealing gaskets composed of a disk of parchment and a disk of felt, arranged the one on the other, but not secured together. *Held*, that pasting together the faces of the old disks, which is all that is contemplated by the patent, does not involve invention, and the patent is void.

In Equity. Suit by Daniel W. Johnson against the Hero Fruit-Jar Company for infringement of complainant's patent. Bill dismissed.

Charles B. Collier, for complainant.
 Geo. J. Harding, for defendant.

DALLAS, Circuit Judge. Prior to the application for the patent in suit, "sealing gaskets" composed of a disk of parchment and a disk of felt, arranged the one upon the other but not secured together, were in use for effecting, and did effect, an air-tight sealing of jars or other vessels to which, for that purpose, they were applied. There was also in use a patented "packing for packages, cars, and vessels of all kinds, in which fluids are to be transported or kept," "composed of a body of tough, flexible material, a sheet of tin or other foil applied thereto, and a flexible waterproof protection or covering;" and the three layers thus described were "glued, cemented, or pasted together." The patent in suit is to Daniel W. Johnson, for "sealing disks for jars," etc., and is No. 408,177, dated July 30, 1889. The claims are:

"(1) A sealing gasket for jars or other vessels, having a base of waterproof material backed with and secured to a felted material, substantially as described. (2) A sealing gasket consisting of a body of felted material having waterproof material secured to its opposite faces, substantially as described."

The novelty of the subject-matter of these claims is at least questionable; but, assuming it to have been new to "secure" the components of the gaskets previously in use, invention was not involved in pasting together the opposite faces of the old disks, and this is all that was done or proposed by the patentee, or is alleged to be done by the defendant. A decree dismissing the bill, with costs, will be entered.

DETWILER v. BOSLER.¹

(Circuit Court, E. D. Pennsylvania. May 9, 1893.)

No. 16.

1. PATENTS FOR INVENTIONS--INFRINGEMENT--MILLS.

Letters patent No. 188,783, granted March 27, 1877, to John S. Detwiler, for an improvement in grinding mills, claimed "the combination of a pair of stones set to grind coarse, with a second pair of stones, of larger diameter, set to grind fine, and run at a lower speed than the upper and smaller pair of stones; the partially ground grain falling from the upper to the lower stones, and passing from the latter in the form of flour." *Held*, that the claim was infringed by the use of rollers revolving in a vertical plane instead of stones revolving in a horizontal plane, the process and its results being essentially the same in other respects; for such rollers are the well-known equivalents of the stones.

2. SAME--EQUIVALENCE--ESTOPPEL.

The patentee was not estopped to set up such equivalence to sustain his claim of infringement by reason of the fact that in a communication to the patent office before his patent was granted he claimed that the result obtainable by his invention was distinguishable from that produced by crushing rollers; for the failure of an inventor to perceive the adaptability of a known equivalent to the practice of his invention does not debar his right to protection against its invasion by the use of such equivalent.

3. SAME--VALIDITY--"GRADUAL REDUCTION" OF FLOUR.

The device claimed by the patent involves invention, though the "gradual reduction" process effected by it was not new.

¹ Rehearing granted.

4. SAME—INFRINGEMENT.

Infringement was not avoided by the use, in connection with the rollers, of a series of "scalpers" or sifting machines, which served a purpose distinct from that of the rollers, and did not vary the mode of their operation, or the result they accomplished.

In Equity. On final hearing. Suit by John S. Detwiler against Joseph Bosler for the infringement of a patent. Decree for complainant.

Charles B. Collier, for complainant.

Horace Pettit, for defendant.

DALLAS, Circuit Judge. This is a suit in equity for alleged infringement of letters patent No. 188,783, for improvement in grinding mills, granted to the complainant, and dated March 27, 1877. The cause has been fully heard upon the pleadings and proofs, and is now for decision.

The only claim of the patent is:

"The combination of a pair of stones, set to grind coarse, with a second pair of stones, of larger diameter, set to grind fine, and run at a lower speed than the upper and smaller pair of stones; the partially ground grain falling from the upper to the lower stones, and passing from the latter in the form of flour, substantially as herein specified."

The defendant's devices and arrangement of parts are not identical with those specifically designated in this claim. Instead of using "stones," revolving in a horizontal plane, he uses rollers, revolving in a vertical plane; but stones and rollers, with this variance in the manner of their revolution, were well-known equivalents in grinding mills, before the application for this patent was made.

It has been urged, however, that the complainant is precluded from asserting this equivalence, because, as is alleged, he had, in aid of his application, denied its existence, and had, in effect, disclaimed rollers. This contention is based upon a communication addressed by the plaintiff's solicitor to the commissioner of patents, in which, by way of argument, the result claimed to be attainable by the applicant's invention was distinguished from that produced by crushing rolls. The contrast which was really intended to be made was not between rollers and stones, but between making flour "practically direct from wheat," and "the crushing of wheat," which it was admitted had been done by rollers. It seems probable that the applicant did not then perceive that rollers might be substituted for burrstones under his method, but ignorance on the part of an inventor of the adaptability of a known equivalent to the practice of his invention does not bar his right to protection against its invasion by the use of such equivalent; and nothing has been shown which should estop the plaintiff from maintaining that right in this case.

The defendant also uses, in connection with his rollers, a series of "scalpers," or sifting machines; but these are additional to the rollers, and have a distinct purpose. Their employment does not vary the mode of operation of the rollers, nor the result which

they accomplish. There are other differences in details between the plaintiff's and the defendant's mechanism, and in its arrangement, but it is not necessary to refer to them. The defendant's expert (Hollingsworth) has testified that, irrespective of scalp-ers, and assuming that rollers are the equivalents of millstones, the two processes are, in his opinion, exactly the same; and my investigation of the exhibits and of the other evidence satisfies me that this opinion is correct. Hence, as the use of scalp-ers is immaterial, and as rollers and stones are, in fact, equivalents, it follows that infringement has been shown, and the only remaining question is as to the validity of the patent.

To overcome the presumption of its validity, the defendant has adduced some oral testimony, and has also proved several printed publications, as well as a number of patents, both foreign and of the United States, which he claims establish lack both of invention and of novelty. But, upon careful examination of all the evidence, I have reached the conclusion that neither of these defenses is sustained. If, as the defendant has contended, the complainant supposed himself to be the inventor of "gradual reduction," broadly, and by whatever apparatus or method accomplished, I quite agree in thinking that he was mistaken. But his claim alone is to be considered, and that has no such scope. It is for a particular combination process, embodying a described organized mechanism, operating in a designated manner. It is for a combination of two pairs of stones, (or their equivalents,) the upper pair being of the smaller diameter, and set to grind coarse, and the lower pair being of the larger diameter, and set to grind fine; and so operated that the lower pair shall run at a lower speed than the upper pair, and that the partially ground grain, falling from the upper to the lower, shall pass from the latter in the form of flour. In the defendant's apparatus every element of this claim is present; the same end is achieved by substantially the same means. On the other hand, while it appears that the want which the complainant's invention was intended to supply had been already recognized by those engaged in milling, and that various attempts had been made to meet it, yet the means to that end, which this patentee devised and claimed, had not been previously in use in this country, nor patented or described in any publication either in this or in any foreign country. The conception of these means clearly involved invention, and they were both new and useful. I do not overlook the fact that in some of the uses, publications, and patents set up some one or more of the elements of the plaintiff's invention are present; but in no one of them can all of its essential features be found. It does not appear from the evidence that any of them "embodied substantially the same organized mechanism, operating substantially in the same manner, as that described in the patent claimed to have been anticipated."

The plaintiff is entitled to a decree in the usual form, which may be prepared and submitted.

STEAMSHIP SAMANA CO., Limited, v. HALL.

(District Court, D. Maine. September 22, 1892.)

1. MARINE INSURANCE—LIBEL ON POLICY—LIBELANT.

A marine policy on the steamship Samana insured D., for account of whom it may concern, to be paid, in case of loss, to the steamship company. D. was owner of the entire stock of the company, except a small quantity held by other parties to comply with the incorporation law. The title to the vessel was in the company, and after issuing the policy it sold her to another company, taking a mortgage to D. for a large portion of the price, and agreeing to give the purchaser the benefit of the insurance on the ship, upon payment of a proportion of the premium, until other insurance should be effected. The purchaser was to keep the vessel insured to protect the mortgagee, and for his own benefit. Before other insurance was effected the vessel was lost. *Held*, that under the provisions that, in case of loss, payment should be made to it, the company could maintain a libel on the policy, not only for its own interest, but also for the interest of all others having rights under the policy.

2. SAME—CANCELLATION—LIABILITY FOR LOSS.

A vessel covered by a marine policy was sold, and a mortgage taken for the price, the seller agreeing to give the purchaser the benefit of the insurance until other insurance could be effected. On November 22, 1888, she sailed from New York to Aux Cayes, a voyage usually lasting eight days. On November 24th, 25th, and 26th a hurricane of great violence prevailed over her course, and she was never again heard of; but, as there was no telegraphic communication with Aux Cayes, her failure to reach that port remained unknown for a long time. On December 3d, before any apprehensions as to her safety had arisen, the purchasers of the vessel effected new insurance, to commence on that day, and a cancellation slip was affixed to the policy as follows: "At the request of the assured, this policy is hereby canceled at and from Dec. 3, '88, at noon, pro rata premium to be paid for 8 months not used." The unused premium was returned. *Held*, that the cancellation was not intended to, and did not, discharge the insurer from liability for loss prior to the date of cancellation, and that the insured was entitled to recover, the returned premium having been paid into court.

8. SAME—PROOF OF LOSS—WAIVER.

An insurer, by denying liability for loss on the ground that he was released therefrom by a cancellation of the policy, is estopped to object to the want of preliminary proofs.

In Admiralty. Libel on a policy of insurance by the Steamship Samana Company, Limited, against Albert B. Hall. Decree for libelants.

William L. Putnam and D. W. Snow, for libelant.
Benjamin Thompson, for respondent.

WEBB, District Judge. By their policy No. 1,761, dated August 2, 1888, sundry associates of the Portland Marine Underwriters, of whom the defendant was one, insured William B. Duncan, Jr., for account of whom it may concern, to be paid in case of loss to the libelants, \$2,500, from August 3, 1888, at noon, to August 3, 1889, at noon, upon the steamer Samana, her body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture. The hull, tackle, apparel, and furniture were valued at \$25,000; and machinery and boiler, at \$20,000. By the terms of the contract, each subscriber assumed liability only in the proportion of one fiftieth part of the loss. The policy contained this provision, viz.:

"It is agreed that any change of interest in the vessel hereby insured shall not affect the validity of this policy." The premium, amounting to \$175, was paid. William B. Duncan, Jr., who caused the policy to be taken, was owner of the entire stock of the Steamship Samana Company, Limited, with the exception of some \$25 worth held by other parties to comply with requirements of the laws under which the company was organized.

This company, subsequent to the date of the policy, sold the steamship to another company, taking a mortgage running to Duncan as security for \$28,500 of the purchase money, and agreeing to give the purchaser the benefit of the insurance on the ship, upon payment of a just proportion of the premium, until such time as other insurance should be effected. The purchasers were to keep the steamer insured to protect the mortgagees, and for their own benefit.

On the 22d of November, 1888, the steamer, being then seaworthy, and properly manned and fitted for the voyage, and loaded with a general cargo of provision and merchandise, sailed from New York for Aux Cayes, between which ports the usual passage took from seven to eight days. On the 24th, 25th, and 26th of November, after the Samana left New York, a hurricane of great violence prevailed over the portion of the ocean she was to traverse, and in the region where, in the ordinary course of her passage, she would at the time have been. She was never heard from after she sailed. But, as there was no communication by telegraph, her failure to reach, in due season, her port of destination, remained for a long time unknown, and no fears for her safety appear to have been entertained. On the 3d day of December, before any apprehensions in respect to the safety of the Samana were excited, the purchasers of the steamer advised the sellers that they had effected new insurance, to commence on that day. Thereupon the broker of the Steamship Samana Company, Limited, and of Duncan, the agent and manager of that company, communicated to the respondent, who was the attorney and general manager of the Portland Marine Underwriters, the wish of the assured to have the policy canceled at and from that date, and inclosed with the communication the policy, and a cancellation slip to be affixed to it, in these words:

"New York, Dec. 3d, 1888.

"Clause added to policy No. 1,761 of Portland Mar. Undwrs., issued to W. B. Duncan, Jr., Str. Samana: 'At the request of the assured this policy is hereby canceled at and from Dec. 3/88, at noon, pro rata premium to be paid for 8 months not used.'

"\$116.67.

Walker & Hughes, per Eustace, for Assured.

"Approved."

The precise date when Hall, in behalf of the underwriters, signed the approval of this cancellation, does not appear; but on the 26th of December the same brokers wrote to Hall this letter:

"New York, Dec. 26th, 1888.

"Albert B. Hall, Esq., Atty. Portland Mar. Undwrs., Portland, Me.—Dear Sir: Referring to our respects of 3d inst., we inclose for your signature duplicate of cancellation slip sent you with policy on Str. Samana, original of which you have.

"Yours, truly,

Walker & Hughes. Pr. Eustace."

And a duplicate was returned:

"Approved. Portland Marine Underwriters.

"By Albert B. Hall, Atty."

Premium, pro rata, from December 3d, was returned; at what time, has not been shown. Later, repayment of the whole of the returned premium, with interest, was tendered the underwriters, and was rejected. At the time when he filed this libel the libellant paid into court, for the respondent, his proportion of returned premium, and interest. The insurers uniformly denied any liability for the loss.

The first question is whether the vessel insured was lost by the perils covered by the policy before the date of cancellation. Upon this point I have not the least doubt. It is unreasonable to resort to remote possibility and unsupported conjecture to overcome the force of the well-established facts in the case. Unseaworthiness has been suggested. The suggestion has no plausible basis.

As amended, the libel is promoted in behalf of Duncan, named in the mortgage; of the purchasers and mortgagors; and of the Steamship Samana Company, Limited,—as their interests may be. The policy is, in terms, made for the benefit of whom it may concern, and payable, in case of loss, to the libellant. That the interests represented by the libellant were those intended to be protected when the insurance was effected is unquestionable. The legal title of the steamer was in the corporation, but Duncan was practically the owner of the corporation's property. He took the mortgage as security for payment for the property of the corporation, that, as its general agent and manager, he had negotiated the sale of. He took the security in behalf of the corporation, and for its benefit and protection, and must be regarded as holding the mortgage in trust for it. In the negotiation for sale he contracted that the insurance, which the policy in terms provided should not be affected by any change of interest in the vessel, should be maintained for the purchaser, as he might desire, and should be at his expense, while continued in force. The provision of the policy that in case of loss payment should be made to the Steamship Samana Company, Limited, authorizes that company to maintain this libel, not only for its own interest, but also for the interest of all others having rights under the policy. *Hurlbert v. Insurance Co.*, 2 Sum. 472; *Aldrich v. Insurance Co.*, 1 Woodb. & M. 272; *Ward v. Wood*, 13 Mass. 539; *Davis v. Boardman*, 12 Mass. 80; *Hooper v. Robinson*, 98 U. S. 528; *Duncan v. Insurance Co.*, 129 N. Y. 237, 29 N. E. Rep. 76.

The cancellation of the policy on the 3d of December, like all contracts, must be interpreted so as to uphold and effect the intention of the parties, if that intention can be ascertained, and does not conflict with any rule of law. Now it is plain that, although all parties were then ignorant of the prior loss of the vessel, and alike believed that she was in safety, yet their whole negotiation looked to the future. It did not take any account of the past. Risk from the 3d day of December on to the time when the policy would expire was the subject-matter of their negotiation. The liability of the

underwriters for loss by any of the perils insured against, which should arise thereafter, was the thing canceled. An earlier day than that fixed in the policy was agreed upon for its expiration; and the underwriters had no more ground for denying liability for losses that had occurred before the earlier day so fixed than, if this cancellation had not been made, they would have had in case of loss prior to the 3d day of August, 1889, at noon, when, by its original terms, it would have expired, and of which no advices were received till a later day. This cancellation was, explicitly, "at and from Dec. 3." Though both parties to the cancellation believed that no loss had then occurred, it cannot be supposed that the assured would have consented to release his right to be indemnified for losses that might have been suffered between the date of sailing from New York and December 3d, if that had been demanded by the underwriters as a condition of cancellation. On that day other policies were to attach. There would be, and was intended to be, no interval when the property was uninsured, nor any period of double insurance. But, as the property was already totally lost, there was, in fact, nothing to cancel. It was of this fact that the parties were ignorant. Being nothing to cancel, there was no return premium to be paid. Tender of the sum returned, with interest, was made as soon as the truth of the case was known, and, though this tender was not accepted, the defendant's share was paid into court when the libel was entered.

The underwriters have uniformly and persistently denied any liability, and contended that the cancellation of December 3d relieved them from responsibility. They are not, therefore, in a position to object to the want of preliminary proofs, which, by the way, are not required by anything in the policy.

The learned argument respecting the jurisdiction of the court, upon the view taken of the law, and the construction given to the memorandum of cancellation, is inapplicable. There must be a decree in favor of the libelants for \$50 and interest, with costs; the amount paid into court as return premium to be deducted from the sum for which execution is to issue, and to be paid back to the libellant.

THE OREGON.

THE PALMS.

THE OREGON et al. v. PITTSBURGH & L. A. IRON CO.

THE PALMS et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. May 1, 1893.)

Nos. 34 and 35.

1. CHARTER PARTY—CONSTRUCTION—SEASON SERVICES—TOWAGE.

Libellant chartered the propeller Oregon and the schooner Palms to carry ore between named ports, the contracts being executed at the same time, and each providing that the vessels should make as many trips as possible during the season. The contract with the Palms also provided that she should always be towed by some other vessel. The Oregon towed

the Palms the whole season, and also another schooner on most of her trips, the latter being one of her regular tows. *Held* that, as the libelants had knowledge of this towing, and failed to object to it, they cannot claim that it was a breach of the contract to make as many trips as possible.

2. SAME—BREACH OF CONTRACT—CUSTOM.

It was, however, a breach of the contract for the Oregon to tow other vessels besides these two, and the construction of the contract in this regard cannot be varied by evidence of a custom for propellers of her class to tow as many as five vessels, where it is not shown that they always tow more than one or two.

3. SAME—CONTRACT FOR ACT OF THIRD PERSON.

The Palms is equally liable for the breach of the contract by the Oregon in taking additional tows, especially when the managing owner of both vessels was the same person, for when he allowed the Oregon to take up tows in violation of the contract he made the owners of both liable for his act.

4. SAME—RETURN TRIP—TAKING CARGO WITHOUT CONSENT.

One of the stipulations of the contracts was that the vessel should take no cargoes on the return trip except with the consent of the charterers. In violation of this, they took on one trip cargoes of coal that delayed them some 10 days. It was shown that at the existing rates of freight it was more profitable for the owners to break their contract in this regard than to observe it. *Held*, that the owners' claim that at that season of the year loaded vessels could proceed faster than light ones, on account of the strong winds prevailing, is no excuse for the breach; especially when their testimony upon this point is contradicted.

5. SAME—TERMS OF CONTRACT.

As the contract makes no mention of the character of ore to be shipped, the owners cannot claim that the charterers themselves violated the contract by loading hard instead of soft ore, which cost less to carry.

6. SAME—MEASURE OF DAMAGES.

The evidence showed that the various delays caused the loss of one trip, and that in consequence the charterers, in order to fulfill their contracts, were compelled to charter other vessels at current rates of freight to carry the cargoes that should have been carried by these vessels. *Held*, that the measure of the charterer's damages was the difference between the freight stipulated in the charter parties and the freight so paid by them.

7. SAME—OVERCHARGE—ADMIRALTY JURISDICTION.

The charterers sold the tonnage of the Palms for one trip at a rate in advance of that stipulated in the contract, and her captain collected from the consignee the whole of the freight, and retained it. *Held* that, as this collection was incidental to the performance of the maritime contract sued on, it may, as to the excess of the charter rate, be regarded as an overcharge of freight; and its recovery is fully within the admiralty jurisdiction, as damages for breach of a maritime contract.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

In Admiralty. Libels by the Pittsburgh & Lake Angeline Iron Company against the propeller Oregon and others and against the schooner Palms. There were decrees in the district court for libellant, which were affirmed on appeal by the circuit court. From the latter decrees respondents appeal. Affirmed.

Statement by TAFT, Circuit Judge:

These were two appeals from decrees of the circuit court for the northern district of Ohio, affirming decrees of the district court for the same district. The two cases have been heard together in the three courts, because the facts and the testimony in them are substantially the same. The testimony in the Oregon case was stipulated into the Palms record. The libels were filed in the district court by the Pittsburgh & Lake Angeline Iron Company,

a corporation operating iron mines on Lake Superior, against the propeller Oregon and the schooner Palms, to recover damages for similar breaches of similar contracts of affreightment, by which J. C. Gilchrist, who was the managing owner of both vessels, agreed to carry iron ore for the mining company. The Oregon contract was as follows:

"Vessel Charter.

"Agreement between J. W. Moore, of Cleveland, Ohio, as managing owner of the vessel called the H. B. Tuttle, and Pittsburgh and Lake Angeline Iron Company, of Cleveland, O., made at * * *, this 15th day of February, 1886, witnesseth, that the said J. W. Moore, for the considerations hereinafter named, hereby agrees that said vessel shall carry cargoes of iron ore for the said Pittsburgh and Lake Angeline Iron Co. during the season of 1886, from Marquette, Mich., to Lake Erie ports, (not east of Erie,) at a rate of freight of one and 20-100 dollars (\$1.20) per ton of 2,240 pounds. Said vessel shall carry no up loads without consent of Pittsburgh and Lake Angeline Iron Co., and shall make as many trips as possible on this contract. There shall be allowed four days' time for loading said vessel, and for furnishing a dock at which to discharge; the time to be reckoned from the hour when said vessel reported and was ready to load, until loaded, and from the time when reported at port of destination, and was ready to unload, until a dock was furnished. The time of such reporting in both cases not to date from an hour earlier than 8 o'clock A. M., or later than 5 o'clock P. M.; Sundays, public holidays, and time lost in consequence of heavy seas, strikes, or any other causes beyond the control of * * *, excepted. When cargoes contracted by this vessel are delivered, if it shall be found that the time of detention exceeds the four days for trip, as above stipulated for, the said vessel shall be allowed a compensation for further detention, except for causes above stated, at the rate of five cents per gross ton of cargo for each day (of twenty-four hours) of such excess. The time of reporting, ready to load, and when loaded, with causes of detention, if any, shall be noted on the bill of lading in every instance. A special order for each cargo shall be obtained from the Pittsburgh and Lake Angeline Iron Co., at Cleveland, O. Said Pittsburgh and Lake Angeline Iron Co., in consideration of the above, hereby agrees to employ said vessel, and agrees to pay the freight as above mentioned.

"Pittsburgh and Lake Angeline Iron Co.

"J. H. Outhwaite, Secretary and Treasurer.

"J. W. Moore, Managing Owner.

"Cleveland, April 22d, 1886.

"The propeller Oregon is substituted for the propeller Tuttle in this contract by mutual consent.

J. H. Outhwaite, Secretary.

"J. C. Gilchrist."

The charter party for the Palms was exactly like the foregoing, with the following additional provisions:

"Said vessel to rate not lower than A2, * * * and to be constantly towed by some steamer."

The Oregon was owned by J. C. Gilchrist, Randall E. Schuck, Thomas Maytham, and William Landgraft. The Palms was owned by J. C. Gilchrist, Randall E. Schuck, and William H. Gilcher. Gilchrist was the managing owner of both vessels.

The libel against the Oregon, after setting out the contract, and an allegation of full performance thereof by the libellant, averred that the Oregon had violated the express stipulation of the contract by going, on the 15th of September, 1886, to Buffalo for a load of coal, without the consent of, and against the protest of, the libellant, whereby she lost so much time that, but for that delay, she could have made one more trip during the season, and she thus compelled libellant, in order to supply the deficiency, to charter other vessels to carry iron ore at a rate greatly in excess of the contract rate, to wit, \$2.10. Another averment was that the Oregon, without the consent of the libellant, took in tow a great many vessels on her trips to and from Marquette, thereby preventing her from making as many trips as possible, and resulting in the loss of another trip.

In the libel against the Palms, in addition to the foregoing averments, it was charged that the captain of the Palms had collected from the consignee of the iron ore carried upon one of the trips, to whom the libelant had sold the tonnage for that trip, \$104 more than the charter rate, which belonged to libelant as profit upon the sale of the tonnage, and which the captain turned over to respondents.

The answer of the respondents was—First, that the libelant had violated the contract in loading hard iron ore, when it was understood and agreed that the cargoes should be soft ore, which was cheaper to carry, and in shipping ore belonging to others than the libelant; and, second, that the vessels made as many trips as possible, and no act of respondents in violation of terms of the contract had caused any loss or damage. As to the \$104 collected by the captain of the Palms, the respondents claimed that, as it was received on a trip in which the libelant had permitted another to ship ore, the respondents were entitled to collect and keep the going rates of freight from the real shipper.

The Oregon towed the Palms during the entire season, and made 12 round trips between Marquette and Cleveland.

It was conceded at the trial that the Oregon, on September 15, 1886, went with two tows, the Palms and the Marsh, from Cleveland to Buffalo, where the three vessels were loaded with hard coal, which was carried to Marquette. The libelant protested against this violation of the contracts before the vessels left Buffalo. The excuse offered at the trial was that in the rough weather of September the vessels made better speed when loaded, because the strong winds of that season would blow them out of their course if running light.

It was also conceded at the trial that, in addition to the Palms, the Oregon also towed the schooner Marsh throughout nine of the twelve round trips, and that on two of the three remaining round trips she towed a schooner in place of the Marsh, so that for only one round trip did she tow only the Palms. In addition to this, on ten half trips, the Oregon towed a third vessel. Libelees' witnesses admit that a second tow delayed the propeller a day and a half in a round trip, and that a third tow delayed her as much more.

The master in the district court found that the two vessels had violated their contracts, and lost one trip, by going to Buffalo for up loads of coal, and by towing the Marsh and other vessels, and fixed their liability for damages at the difference between the contract rate of freight and the going rates of freight which the libelant was compelled to pay to carry the cargoes for the lost trip. He also found for libelant against the Palms for \$104. The district court confirmed the findings, and entered the proper decree, which was affirmed by the circuit court. The difference between the contract and going rates of freight when libelant bought tonnage to carry the cargoes for the lost trip was 80 cents a ton, making \$840 damages chargeable to each vessel, as well as the \$104 additional against the Palms.

Harvey D. Goulder, (F. H. Canfield, of counsel,) for appellants.

Henry S. Sherman, for appellee.

Before TAFT, Circuit Judge, and SAGE and SWAN, District Judges.

TAFT, Circuit Judge, (after stating the facts.) It is contended by appellants that the provisions of the charters that the vessels should make as many trips as possible did not prevent them from towing other vessels on their trips, because it was the custom for a propeller like the Oregon to tow two, three, and sometimes as many as five, vessels at a time. We do not see how such a custom could affect the construction to be placed on this contract. It may be very true that propellers of the power and tonnage of the Oregon are in the habit of towing three, four, and five vessels, but they do not always do it. Mr. Harvey Brown, in giving evi-

dence as one experienced in lake transportation, said that he had in his charge three propellers carrying iron ore between Marquette and Michigan, which towed only one vessel. Indeed, appellants' own witnesses admitted that the number of tows was varied from one to five. It is only reasonable to suppose, therefore, that the intention of the parties to the contract in inserting the stipulation that the vessel should make as many trips as possible was to prevent delays, as well by the towing of other vessels as by other causes. We may infer, from the fact that the two contracts were executed about the same time, and for the same purpose, that the parties expected the propeller named in one to tow the schooner named in the other, although there is no such express provision in either. The Oregon towed the Palms throughout the season. The libelant had full notice of it, and did not object. This is a practical construction of the contract by the parties that is quite conclusive. The Marsh was not carrying freight for libelant, but she and the Palms seem to have been the regular tows of the Tuttle, the propeller mentioned in the original contract, for which the Oregon was substituted, and there is no denial that the libelant knew she was being towed by the Oregon all summer. The libelant made no objection, and cannot be heard now for the first time to claim that this was a breach of the contract. There is no evidence to show, however, that libelant had any knowledge that the Oregon was towing other vessels, and we are satisfied that, in so far as this extra towage delayed the Oregon and the Palms, and made their trips less numerous, it was a violation of both contracts. It is objected on behalf of the Palms that her owners, who are not all the same as those of the Oregon, should not be responsible for the delay caused by the Oregon's taking up other tows, because the Palms could not control the propeller's action. There is no force in the objection. The Palms was under contract to make her trips as fast as possible. We have found from the surrounding circumstances that this meant as fast as possible with another tow and the propeller Oregon. In so far as the Palms' making the trip without delay depended on the conduct of the steamer, her owners, in effect, agreed that the steamer should do nothing to prevent it. There is nothing unusual or impossible in one person contracting with another that a third person shall do something. But here the case is even stronger, for the managing owner of the Palms and the managing owner of the Oregon were the same person. When he allowed the Oregon to take up other tows in violation of both contracts, he made the owners of the propeller and the schooner both liable for his act, because, as managing owner for the schooner, he necessarily consented to his own conduct as managing owner of the propeller. His was a general agency for the owners of the two vessels, and he represented both sets of owners fully and completely.

The evidence shows that the delay occasioned by towing third vessels was about three quarters of a mile an hour, or 18 miles a day. This would mean a reduction of speed of one eighth. Estimating the time for a half trip, exclusive of the time for loading, as

six days, though it was often longer, this would amount to a delay of about three fourths of a day for each half trip. There were ten half trips when the Oregon towed a third vessel in addition to the Palms and the Marsh, which made a delay in all, on this account, of seven days and a half. Some effort was made to show that extra tows were only taken up when no delay could occur. The captain of the Oregon said that he only took an extra tow when he calculated ahead, and found he would arrive at Marquette Saturday night, and no unloading could begin until Monday; or when he would arrive at the Sault canal too late to go through until the next morning. It was immaterial in such cases whether he arrived at night or the next morning, so far as the time to be consumed in the trip was concerned. The captain could only have referred in this excuse to tows which he took for short trips. The tows counted in the ten half trips we have been considering were towed all the way between Cleveland and Marquette, one way or the other; and it was impossible, with respect to a whole trip, to make such a calculation with any exactness. This excuse is of a piece with the excuse which Gilchrist and his captains offer for the flagrant and deliberate violation of the two contracts in going to Buffalo, and taking thence full up loads of coal on the Oregon, the Palms, and the Marsh for the ninth trip. They were ready to leave Cleveland on September 15th. Gilchrist went to the secretary of the libelant company, and informed him that he was going to send his vessels to Buffalo, to take cargoes of coal from there to Marquette. He was told that this was a violation of his contract. He intimated that he would do it anyhow. He says that he explained that in the heavy winds that were likely to prevail during the trip which covered the equinoctial season his vessels would make better time if loaded than light, and that on the previous trip up they had been delayed by being blown around by side winds, although the record shows that to have been one of his shortest trips. The libelant objected, and sent a written protest to Gilchrist. The captains of his vessels seek to sustain this explanation as a valid excuse, and argue that, even though a technical violation of the contract, it caused no delay. The district and the circuit courts evidently gave no credence to this claim, and rightly. Harvey Brown, who at this same time sent three propellers and their consorts, not very unlike in draught and tonnage to those of libelant, from Cleveland to Marquette, testifies that they had no difficulty of this kind, and made their trips very promptly. The excuse was late-born for the purposes of the case. The real reason for taking the coal was that freight rates for coal had risen so much that Gilchrist could make upwards of \$1,500 by violating his contract. This is perfectly evident from his conduct in respect to his last—the twelfth—trip, when he again applied to Outhwaite, the secretary of the libelant, to take up a load of coal. Outhwaite's statement is as follows:

"At first I refused, but he threatened to repudiate these contracts if he was not allowed to take these up loads, saying that he knew he could make more money by breaking these contracts and carrying these up loads of coal than all

the damages we could recover against him by reason of the breach of the contract. At that time it was almost impossible to get vessels to carry ore by reason of the great demand for such tonnage, and it was absolutely necessary that we should have the ore to fulfill our contracts with other parties, and for this reason I was obliged to yield to his demands, and consent to these vessels carrying on this one occasion an up load of coal, as demanded by him."

A man who manifests such a total disregard of the obligation of his contracts cannot expect courts to look with favor or credence on the hypothetical excuses made by him or his employes for his flagrant and deliberate breaches of them. It is ample explanation of his conduct that it was more profitable for him to break than to keep his charter stipulations. The delay caused by taking an up load of coal was something more than 10 days. The vessels were ready to leave Cleveland for Marquette on the 15th of September. Instead of this, they went east to Buffalo, a distance of 200 miles, and did not leave there until the 18th. They were then a day's sail further away from Marquette than at Cleveland, so that, instead of leaving Cleveland on the 15th, as they ought to have done, they really began their trip from that point on the 19th,—a loss of four days. The vessels reached Marquette on the morning of the 27th of September, and reported at the dock of the libellant, ready to load, on the morning of the 2d of October. In other words, there was a delay of six days in unloading the cargoes of coal, a delay which obviously would not have happened had the vessels gone up without a cargo. Another labored effort is made by Gilchrist and his witnesses to show that the winds were so high and so adverse that he could not have left Cleveland before the 18th or 19th, even if he had not gone to Buffalo for the coal, from which the argument is made that his trip to Buffalo and back did not cause the loss of time. Gilchrist did not produce the logs of his vessels, and gave no explanation for their absence. He preferred to rely on the unassisted memory of his captains as to the exact direction and force of the winds during the four days, a year and a half before they testified. This would be unsatisfactory evidence at the best, but it loses all weight when considered in connection with the absolutely truthful data taken from the weather and wind records of the government signal service office at Cleveland, which are in direct conflict with it. Without commenting on the evidence more in detail, it is sufficient to say that it clearly shows a delay of seventeen days and a half, caused by extra tows and the coal trip to Buffalo, both of which were breaches of contract by the libelees. We make no account in this calculation of the delay caused by the weight of the cargoes of coal in the tenth up trip, though we do not doubt that the trip was a slower one for that reason. It is very significant that of the 12 trips which the two vessels made, but two occupied more than 18 days. These were the two when cargoes of coal were carried on the up trip, and they occupied 28 and 26 days respectively. Excluding these two trips, the average time of the round trips when no loads were taken was 15.2 days. It is quite clear that the 17 or 18 days consumed, as we have found, by Gilchrist in breaking his contracts would have enabled his vessels to have made at least one more trip.

The defense that the libellant violated its contracts in loading hard, instead of soft, iron ore, has nothing in it. The contract mentions no particular kind of ore, and the attempt of the respondents to insert such a limitation by oral evidence is entirely unwarranted. Moreover, respondents made no objection to the hard iron ore when it was being loaded, but only advance it now, when in search of excuses.

Were we in doubt, inasmuch as two courts have found the issue, which is purely of fact on conflicting evidence for the appellees and libellant, it would be our duty to follow their finding. *Walsh v. Rogers*, 13 How. 284; *The Marcellus*, 1 Black. 414; *The Waterwitch*, Id. 494; *The Albany*, 48 Fed. Rep. 565. But, as the whole case was vigorously reargued before us, we have thought it proper to review the evidence.

One of the chief objections by appellants to the decrees appealed from is the measure of damages enforced thereby. It is said that the correct measure is the difference between the market values of the two cargoes of ore at Cleveland and Marquette, less the contract rate of freight, whereas the measure adopted by the courts below was the difference between the contract rate of freight and the rate of freight which the libellant actually paid to transport the ore. Damages for breach of contract should be such compensation as will restore the injured party to the same pecuniary condition that he would have been in, had the contract been performed. Where one contracts with a carrier to transport ordinary merchandise, having a market value, from one point to another, the profit which both he and the carrier may reasonably expect him to make out of the transaction is the difference between the market value of the merchandise at the point of destination and the market value at the point of shipment, less the freight under the contract. The pecuniary difference between the shipper's condition with the contract performed and his condition if the merchandise is not shipped, but remains at the point of shipment, is this profit, which is, therefore, his legal damage. But it is a general rule that it is the duty of one party to a contract which has been broken by the other to use reasonable diligence to reduce the damages arising from the breach. If, therefore, in cases of freight contracts, the carrier refuses to perform, it is the duty of the shipper, if he can reasonably expect thereby to reduce his loss, to seek other means of transportation, and perform the contract himself. In such a case the difference between his actual pecuniary condition and that in which he would have been had the carrier transported the goods under the contract is, not the profit which he would have made had the contract been performed,—for the contract has been performed, and he has acquired the opportunity to sell his merchandise at the market value prevailing at the place of destination,—but it is the increased expense of performing the contract; that is, the difference between the contract rate of freight and the freight which he was actually obliged to pay to secure performance. And it would seem to be a good defense against a claim for profits lost by breach of a freight contract, that the shipper could have saved himself, or at any rate could have re-

duced his loss, by employing other means of transportation. This may be hardly consistent with Chief Justice Taney's opinion in *Harrison v. Stewart*, Taney, 485, but it is in accordance with the weight of modern authority. 2 Sedg. Dam. (8th Ed.) § 482. In such a case it would be necessary for the defendant to show that the shipper could reasonably expect to reduce his loss by other transportation. But it would hardly seem so necessary, in order to justify the shipper in seeking other means of transportation and charging the carrier with the increased freight, for him to show either that the profit from the executed contract would have equaled or exceeded the increase in the freight. When a shipper contracts with a carrier to transport merchandise, he is legally entitled to have his merchandise carried without regard to the question whether the transaction would have been profitable to him or not. Were the contract one which justified a resort to a court of equity for its specific performance, it certainly would not defeat the relief prayed for, that the result would be unprofitable to the complainant. Of course, there is a limit to the increased expense which the injured party may incur in doing what the other was obliged, under the contract, to do, and which he may charge to that other. The limit is suggested in the rule laid down in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, under which damages for a breach are limited to such as would naturally flow from the breach within the reasonable contemplation of the parties at the time of making the contract. He cannot go to extraordinary and unreasonably excessive expense or take unusual means to accomplish that which the other party agreed to do, and thus impose on the other liability for damages out of all proportion to what either party might have reasonably expected as the loss from the breach. In *Le Blanche v. Railway Co.*, 1 C. P. Div. 286, 302, Lord Esher, Master of the Rolls, then Mr. Justice Brett, used this language:

"We think it may properly be said that, if the party to perform a contract does not perform it, the other may do so for him, as reasonably near as may be, and charge him for the reasonable expense in so doing."

This was approved as a correct statement of the law by Mellish and James, Lord Justices, in the court of appeal, although on the facts of the case they held that not to be a reasonable expense which Brett, J., had deemed to be so. The limitation upon the right of one party to perform the contract on the default of the other to do so is well brought out in that case. There the plaintiff had bought a ticket entitling him to a passage to Scarborough, to arrive at a certain time. Connection was missed at Newcastle with the Scarborough train. Plaintiff would have had to wait an hour or two at Newcastle before resuming his journey by regular train, and would have arrived at Scarborough about two hours late. There was no special reason why he should reach Scarborough at the time agreed on. He nevertheless chartered a special train, and arrived at Scarborough a very little late. He sought to impose the heavy expense of the special train upon the company selling him his ticket. It was held that he could not do so, because the means selected by him to perform the contract on the default of the railway company involved

an outlay extravagant and out of proportion to the loss he would have sustained by waiting for a regular train. It was suggested that the proper standard for reasonableness of expense in such a case was that cost which the plaintiff would have incurred to avoid the delay under the same circumstances, if he had not expected to charge it to the railway company.

The case of *Lake Co. v. Elkins*, 34 Mich. 440, upon which appellants chiefly rely, was a case the decision of which went upon the same principles as that announced in *Le Blanche v. Railway Co.* There the contract was to carry three cargoes of salt from Bay City to Chicago by water. The defendant did not receive the cargoes, and the plaintiff was unable, because of the close of navigation, to obtain other lake transportation. He therefore shipped the salt in small lots, as he needed it, by rail to Chicago, and then sought to charge defendant with the difference between the contract rate of freight on the three cargoes and the cost of transporting the same quantity of salt by rail in small lots during the winter season. It would have been manifestly unjust to have charged defendant with this extravagant difference in the cost of freights. As compared with the means of carriage stipulated in the contract, that actually taken was excessive and unreasonably expensive, and the difference was far beyond any loss naturally flowing from the breach within the contemplation of the parties. The case was one where, because of the impossibility of securing transportation of the same character as that provided in the contract, the injured party could not perform the contract at all at the expense of the other, and was remitted to the same measure of damages which he would have had if he had not attempted to carry his salt to Chicago after defendant's default; that is, to the difference between the market values of the salt at Chicago and at Bay City, less the amount of the freight fixed by the contract. This is the only theory upon which the conclusion in that case can be explained. While Mr. Justice Campbell uses language which might seem to imply that the only measure of damages in any case for the breach of freight contracts is that derived from market values, he refers to the rule laid down in the case of *Le Blanche v. Railway Co.* as authority for his conclusion, and states the principle there laid down as applicable to the facts before him.

An examination of the authorities shows that in all cases where the measure of damages for a failure or refusal of a carrier to receive goods tendered for shipment under a contract has been held to be the difference between the market value of the goods at the destination and their market value at the point of shipment, less the contract price of the freight, the shipper has not attempted to perform the contract by procuring transportation by other means. *Bracket v. McNair*, 14 Johns. 170; *O'Conner v. Forster*, 10 Watts, 418; *Bridgman v. The Emily*, 18 Iowa, 509; *McGovern v. Lewis*, 56 Pa. St. 231; *Pennsylvania R. Co. v. Titusville & P. Plank Road Co.*, 71 Pa. St. 354. But where the goods, not received by the contracting carrier, are transported by another at a higher rate than the contract price, this measure is not adopted. In such a case

the goods, it may be, are brought at the same time into the same market, and sell for the same market price as if carried under the contract, but it costs more to get them there. Under these circumstances, neither reason nor authority leaves any doubt that, within the limitation already referred to, that the substituted means of transportation shall be reasonable, and not extravagant, the measure of damages is the difference between the contract and the actual price of freight. *The Rossend Castle*, 30 Fed. Rep. 462; *Lord v. Strong*, 6 Mich. 61; *The Flash*, 1 Abb. Adm. 119; *Featherstone v. Wilkinson*, L. R. 8 Exch. 122; *Grund v. Pendergast*, 58 Barb. 216. In *Cutting v. Railway*, 13 Allen, 381; *Spring v. Haskell*, 4 Allen, 112; *Railway Co. v. Henry*, 14 Ill. 157; and *Ward v. Railroad Co.*, 47 N. Y. 29,—cited on behalf of appellants, the goods were actually received by the defendant carrier, but were delayed in the delivery, and the measure of damages was, of course, held to be the difference between the market value of the goods when they should have been delivered and their value when they were delivered. But such cases obviously have no application to cases like that at bar.

It is very clear, therefore, that the measure of damages adopted by the circuit and district courts in these two cases before us was correct. In the months of October and November, when it became entirely certain that the two vessels were going to make but 12 trips, the libellant bought tonnage at the going rate of freight, i. e. 80 cents a ton more than the contract price, and shipped ore enough to make a full cargo for each vessel. This was not substituted performance of the contract by unusual or extravagant means. It was the same method of transportation, and at the same season, as that fixed in the contract. Its cost may, therefore, be properly charged to the defaulting party. As each vessel carried 1,050 tons of ore, the damages chargeable to each under the contract was \$840.

The measure of damages adopted can be supported in another way. Ore tonnage between Marquette and the Lake Erie ports west of Erie has a market value, which varies from month to month in the season. Under the construction put upon these charters by the parties, the libellant had the right to sell the tonnage thereby secured to it to any one else, because, with the knowledge of the owners of the vessels, it did sell the tonnage for two trips without objection. Viewing tonnage as a commodity bought and sold, the measure of damages for failure to supply it according to contract would naturally be the difference between the market and the contract prices. *Higginson v. Weld*, 14 Gray, 165; *Ogden v. Marshall*, 8 N. Y. 340. The price actually paid by the libellant was the going or market rate of freight, and the damages found by the court below were the difference between that rate and the contract rate.

There remains to consider only the \$104 charged against the Palms. This was the profit of 10 cents a ton on one trip of that vessel where the libellant sold the tonnage to Harvey Brown at \$1.30 per ton. There is no doubt of libellant's right to sell the tonnage under the charter, because, as already stated, it had been done be-

fore, with the knowledge and consent of the vessel's owners. The captain of the Palms collected the entire freight from Brown, and turned it over to Gilchrist, managing owner of the Palms. The 10 cents a ton, or \$104, of the freight belongs to the libellant, and the Palms or her owners should pay the same to the libellant. But the jurisdiction of this court in admiralty to render a decree for the money is denied on the ground that the cause of action is not maritime, but is a mere right to sue for money had and received at common law. As the collection of the \$104 was incidental to the execution of the maritime contract sued on, and may be regarded as an overcharge of freight by appellants against appellee under that contract, we think the amount fairly recoverable as damages for its breach, and therefore fully within the admiralty jurisdiction.

The decrees of the circuit court in both cases are affirmed, with interest from their date, at the costs of appellants.

LUMBERMAN'S MIN. CO. v. GILCHRIST et al.

(Circuit Court of Appeals, Sixth Circuit. May 1, 1893.)

No. 37.

1. SHIPPING—CHARTER PARTY—ABSOLUTE CONTRACT.

A charter party provided that the vessel should carry eight cargoes of iron ore from Escanaba, Mich., to Lake Erie ports, during a certain season; the vessel to be constantly towed by a specified propeller, and the eight trips to be distributed through the season of navigation as equally as possible. The vessel, however, only made six trips, and the shipper sued to recover advanced freight, which he was compelled to pay for the transportation of the other two cargoes by other vessels. *Held* that, as defendants' undertaking was an absolute one, they were liable, notwithstanding that the propeller named was not under their control, and had been previously engaged to make a triangular trip to Chicago in connection with each trip from Lake Erie ports to Lake Superior, and that this fact was known to the agent of the shippers when he made the contract for them. 50 Fed. Rep. 118, affirmed.

2. SAME—DEFENSES.

The shipowners were not relieved of liability by the fact that in August they tendered other tonnage to make up an anticipated default of the chartered vessel, it appearing that navigation did not open for that season until the 1st of May, and that in August the chartered vessel was only a few days behind in her trips, according to the equal distribution of the eight cargoes during the season, as provided for in the charter; and that her defaults occurred later in the season, at which time her owners made no tender of additional tonnage. 50 Fed. Rep. 118, affirmed.

3. SAME—MEASURE OF DAMAGES.

Under these circumstances, the measure of damages was the difference between the freight as fixed in the charter party and the freight actually paid for the transportation of the cargoes which the chartered vessel failed to carry. 50 Fed. Rep. 118, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

In Admiralty. Libel in personam for breach of charter party. In the district court a decree was rendered for libellant, which was affirmed by the circuit court on an appeal thereto. 50 Fed. Rep. 118, affirmed. The respondents appeal. Affirmed.

Harvey D. Goulder, (F. H. Canfield, of counsel,) for appellants.
Henry S. Sherman, for appellee.

Before TAFT, Circuit Judge, and SAGE and SWAN, District Judges.

TAFT, Circuit Judge. This is a libel in personam against J. C. Gilchrist, R. E. Schuck, William H. Gilcher, Louis Woodruff, Myra Lavoo, and L. H. Weeks, owners of the schooner B. F. Bruce, for breach of the following contract:

"Vessel Charter.

Agreement between J. C. Gilchrist, of Vermillion, Ohio, as managing owner of the vessel called the B. F. Bruce, and J. H. Outhwaite & Co., of Cleveland, Ohio, as agents for Lumberman's Mining Company, made at Cleveland, Ohio, this 4th day of February, 1886. Witnesseth, that the said J. C. Gilchrist, for the considerations hereinafter named, hereby agrees that said vessel shall carry eight (8) cargoes of iron ore for the said J. H. Outhwaite & Co., agents, during the season of 1886, from Escanaba, Michigan, to Lake Erie ports, (not east of Erie,) at a rate of freight of one dollar (\$1.00) per ton of 2,240 pounds. It is understood that the above number of trips shall be distributed through the season of navigation of 1886 as equally as possible in regard to time. It is also understood that the said vessel shall be constantly towed by the propeller N. K. Fairbanks, during the life of this contract. There shall be allowed an average of four days' time for loading said vessel, and for furnishing a dock at which to discharge; the time to be reckoned from the hour when said vessel reported and was ready to load, until loaded, and from the time when reported at port of destination, and was ready to unload, until a dock was furnished. The time of such reporting in both cases not to date from an hour earlier than 8 o'clock A. M. or later than 5 o'clock P. M.; Sundays, public holidays, and time lost in consequence of heavy seas, or any other causes beyond the control of Lumberman's Mining Company, excepted. When each cargo contracted by this vessel is delivered, if it shall be found that the time of detention exceeds four days for each trip, as above stipulated for, the said vessel shall be allowed a compensation for further detention, except for causes above stated, at the rate of five cents per gross ton of one average cargo for each day (of twenty-four hours) of such excess. The time of reporting, ready to load, and when loaded, with causes of detention, if any, shall be noted on the bill of lading in every instance. A special order for each cargo shall be obtained from the agents of said Lumberman's Mining Company, at Cleveland. Said J. H. Outhwaite & Co., agents, in consideration of the above, hereby agree to employ said vessel, and to pay the freight as above mentioned.

"J. C. Gilchrist, Managing Owner.

"Lumberman's Mining Co.

"By J. H. Outhwaite & Co., Agents."

The libel averred that but six cargoes of iron ore were carried during the season of navigation of 1886 by the respondents, and that the libelant was obliged to and did charter other vessels to bring the two other cargoes of iron ore from Escanaba to Cleveland at the rate of \$1.72 per ton of 2,240 pounds. The respondents admitted the charter, and that the Bruce did not carry eight cargoes, but averred in defense that it was known to both the parties to the charter that the steamer Fairbanks was chartered during that season to make trips from Lake Erie to Lake Superior, thence to Chicago, and thence to Escanaba, and from there to Lake Erie ports; and the number of trips the Bruce could make was known and understood to depend on the number of trips the propeller Fairbanks made. That the respondents well and truly performed the contract, be-

cause the Bruce was constantly towed by the propeller Fairbanks, and remained steadily in the employ of the libelant during the season, and accomplished all the trips for libelant that it was possible for a schooner so towed to make during the season of 1886. The answer also charged that the Bruce had been subject to great and unwarranted delays in obtaining libelant's cargoes, whereby she was prevented from making the trips specified in the contract. Further, the respondents averred that after the Bruce had accomplished several trips it became apparent that, owing to the great delay to which the vessels were subjected in handling cargoes, she would be unable to make the entire eight trips. That the respondents frequently pointed out to the libelant the evident inability of the Bruce to make eight trips, and offered to put in other tonnage to make good the deficiency. That they then had other tonnage which they were ready and willing to put in to equalize the number of trips, but the libelant refused to employ other tonnage, or to permit the respondents to put in other tonnage; and that, if this other tonnage had been permitted, there would not have been any loss to either libelant or respondents.

There is no evidence whatever to support the averment of the answer that the libelant company had delayed respondents' vessel in loading beyond the time allowed for this purpose in the contract. We think equally untenable the contention of counsel for the appellant that, under the contract, and the circumstances surrounding it, the appellant should not be held responsible for the delays of the steamer Fairbanks on the ground that she had been named in the charter with the consent of the Mining Company, as the vessel to tow the Bruce thereunder.

The evidence disclosed that the parties had made a contract on the 4th of February, 1886, as follows:

"Outhwaite & Co., Agents of the Lumberman's Mining Co.: We will transport for you 30,000 tons of iron ore from the port of Escanaba, Michigan, to Lake Erie ports, not east of Erie, in equal monthly quantity, during the season of navigation, 1886, at the rate of one dollar per gross ton, steam tonnage.
[Signed] "Moore, Bartow & Gilchrist."

This was accepted by the mining company per Outhwaite & Co., February 9, 1886, and thereafter the parties met for the purpose of naming the vessels under which this contract was to be performed, and signed the charter herein. This notation was made on the contract by libelant: "We accept charter of schooner B. F. Bruce to apply on this contract." In making the charter the Fairbanks was named by Gilchrist as the steam vessel to tow the Bruce, and the name of that propeller was accordingly inserted therein.

Taking the original contract and the charter together, it is perfectly clear that the respondents are responsible for the Fairbanks' delays, because they stipulated to carry the iron ore by steam tonnage. It is wholly immaterial whether the Fairbanks was under the control of the respondents or not. The contract was that the Bruce should make eight trips in tow of the Fairbanks. It was, therefore, the contract of the respondents that the Fairbanks should make eight trips. There is no reason why one may not contract

with another that a third shall do a stipulated work. The circumstance that Pollock, who negotiated the contract for the mining company, may have known that the Fairbanks was chartered to some one else, and may have known that the Fairbanks was going to take a triangular trip to Chicago in connection with her trips from Lake Erie ports to Lake Superior, cannot affect the unqualified obligation of the contract into which the respondents entered that the Bruce should make eight trips between Lake Erie ports and Escanaba, during the season of navigation, in tow of the Fairbanks. It would be unheard of to ingraft a condition of the character suggested on a contract so explicit in its provisions. If the parties had wished to make their obligation to perform eight trips with the Bruce conditional on prompt navigation by the Fairbanks, they should have expressly so stipulated. Even if we could consider all the oral evidence offered upon this point, we have no doubt whatever that the intention of the parties was exactly expressed in the contract.

Coming now to the third defense, based on Gilchrist's tender of extra tonnage, we are of opinion that libelant was not obliged to accept the offer when made. The trips made by the Bruce were as follows: She reported at Escanaba on the 6th of May, and she delivered her first cargo so as to be paid for it on the 14th of May. She reported again at Escanaba on the 7th of June, and finished loading on the 8th. The time when she arrived at Cleveland does not appear. She reported ready to load again at Escanaba on the 13th of July, and finished loading on the same day, and collected her freight at Cleveland on the 21st of July. She reported again at Escanaba on the 18th of August, finished loading on the 19th, and collected her freight the 24th of August at Cleveland. She was ready to load again at Escanaba on the 28th of September, was loaded on the 29th, and it does not appear when she reached Cleveland. She was ready to load at Escanaba on the 31st of October, finished loading on the 1st of November, and collected her freight on the 10th of November. The 30,000 ton contract provided that the ore should be delivered in equal monthly installments. The charters subsequently made provided for the distribution of eight cargoes as equally as possible through the season of navigation. It is quite probable that the parties hoped that the season of navigation would begin on the 1st of April, and that the eight cargoes might be distributed through eight months. As a matter of fact, the season of navigation did not begin until the 1st of May, so that it was seven months instead of eight. In this result we think that the construction of the contract should be that the eight cargoes were to be distributed over the actual season of navigation, equally; and that it was a compliance with the contract for the respondents to furnish their first vessel in May. If we are right in this, then, dividing the time between the 1st of May and the 30th of November, 214 days, by 8, we find that the trips, if distributed with exact equality, would be $26\frac{3}{4}$ days each. The third trip was completed on the 21st of July, 82 days after the opening of the season of navigation, or but 2 days after the third trip should have

been completed if each trip had been made in 26 $\frac{3}{4}$ days. Gilchrist says that in the first part of August he went to Pollock, who represented the libellant, and asked to have the privilege of putting in some other tonnage for the Bruce, but Pollock would not permit it, because, he said, they were carrying their ore as fast as they were entitled to it. When the conversation with Pollock was had, therefore, there had been no such falling behind that libellant could then be required to accept extra tonnage. The fourth trip was completed on the 24th of August, or nine days after it should have been completed to make the trips exactly equal. This certainly gave no right to Gilchrist to put in another cargo in August, as he wished to do. His defaults were later,—at a time when freights were higher. Gilchrist did not propose to put in new tonnage for September, October, or November, and the August tender did not relieve him from the obligation he was under of making the other four trips after the 13th of August at periods as nearly equal as possible. There is no attempt to show that at the time when Pollock might reasonably have anticipated a failure on Gilchrist's part to make the eight trips he could then have obtained tonnage at a less rate than he did afterwards obtain it to be put in during the months of October and November,—the months in which the delinquencies occurred.

Finally, as to damages, the same question is raised that has already been considered in the case of *The Oregon v. Iron Co.*, 55 Fed. Rep. 666, (decided at this term.) Under the circumstances here the proper measure of damages was the difference between the freight as fixed in the contract and the freight actually paid on the cargoes which were shipped to take the place of the two cargoes which the Bruce failed to carry. The district court adopted this measure of damages, and its decree was affirmed by the circuit court. The decree of the circuit court is therefore affirmed, with interest, at the cost of the appellant.

LUMBERMAN'S MIN. CO. v. GILCHRIST et al.

(Circuit Court of Appeals, Sixth Circuit. May 1, 1893.)

No. 36.

SHIPPING—CHARTER PARTY—BREACH—DEFENSES.

A vessel was chartered to carry eight cargoes of iron ore from Escanaba, Mich., to Lake Erie ports, during a given season of lake navigation. Her seventh voyage was completed late in the season, but she was then requested, late in November, to go to Escanaba for the eighth cargo, and proceeded thither on the promise of the charterer's agent that she would be loaded. The charterer allowed four days for loading, and if she had been loaded in that time she could have completed the trip, but, owing to the fact that the ore was frozen, her loading was not in fact completed until the next spring. *Held*, that her owners were not liable for advanced freight paid by the charterer for the transportation of another cargo during that season, for the vessel's breach of the charter party was caused by the charterer's default in loading. 50 Fed. Rep. 124, reversed.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

In Admiralty. Libel in personam by the Lumberman's Mining Company against J. C. Gilchrist to recover damages for breach of a charter party. The district court entered a decree for libelant in the sum of \$477.70, which, on appeal to the circuit court, was reduced to \$407.40, and affirmed as thus modified. See 50 Fed. Rep. 124. Respondents appeal. Reversed.

Harvey D. Goulder, (F. H. Canfield, of counsel,) for appellants.
Henry S. Sherman, for appellee.

Before TAFT, Circuit Judge, and SAGE and SWAN, District Judges.

TAFT, Circuit Judge. This is a libel in personam against the same respondents as in the last case, (*Lumberman's Min. Co. v. Gilchrist*, 55 Fed. Rep. 677,) for the breach of a charter party which J. C. Gilchrist, as managing owner of the schooner *S. H. Foster*, entered into with the Lumberman's Mining Company, to carry eight cargoes of iron ore during the season of navigation of 1886, from Escanaba, in Michigan, to ports on Lake Erie, not east of Erie; said cargoes to be distributed through said season as equally as possible, and the schooner to be constantly towed by some steamer. This charter was entered into under exactly the same circumstances as those stated with respect to the *Bruce* in the previous case, and contained substantially similar terms. The eight cargoes to be carried were to form part of the 30,000 tons mentioned in the original contract of February 4, 1890. The breach claimed was a failure to make the eighth trip. The other seven were either made or performance of them was waived. The master in the district court found that the trip had not been made through default of respondents, and that other tonnage had been chartered in the month of November at an increased cost of 81 cents per ton, for which respondents were liable. This finding, which was approved by the district court, was not sustained by the circuit judge, for the reason that the other tonnage obtained by the libelant between the 1st and 16th of November could not properly be said to have been secured in consequence of the *Foster's* default, because an agent of libelant had requested the *Foster* to go to Escanaba for her last cargo after the time of procuring such other tonnage. The *Foster* reached Escanaba late in the season, and the libelant commenced loading her under the contract, but did not finish loading her until the next spring. When she came down to Cleveland, Gilchrist says he offered to put her cargo in under the contract, and thus make the eighth trip, but that the libelant refused to accept the offer, and paid \$1.35 per ton, which was the going rate of freight in the spring of 1887. The circuit judge held that the trip completed in the spring of 1887 ought to be counted under the contract, and therefore that the libelant should be allowed to recover the difference between the contract price, \$1 per ton, and the \$1.35 per ton which was actually paid, for which he entered a decree.

We are of opinion that this decree must be reversed. We think the evidence is very clear that the Foster went to Escanaba late in November, at the request of the libelant, on the statement of its agent that when she got to Escanaba she would be loaded. She arrived at Escanaba on the 26th of November. Had the libelant then loaded her, she could have made the eighth trip that season, because her consort, the steamer Tuttle, who towed her to Escanaba, did load and take a cargo down to Lake Erie. The libelant was bound by contract to load the Foster in four days. It did not do so. This was a breach of contract on its part for which it is no excuse now to say that performance was prevented by act of God. The agent of libelant knew, or ought to have known, that the ore was so frozen at Escanaba at the time he directed the Foster to go there that she could not load. Upon this point the evidence is clear. The libelant is, therefore, clearly estopped, having induced the Foster to go to Escanaba with the promise that she should have a load, to rely on the frozen condition of the ore as an excuse. The failure to make the eighth trip must be charged to the fault, not of the respondents, but of libelant. We do not think there is any sufficiently definite proof of damage caused by the laying up of the Foster at Escanaba during the winter to warrant a decree in favor of the respondents on their cross bill.

The judgment will be reversed, with instructions to dismiss both the libel and the cross libel, at the costs of the libelant.

THE PERCY BIRDSALL v. THE INVERTROSSACKS AND THE JAMES
McCAULLEY.

THE INVERTROSSACKS v. THE JAMES McCAULLEY.

(District Court, E. D. Pennsylvania. May 5, 1893.)

Nos. 5 and 10.

1. COLLISION—VESSEL AT ANCHOR—TUG AND TOW—NEGLIGENCE.

A schooner lay at anchor, well over to the western side of the Delaware river, where the channel was over a mile wide, with her sails taken in, her bow pointing down the river, and her anchor light properly set. A tug with a large and heavy iron ship in tow, at the end of a long hawser, came up the western side of the channel. The tug passed the schooner a short distance off the port side, but the ship collided with the schooner's starboard bows, and inflicted considerable injury. *Held*, that both the tug and the ship were at fault,—the tug, in running with her unwieldy tow so far westward in the channel, and in approaching so near the schooner before turning off; and the ship, in failing to change her course and follow the tug until collision was inevitable.

2. SAME—DUTY OF TUG AND TOW.

The fact that the ship was heavy, and the tug's control of her at the end of a long hawser very imperfect, imposed on both unusual vigilance, and rendered imperative the duty of keeping well to the eastward.

3. LIBEL IN REM—DEFENSES—RELEASE ON BOND—LOSS OF LIBELED VESSEL—LIMITATION OF LIABILITY.

The fact that a ship, against which an action in rem is pending, after her release on bond, is lost in a subsequent venture, and that a petition for limitation of liability was afterwards filed, is not a defense to the libel.

In Admiralty. These were two libels in rem for collision,—one brought in behalf of the schooner Percy Birdsall against the ship Invertrossacks and the tug James McCaulley; and the other, in behalf of the owners of the Invertrossacks against the James McCaulley. Decree in the former for libelants against both the ship and the tug; and in the latter, in favor of the ship, for half damages.

Curtis Tilton, for the schooner.

J. Rodman Paul and Horace L. Cheyney, for the ship.

John F. Lewis, for the tug.

BUTLER, District Judge. The schooner was at anchor on the night of January 10, 1892, in the river Delaware, well over to the western side, off Bombay hook, where the channel is a mile or more, in width. Her sails were taken in, and an anchor light properly set. The Invertrossacks, a very large and heavy iron ship, in tow of the McCaulley, at the end of a long hawser, was coming up on the western side of the channel. The tug passed the schooner a short distance off on the port side, while the ship came into collision with her bows (which pointed downwards) on the starboard side, inflicting considerable injury.

I do not find anything to justify a belief that the schooner was in fault. She was properly anchored in a suitable place, and all usual and necessary precautions were observed to warn approaching vessels of her position. Furthermore she was plainly seen from both the tug and ship at sufficient distance to enable them to keep off. No additional precautions (if any could have been taken) would have been of service.

I find both the tug and ship to have been negligent; the former in running with her unwieldy tow so far westward in the channel, and in approaching so near the schooner before turning off; and the ship in failing to change her course and follow the tug until collision was inevitable. The evidence fully justifies a belief that the latter was negligently handled. The warning of her lookout was not promptly heeded. She seems to have virtually committed herself to the guidance of the tug, and to have paid little attention to the latter's movements. The fact that the ship was very heavy and the tug's control of her, at the end of a long hawser, very imperfect, imposed on both unusual vigilance, and rendered the duty of keeping well over to the eastward, the more imperative. I will not discuss the evidence; it is sufficient to indicate my reasons for the conclusions reached.

A decree in favor of the schooner must be entered against both; and in favor of the ship against the tug for half damages.

The defense based on the fact that the ship after her release on bond, was lost in a subsequent venture, and that a petition for limitation of liability was afterwards filed has not been overlooked; but it cannot be sustained. The authorities cited are inapplicable to such a state of facts as exists here. It would be most unreasonable to subject the libellant to the consequences of such loss, after the vessel had been taken from her control, or from under her

attachment, and risked in another venture in which she had no interest or concern. The owners' prayer for limitation came too late; and came only for the purpose of shifting from their own shoulders a loss, (which arose exclusively from their own subsequent venture, and which they should consequently bear) to the shoulders of the libellant, who had no connection with it.

THE CHARLES L. JEFFREY.

CARLETON et al. v. THE CHARLES L. JEFFREY.

(Circuit Court of Appeals, First Circuit. April 28, 1893.)

No. 29.

COLLISION—SCHOONERS—CROSSING COURSES—LIGHTS.

On a clear, cold night in March, with a fresh wind from the N. N. W., a collision occurred between the schooners Carleton and Jeffrey, the latter striking the former at right angles, just forward of the mainmast, on the starboard side, and sinking her. The Carleton was headed W. S. W., or nearly so, on the starboard tack, and making about nine knots, while the Jeffrey was on the port tack, heading about the opposite course, and running from seven to eight knots. The vessels sighted each other from one and a half to two miles apart. The Jeffrey was properly manned, and had a competent lookout. Her witnesses testified that they first saw the Carleton's red light nearly ahead, and the Jeffrey was kept off some three or four points under a port helm; that the red light disappeared, and the Carleton was then discovered about four points on their port bow, and crossing it, whereupon the Jeffrey's helm was put hard a-port, and in a short time she struck the Carleton. None of the witnesses saw any green light on the Carleton. The Carleton was manned by the captain at the wheel and the cook on lookout. They testified that they first saw the Jeffrey's green light about half a point on their weather bow, and that it continued to draw to windward until it was three points on their starboard hand. The cook admitted that after he went on lookout he spent some 10 or 15 minutes in trimming the sails, and that he also went below for a muffler. *Held*, that the Carleton was in fault for not having a sufficient green light, while the Jeffrey was free from blame, inasmuch as the Carleton's red light probably intersected to starboard, and misled her into the supposition that the Carleton was crossing to windward, when in fact she was drifting or sailing to leeward.

Appeal from the District Court of the United States for the District of Maine.

This was a libel in admiralty by Philander J. Carleton and others, owners of the schooner Joe Carleton, against the schooner Charles L. Jeffrey, Frank Harrington, claimant, for the loss of the former vessel by collision. The libel was dismissed, and libellants appeal. Affirmed.

Eugene P. Carver, (Edward E. Blodgett, on the brief,) for appellants.

Edward S. Dodge, for appellee.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. This collision occurred between the two-masted schooner Joe Carleton and the three-masted schooner Charles L. Jeffrey, on the coast of Maine, near Monhegan, between 10 and 11 o'clock on a clear, starlight night in March, when the weather was so cold as to require great vigilance to keep a watch to its strict duty. The wind was N. N. W., and fresh or strong. The Joe Carleton was heading W. S. W., or nearly so, and the Charles L. Jeffrey the opposite course, or nearly so. No complaint is made of the lights of the Charles L. Jeffrey; but while it is admitted that the red light of the Joe Carleton was sufficient, it is claimed that her green light was dim, or had gone out, or for some reason was not visible. It is apparent that the vessels sighted each other at a distance of between one and one half and two miles; that the Joe Carleton was sailing about nine knots an hour, and the Charles L. Jeffrey between seven and eight knots, thus crossing the intervening space in about five minutes; that the Charles L. Jeffrey was running on the port tack, with a free wind, and the Joe Carleton on the starboard tack; that, therefore, it was the duty of the Joe Carleton to hold her course, and of the Charles L. Jeffrey to keep clear; and that the Charles L. Jeffrey collided with the Joe Carleton just forward of the main rigging on the starboard side of the latter at nearly a right angle, and with such force as to cause her to fill and sink within a short time.

It is plain that the deck of the Charles L. Jeffrey was fully manned by the mate's watch, joined also by the captain, thus including the captain, mate, man at the wheel, and a lookout. Everything about this vessel indicates a reasonable degree of vigilance, so that the probability that she complied with her duty under the law is *prima facie* established. On the other hand, the entire watch of the Joe Carleton consisted of the captain and steward, or cook, the latter testifying that, although he had followed the sea for 16 years, it had been mostly in the latter capacity. According to the testimony of both of these men, the captain relieved the cook at the wheel at or about 10 o'clock, and the cook then went on the lookout. The cook admits that after he went on the lookout he took about 10 or 15 minutes in clewing up the topsails and trimming down the staysail. Also he admits that at one time he went below for his muffler, and it is clear he does not remember distinctly whether this was before or after the captain relieved him from the wheel. If it was before, the case would not be helped, because, in that event, the captain, who had been forward while the cook was at the wheel, must have left the lookout, and temporarily relieved the cook.

Natural justice and good sense, as well as the settled practice of the admiralty courts, are not ordinarily satisfied with testimony touching contested issues of fact relating to the topics in dispute here, given by mariners who are so slack as these witnesses with reference to the cognate prime requirements of navigation. When one vessel makes a claim against another in the case of a collision, admiralty courts are bound by the same rule which forbids any other court from condemning any one in damages, except in behalf of

a party who supports his demand by a preponderance of evidence. If, therefore, as with the Joe Carleton, the owners of a vessel, either through the necessities of economy or for other reasons, are not able to show such constant vigilance, especially on the part of the lookout, as is necessary to sustain the burden which rests upon every one who claims another to be in fault, the inability to maintain the claim must be laid to their own misfortune or negligence, and not to the courts or to the law. Under the circumstances of this case, and applying the rule of evidence referred to, even if this court was not able to find by a preponderance of evidence that the Charles L. Jeffrey was free from fault, there is also lacking the like preponderance in favor of the claim that she was in fault, or that the Joe Carleton was fulfilling all the duties which the statute required of her; and therefore, for this reason alone, we would justly be compelled to affirm the decree of the district court, and dismiss the libel of the owners of the Joe Carleton, on the ground that the case of the latter was not proven to our satisfaction.

We are, however, able to go somewhat further, and indicate where we think the fault rests as between these two vessels. This case was heard in January, 1893. The court took the papers, and ordered a reargument, which was completed in April of the same year. At the original argument the proctor for the Charles L. Jeffrey claimed that when she sighted the Joe Carleton the side light of the latter vessel was first seen nearly ahead, and one or two miles distant; that the wheel of the Charles L. Jeffrey was thereupon put to port, and she was kept off three or four points, and would have avoided the other vessel by a superabundant margin; that, soon after, the red light of the Joe Carleton disappeared, and she showed no other light until the collision; that at the time when, and in the place where, the red light disappeared, the sails and hull of the Joe Carleton became visible about four points on the port bow of the Charles L. Jeffrey and about one quarter of a mile distant; that the wheel of the Charles L. Jeffrey was then put hard to port, and then it was seen that the Joe Carleton was running down across the bow of the Charles L. Jeffrey, and that in a short time the Charles L. Jeffrey struck the Joe Carleton on the starboard side, at nearly right angles. A diagram was introduced illustrating this theory. The court, however, was unable to accept all these propositions, and therefore ordered the case reargued.

The cook, who was acting as lookout of the Joe Carleton, testified that he first sighted the green light of the other vessel about half a point on his own weather or starboard bow, bringing, of course, green to green, and indicating either that the Joe Carleton was already to the leeward of the Charles L. Jeffrey, and running on a parallel course, or was crossing to the leeward. The captain of the Joe Carleton also testified to the same effect, but added that the green light of the Charles L. Jeffrey continued to draw on his weather bow, until it appeared on his starboard hand about three points, thus indicating that the Joe Carleton was going still further to the leeward. This might be, either if she was sailing on a

parallel course, as already suggested, or was drifting or crossing to the leeward.

On the other hand, the witnesses for the Charles L. Jeffrey testified that they first sighted the Joe Carleton nearly ahead, and saw then her red light. None of them testified to seeing her green light at the time she was first sighted, or ever after; and the captain and the lookout swore positively that they did not see it. All of the witnesses for the Charles L. Jeffrey stated that when they first saw the red light of the Joe Carleton it bore somewhat over their weather bow, except the captain, who testified that, although it was nearly ahead, it was just under his lee. It will thus be seen that his testimony agrees with that of the witnesses for the Joe Carleton in placing the latter vessel somewhat to his leeward, instead of dead ahead; although if, as he says, he saw only her red light, she had to him the appearance of running on a course crossing his to the windward, instead of to the leeward. We must, moreover, yield to the concurrent testimony from the Charles L. Jeffrey, and hold that the Joe Carleton failed to show a proper green light. Taking all the circumstances together, it is also probable, as is not uncommon in consequence of the way lights are set at times in the fore rigging, that her red light intersected somewhat to the starboard, so that, on the whole, the captain of the Charles L. Jeffrey was misled, without fault on his part, into the supposition that the Joe Carleton was crossing his course from her port to starboard hand, when in fact she was below him to the leeward, and either drifting or sailing still further in that direction.

Placing the Joe Carleton to the leeward, or running to the leeward or starboard hand of the Charles L. Jeffrey, it is easy to see that the Charles L. Jeffrey was deceived into not altering her own course to the leeward sufficiently or soon enough, and that thus, in connection with the subsequent change of course of the Joe Carleton, also to the leeward, immediately before the collision, the former vessel was unavoidably brought down upon the latter. The result would be the same, even if we should find that the Joe Carleton was in such position that the master of the other vessel should have seen both her lights, but, seeing only one, supposed she was working to the windward, when in fact she was nearly heading for him, but on his lee bow, where he and her witnesses place her, and drifting still more to the leeward.

The court, for reasons which it is not necessary to detail, has not been materially aided to reach a just conclusion by the attempts to prove alleged contradictory statements of some of the witnesses.

Decree of the district court affirmed.

TURNER v. ILLINOIS CENT. R. CO.

(Circuit Court, W. D. Tennessee. May 3, 1893.)

No. 118.

REMOVAL OF CAUSE—TIME TO PLEAD OR DEMUR—TENNESSEE PRACTICE.

Under Mill. & V. Code Tenn. §§ 5010, 5011, which require the plaintiff to file his declaration within the first three days of the term to which the writ is returnable, and the defendant to appear and plead or demur within the first two days thereafter, the plea or demurrer is due, in the absence of a rule of the court, on or before the fifth day of the term, and applications to remove after that day, in the absence of an order or rule of court extending the time, are too late.

At Law. On motion to remand to the state court. Granted.
Statement by HAMMOND, J.:

This was an action at law by W. C. Turner, administrator, etc., against the Illinois Central Railroad Company, commenced in the circuit court of Gibson county, at Trenton, Tenn., for the recovery of \$30,000 damages from defendant for negligently causing the death of plaintiff's intestate, who was an express messenger upon a passenger train which collided with a freight train. The teste of the original writ, under the practice of the Tennessee courts, was the "fourth Monday in September, A. D. 1891," but it was issued November 30, 1891, and commanded the sheriff to summon defendant to appear before that court "on the fourth Monday in May next," to answer, etc., and it was duly served on January 6, 1892. The caption of the declaration is, "May term, 1892," and it was filed on May 4, 1892, before the fourth Monday of May, which was May 23, 1893. On Monday, May 30th, defendant filed its pleas, and on the same day its petition and bond for the removal of the suit to the circuit court of the United States at Jackson, Tenn., and the transcript was duly filed in the federal court. The plaintiff moved to remand the suit to the state court, because the petition and bond for removal were not filed in the state court "at the time, or at any time before, the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff," under section 3 of the act of congress of March 3, 1887, as amended by the act of August 13, 1888, (24 Stat. 552; 25 Stat. 435.) There is no rule of the Gibson county circuit court on the subject, and the state statutes pertaining thereto appear as follows, in Mill. & V. Code: "Sec. 5010. The declaration of the plaintiff shall be filed within the first three days of the term to which the writ is returnable; otherwise the suit may, upon motion of the defendant, be dismissed at plaintiff's cost. Sec. 5011. The defendant shall appear and demur or plead within the first two days after the time allotted for filing the declaration; otherwise the plaintiff may have judgment by default. Sec. 5012. The plaintiff and defendant shall, within the first two days after each subsequent step taken by the other in making up an issue, demur or plead thereto, on penalty of having the suit dismissed, or judgment taken by default, according as the failure is by the plaintiff or defendant. Sec. 5013. The court may, however, enlarge the time for pleading, upon application of either party, in proper cases, or excuse the failure to plead within the time prescribed, upon good cause shown." These provisions are found in Thompson & Steger's Tennessee Code as sections 4238-4241.

Neil & Deacon, for the motion.
Rankin & Rhodes, opposed.

HAMMOND, J., (after stating the facts as above.) As we understand the ruling in *Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. Rep. 306, the statute in Tennessee requiring the plea or
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demurrer to be filed within two days after the time allotted for filing the declaration makes the plea or demurrer due, in the absence of a rule of court, before the expiration of the fifth day of the term; hence all applications to remove after the fifth day, in the absence of an order or rule of court extending the time to plead, come too late. Motion granted.

SOUTHERN MINNESOTA RAILWAY EXTENSION CO. v. ST. PAUL
& S. C. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1893.)

No. 203.

1. RES JUDICATA—APPLICATION—DIFFERENT CAUSE OF ACTION.

Although a second suit between the same parties is upon a different claim or demand, the prior judgment constitutes an estoppel as to matters actually put in issue, or points controverted, upon the determination of which the finding or verdict was rendered. *Cromwell v. Sac Co.*, 94 U. S. 351, followed.

2. SAME—EXTENT OF ESTOPPEL—FINDINGS OF FACT AND LAW.

The estoppel arising from a finding in a previous suit between the same parties is not confined to matters purely of fact, or of mixed fact and law, but extends to a decision of the legal rights of the parties on a state of facts common to both suits, although the causes of action are different.

3. SAME—MATTERS DECIDED—HOW SUSTAINED.

On a plea of *res judicata*, where the former judgment was rendered pursuant to the findings and conclusions of a referee, the court may examine the entire report of such referee, as well as the pleadings, for the purpose of ascertaining what issues were in fact raised and decided, and upon what theory the former judgment proceeded.

4. SAME—SUIT TO RECOVER LANDS—SUFFICIENCY OF DESCRIPTION.

In a suit in a state court by one land-grant railroad company against another to recover lands lying within overlapping grants, the bill designated the lands sued for as the odd-numbered sections lying within 20 miles of its route within specified ranges and townships, and there was annexed to the bill a diagram alleged to be a correct map of complainant's road through such townships and ranges. There was nothing to show that during the progress of the suit any question had ever been raised as to the sufficiency of the description. *Held*, that in a subsequent suit in a federal court to recover the lands the plea of *res judicata* could not be avoided on the ground that the record in the prior suit did not show that the same lands were then sued for.

5. SAME—MATTERS WHICH MIGHT HAVE BEEN PLEADED.

The second suit being based upon the ground that as the lands lay within the defendant's indemnity limits, and within complainant's grant limits, the full equitable title passed to complainant as of the date of its grant, the plea of *res judicata* could not be avoided on the theory that the former suit was based entirely on an alleged fraud by defendant in constructing its road through the overlapping region on a route somewhat different from that indicated in its original map of definite location; for as the suit was between the same parties, and to recover the same lands, the estoppel applied to all grounds of action which might have been pleaded in the former suit. *Cromwell v. Sac Co.*, 94 U. S. 351, followed.

6. SAME—MATTERS ACTUALLY LITIGATED.

In the prior suit the referee found as a fact that all the odd-numbered sections within defendant's indemnity limits throughout the overlapping

region were withdrawn from sale prior to the date of plaintiff's grant; and, as a conclusion of law thereon, held that such withdrawal operated to exclude such lands from plaintiff's grant. In the second suit there were claimed, in addition to the lands before demanded, certain other lands lying within defendant's indemnity limits. *Held*, that as to these additional lands the prior judgment also constituted an estoppel, the matters found having been actually litigated in the prior suit.

7. LACHES—WHAT CONSTITUTES.

Defendant, a land-grant railroad company, having finished its road, laid claim to certain lands lying within its indemnity limits to make up for deficiencies arising from prior reservations within its grant limits. This claim was conceded by the United States and by the state through which the grant was made, although the lands lay within a subsequent overlapping grant to complainant railroad company. The lands were accordingly certified to the state, which between 1867 and 1876 patented the same to defendant. Plaintiff took no steps to claim the land until 1880, when it brought suit in a state court, which suit was dismissed in 1883. Nothing further was done till 1887, when the present suit was begun to recover the same lands. *Held*, that the claim was barred by laches. *Railroad Co. v. Sage*, 49 Fed. Rep. 315, 1 C. C. A. 256, 4 U. S. App. 160, followed.

Appeal from the Circuit Court of the United States for the District of Minnesota.

In Equity. Bill by the Southern Minnesota Railway Extension Company against the St. Paul & Sioux City Railroad Company, the Sioux City & St. Paul Railroad Company, and Amherst H. Wilder and Alexander H. Rice, trustees, to determine the title to certain lands, and for an accounting as to lands wrongfully sold by defendants. The court below dismissed the bill, and complainant appeals. Affirmed.

Statement by THAYER, District Judge:

On the 29th day of May, 1892, the appellant filed its amended bill of complaint in the circuit court of the United States for the district of Minnesota to obtain an adjudication that the appellee had wrongfully acquired the legal title to certain lands which of right belonged to the appellant, and to divest the appellees of the title so obtained, and to compel them to account for the proceeds of all lands thus wrongfully acquired which had been sold to innocent purchasers previous to the filing of the bill. Both of the parties to the suit claimed the lands under certain acts of congress granting lands to the state of Minnesota to aid in the construction of railroads within that state. The appellant is a Minnesota corporation, and is the successor in interest of the Southern Minnesota Railroad Company. The title preferred by the appellant to the lands in controversy is as follows: First. An act passed by the legislature of the state of Minnesota on March 4, 1864, creating the Southern Minnesota Railroad Company, and pledging to it all such lands as congress might thereafter grant to the state in aid of building the railroad which the last-mentioned company was authorized to construct. *Edgerton, R. R. Laws Minn.* 478-492. Second. An act of congress approved July 4, 1866, (14 Stat. 87,) granting to the state of Minnesota five alternate sections of land per mile on each side of the road to aid in building a railroad from Houston, in Houston county, Minn., westwardly through certain counties of the state to the western boundary thereof, which was the line of road, as it is claimed, that the Southern Minnesota Railroad Company was authorized to build. Third. An act of the legislature of the state of Minnesota, approved February 25, 1867, accepting the grant last aforesaid, and conferring the same upon the Southern Minnesota Railroad Company. *Edgerton, R. R. Laws.* 497. Fourth. The filing of maps of definite location, and the subsequent completion by the appellant of the railroad in question from Houston to the western boundary of the state.

The appellees are the successors in interest of a corporation styled the Minnesota Valley Railroad Company. The title which they prefer to the lands in controversy is as follows: First. An act of the legislature of the state of Minnesota creating the Minnesota Valley Railroad Company, and conferring upon it all the rights of the state of Minnesota in and to certain public lands theretofore granted by the United States to the territory of Minnesota, to aid in building a railroad across the then territory, from St. Paul and St. Anthony southwesterly to the Iowa state line, in the direction of the mouth of the Big Sioux river. Edgerton, R. R. Laws Minn. 486. Second. The act of congress of March 3, 1857, last referred to, (11 Stat. 195,) granting to the territory every alternate section of land designated by odd numbers, for six sections in width, on each side of the projected line. Third. Another act of congress, approved May 12, 1864, (13 Stat. 72, 74, § 7,) granting to the state of Minnesota four additional sections of land per mile in aid of building the aforesaid railroad from St. Paul and St. Anthony to the Iowa line. Fourth. The filing of maps of definite location, and the completion of the railroad in question, by the Minnesota Valley Railroad Company and its successors in interest.

The appellees finished the construction of the road running in a southwesterly direction across the state from St. Paul and St. Anthony, which the Minnesota Valley Railroad Company had been authorized to build, by June 1, 1872. The appellant's road from Houston to Winnebago City, a distance of 149 miles, was built and put in operation about January 1, 1871, but the remaining portion thereof, from Winnebago City to the western boundary of the state, a distance of 130 miles, was not completed until December 8, 1879.

It was provided, in substance, in the act of congress of March 3, 1857, under which the appellees claim, that if the United States had sold, or if pre-emption rights had been attached to, any of the lands therein granted at the time the line of railroad therein referred to was definitely fixed, then other lands of the United States lying nearest to the tiers of sections in which the granted lands lay might be selected, in alternate sections and parts of sections, to make up for the deficiency caused by sales and pre-emptions, provided that the lands so selected lay within 15 miles of the line of the railroad, as the same might be located. The act of congress of May 12, 1864, which granted four additional sections per mile, further provided that the lands might be selected within 20 miles of the railroad in question.

The appellant's road, as laid out and constructed, crosses the appellees' road some distance west of Winnebago City, and for some distance east and west of the point of intersection the two roads approach each other so nearly that the land grants interfere and overlap. The lands in controversy in this proceeding lie within the 10-mile or granted limits of the appellant's road. The appellant, therefore, claims that according to a well-established doctrine the act of congress of July 4, 1866, operated as a present grant of all of said lands to the state of Minnesota for its exclusive use and benefit. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. Rep. 334.

Said lands also lie within 20 miles of the appellees' road, but more than six miles therefrom. They are therefore outside of the appellees' granted limits as defined by the act of March 3, 1857, but are within their indemnity limits. On the completion of their road the appellees laid claim to the aforesaid lands as lands which they were entitled to to make up for deficiencies within their granted limits. The claim was conceded both by the general government and by the state of Minnesota. The lands were accordingly certified to the state, and were by the state patented to the appellees between August 22, 1867, and the year 1876. Notwithstanding the action of the general government and the state, no steps were taken by the Southern Minnesota Railroad Company, or its successor in interest, to enforce its alleged right of the lands in question until February 20, 1880. On the last-mentioned date a bill was filed by the appellant against the appellees in the district court of Nobles county, in the state of Minnesota, with a view of recovering a large portion of the same lands, as it is claimed, which form the subject-matter of the present controversy. The bill filed in the district court of Nobles county discloses the same title to the lands that the appellant then sought to recover, which is pleaded and relied upon in the case at bar. It

also prayed for the same relief as to the lands then in litigation which is sought for in the present proceeding. The suit in the district court of Nobles county resulted in a decree in favor of the appellees on March 28, 1883, after a full hearing upon the merits, from which decree no appeal was taken by either party. Among other defenses urged in the present suit, the appellees plead the record and final decree in the suit formerly tried in the state court as a bar to the action. It should be further stated that a small portion of the lands sued for in the present case are situated in even numbered sections in township 105, ranges 41 and 42. Both parties lay claim to these lands under the provisions of an act of congress approved June 22, 1874, (18 Stat. 194.) which was enacted for the relief of actual settlers upon lands previously granted to railroad companies.

John W. Cary and Frank W. M. Cutcheon, (W. H. Norris, Charles E. Flandrau, and George C. Squires, on the brief,) for appellant.
George B. Young, for appellees.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge, after stating the facts as above, delivered the opinion of the court.

It is urged that the plea of a former adjudication is not supported by the record of the suit formerly pending in the district court of Nobles county, Minn., for the reason that the record does not show what lands the appellant then sought to recover, or at least that it does not show that the lands then sued for are a portion of those now claimed. We think that this contention is untenable. The bill of complaint filed in the district court of Nobles county, contained among others, the following allegations, in substance: That, upon the filing of its map of definite location, and upon the completion of its road, the appellant became entitled, under the act of congress of July 4, 1866, and the act of the Minnesota legislature of February 25, 1867, to every alternate section of land designated by odd numbers, for 10 miles in width, on each side of its road, situated in ranges 32 to 45, both inclusive, and in townships 101 to 107, both inclusive, these being lands within its place limits; that it also became entitled to select, if necessary, all of the alternate sections designated by odd numbers within the ranges and townships aforesaid, which were more than 10 and less than 20 miles from its road, to make up for any deficiency within its granted or place limits; that it, in fact, required all of the lands within its deficiency limits to make up for losses within its granted limits; that it had applied to the secretary of the interior to certify to it all of the alternate sections of land aforesaid that were within its place limits and its indemnity limits, and that he had declined to so certify any of said lands because they had already been certified to the state of Minnesota as lands which of right belonged to the appellees; and that the appellees had wrongfully obtained patents for said lands from the state. Annexed to the bill of complaint in the Nobles county suit was a diagram, which was alleged to be a correct map of appellant's road through the aforesaid townships, from the east line of range 32 to the western boundary of the state of Minnesota; and the bill prayed that the appellees might be adjudged to convey to the appellant said lands so conveyed to them in fraud of the appellant's rights.

In response to the foregoing allegations of the bill, the answer denied that the appellant had ever become entitled to the lands therein mentioned, or to any part or portion thereof. The answer admitted that all of said lands had been certified to the state of Minnesota for the benefit of the appellees, and it further averred that the lands in question rightfully belonged to them, and that they had been properly certified for their benefit. These allegations of the bill and answer show with sufficient certainty what lands were embraced in the former litigation. It does not seem to have occurred either to the court or counsel, during the long pendency of the suit in the state court, that there was any difficulty in ascertaining from the pleadings and the diagram in that case, what lands were then claimed, and we have no difficulty in determining from the record what lands were then in controversy, or in identifying them as a portion of those now sued for. It appears to us that substantially all of the sections designated by odd numbers which lie in the townships aforesaid, and in and west of range 32, and within the appellant's place or indemnity limits, were involved in the former suit, and were actually claimed by the appellant. A decree sustaining the appellant's title to all of said lands, could without doubt be supported under the averments of the former bill. In the present case the appellant seeks to recover the lands formerly claimed which lie within its place limits.

It is also suggested that the plea of a former adjudication is not tenable, for the reason that the right to relief in the former action was predicated on the alleged fraud of the appellees, in constructing their road for some distance through the territory where the land grants interfere, on a route somewhat different from that indicated by their original map of definite location. In other words, it is urged, in substance, that the respective suits proceed upon a different theory, and state different grounds of recovery, and that the plea is bad for that reason. This contention would be immaterial, so far as the lands now and formerly sued for are concerned, even if it was true, as supposed, that the right of recovery in the former action was predicated solely on the ground of fraud. The appellant might have pleaded in the former action the same grounds of recovery which it now relies upon, and if it did not do so it cannot take advantage of such neglect. It will not be allowed in this suit to avoid the conclusive effect of the former decree, by averring that it did not plead a particular ground of recovery which it obviously might have pleaded. The parties to the two suits being the same, the judgment in the former case operates as an estoppel, both as to those grounds of recovery which were pleaded, and as to those that might have been pleaded, so far as the lands now sued for are concerned, which were also claimed in the previous action. *Cromwell v. Sac Co.*, 94 U. S. 351-353. But it is a mistake, we think, to suppose that the alleged fraud of the appellees in departing somewhat from their line of definite location was the sole basis for the relief sought in the suit instituted in the district court of Nobles county. In the complaint filed in that case, the appellant pleaded the same equitable title to the lands lying within its place

limits, which are the only lands now sued for, that is relied upon in the case at bar; and the allegations contained in the respective bills, as well as the prayers for relief, are substantially the same. Furthermore, the two suits are alike in the respect that they are actions to establish and to enforce a constructive trust, on the ground that the appellees have wrongfully obtained patents for certain lands which of right belong to the appellant. It is apparent, we think, that in the former suit the complainant laid claim to every alternate section, designated by odd numbers, which was situated within its place limits, not on account of any fraud practiced by the defendants, but solely on the ground that as to such lands the act of congress of July 4, 1866, was a grant in praesenti, and that the title thereto became vested in the complainant, by relation, as of date July 4, 1866, upon the filing of its map of definite location. That is the same title to the lands which is preferred in the case at bar, and, as the record shows, it is the very matter which was considered and adjudicated in the former action. We are of the opinion, therefore, that the decree in the Nobles county suit is an effectual bar to the action, in so far as those lands are concerned which lie in and west of range 32.

The next question to be considered is whether the appellant is estopped by the record in the former suit from asserting title to the lands lying east of range 32, which were not sued for in the former action. It is insisted by the appellee companies, that even as to such lands, the former judgment and findings (particularly the findings) operate as an estoppel. The doctrine is well established, that when an issue of fact, or a mixed question of law and fact, on which the decision of a case depends, has been tried and determined, the parties to such trial will be estopped, even in a second suit on a different cause of action, where the same issue or question arises, from contending to the contrary of what was thus found and determined. In *Cromwell v. Sac Co.*, 94 U. S. 351-353, Mr. Justice Field says:

"Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered."

And in *Outram v. Morewood*, 3 East, 346, the rule is thus stated:

"It is not the recovery, but the matter alleged by the party and upon which the recovery proceeds, which creates the estoppel. * * * The estoppel precludes parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them, * * * has been, on such issue joined, solemnly found against them."

There are many cases in which the foregoing doctrine has been either stated or applied. *Campbell v. Rankin*, 99 U. S. 261-263; *Nesbit v. Independent Dist.*, 144 U. S. 610-618, 12 Sup. Ct. Rep. 746; *Franklin Co. v. German Sav. Bank*, 142 U. S. 93-100, 12 Sup. Ct. Rep. 147; *Laird v. De Soto*, 32 Fed. Rep. 652; *Corrothers v. Sargent*, 20 W. Va. 351-356; *Gardner v. Buckbee*, 3 Cow. 120.

The authorities furthermore show, that the estoppel arising

from a finding in previous suit between the same parties, is not confined to a finding upon a question purely of fact, or upon a mixed question of law and fact, but that it extends as well to a decision construing an agreement between the parties, and to a decision which determines the legal rights of the parties on a state of facts common to both suits, although the causes of action are different. *Tioga R. v. Blossburg & C. R.*, 20 Wall. 137; *Merriam v. Whittemore*, 5 Gray, 316; *Goodenow v. Litchfield*, 59 Iowa, 226-236, 9 N. W. Rep. 107, and 13 N. W. Rep. 86; *Whitehurst v. Rogers*, 38 Md. 503; *Haynes v. Ordway*, 58 N. H. 167; *Clark v. Wiles*, 54 Mich. 323, 20 N. W. Rep. 63; *Mueller v. Henning*, 102 Ill. 646; *Bigelow, Estop.* (5th Ed.) 99. It is also well settled that extrinsic evidence is admissible to show the identity of the issues in the two suits, where such fact is not made manifest by the record in the former proceeding. *Miles v. Caldwell*, 2 Wall. 35; *Campbell v. Rankin*, 99 U. S. 261; *Packet Co. v. Sickles*, 5 Wall. 580; *Whitehurst v. Rogers*, 38 Md. 503.

In the light of these principles the record in the Nobles county suit must be examined, with a view of ascertaining whether any finding therein made upon a question or issue common to both suits is an effectual bar to a recovery of the lands in controversy which lie east of range 32. The suit in the state court was tried before a referee, who returned into court his findings of fact and conclusions of law, in obedience to which a final decree was entered in favor of the appellee companies. There can be no doubt, we think, of our right to consider the entire report of the referee, as well as the pleadings in the case, for the purpose of ascertaining what issues were in fact raised and decided, and upon what theory the former judgment proceeded. In the former case two findings of fact were made and reported by the referee, upon which the decree in that case undoubtedly depended. The first of these findings was, in substance, as follows: That prior to any location of the appellant's road, and prior to the grant of July 4, 1866, the United States, through the proper action of the department of the interior, had accepted the location of the appellees' road from its eastern terminus as far west as the west line of range 39, and had fixed the limits of their grant under the acts of March 3, 1857, and May 12, 1864; and in the month of July, 1864, had withdrawn from settlement, entry, and location all of the lands in odd-numbered sections within a distance of 20 miles on each side of the appellees' road, from the eastern terminus thereof to the west line of range 39, and had thereby reserved said lands to be applied in aid of the construction of said road. In view of the foregoing finding the referee concluded, as a matter of law, that the withdrawal from entry and sale so found to have been ordered by the department of the interior, and to have been made pursuant to such order in July, 1864, operated in itself to exclude all of the odd-numbered sections lying within the appellees' indemnity limits, and as far west as the west line of range 39, from the operation of the granting act of July 4, 1866, under which the appellant claims; and upon that ground the referee recom-

mended a dismissal of the former bill as to all of the land formerly sued for, which lay within ranges 32 to 39, both inclusive. In the former case the referee also found, and reported, in substance, that a very large quantity of land lying in odd-numbered sections within the appellees' place limits, and which the appellees were entitled to under their grant, had been sold or pre-empted prior to the grant of March 3, 1857, and that all of the lands lying within 20 miles of the appellees' road which had not been pre-empted, or granted to other roads, prior to the location of the appellees' line, were in fact insufficient to satisfy the grant of 10 sections per mile to the appellee companies under the acts of March 3, 1857, and May 12, 1864. In view of the latter finding the referee further concluded, as a matter of law, that, because of the deficiency found to exist within the appellees' place limits, all of their indemnity lands as far west as the west line of range 39 passed *without selection*, and that the title thereto became vested in the state of Minnesota for the benefit of the appellee companies as soon as their road was definitely located to range 40, that is to say, long prior to July 4, 1866.

There can be no doubt that the referee properly concluded that a prior withdrawal of the lands by the United States for the benefit of the appellee companies, was a reservation of the same, within the meaning of the act of congress of July 4, 1866, such as would have the effect of excluding them from the operation of that act. We do not find it necessary to decide, and we do not decide, whether the further ruling of the referee is also tenable,—that the title to the lands became vested in the state, without any prior selection, by virtue of the deficiency found to exist within the appellees' place limits. It is obvious, we think, that the right to recover the lands lying east of range 32 is effectually set at rest by the record in the former case, if the finding in that case is accepted as conclusive,—that all of the lands within the appellees' indemnity limits, and east of range 40, were in fact withdrawn for the benefit of the appellee companies in July, 1864, by the proper action of the department of the interior. That finding comprehends all of the lands now sued for which were not formerly in controversy, and it goes without saying that, if the matters covered by the finding are not open to dispute, the estoppel raised by the former decree extends to the whole subject-matter of the present controversy.

We are unable to say that any sufficient reason exists which would warrant us in holding that the finding in question is not conclusive in the present suit. It was made a distinct issue in the former case, as it is in this, that the appellees' line was definitely located as far west as range 40 as early as 1859; that such location was duly accepted by the United States; and that all of the odd-numbered sections for a distance of 20 miles on either side of the located line, as far west as range 40, were actually withdrawn from entry, location, and sale for the benefit of the appellee companies in July, 1864, and were therefore unaffected, by the grant of July 4, 1866. Upon that issue of law and fact, there was a finding in

favor of the appellee companies in the former action, and upon such finding the decree in that case evidently rests. While it is true that some lands are involved in the present suit which were not formerly involved, yet it is obvious that as to them the action of the department of the interior in July, 1864, in ordering a withdrawal of lands, could have had no other or different effect than it had upon those previously sued for. All of the lands lying east of range 40, and within the appellees' indemnity limits, were comprehended and equally affected by the order of withdrawal made in July, 1864, as modified in June, 1865. If the proceedings taken by the department of the interior operated as a reservation of the lands situated in and west of range 32, as the referee found and determined, then, beyond all question, they had a like effect upon the lands lying to the east of that range. The action of the department of the interior having been reviewed in the former proceeding, and the effect thereof having been declared with respect to the lands then in controversy, we think that the appellant should be estopped from contending to the contrary of what was thus found and determined in a suit to recover other lands, which are similarly situated, and with respect to which the same questions of law and fact arise, in substantially the same form, and under the same circumstances. Public policy demands that parties should not be permitted to open up an issue which in an action between them has once been tried and determined, by a slight change in the subject-matter of a subsequent suit, where such change in the subject-matter does not alter the character of the issue, or any of the considerations applicable to its determination. It is sufficient to say with reference to the lands situated in even-numbered sections in ranges 41 and 42, which are sued for in this case, and were acquired by the appellees under the provisions of the act of congress of June 22, 1874, (18 Stat. 194,) by relinquishing to settlers all their right to certain odd-numbered sections, that the decree in the Nobles county suit is an effectual bar to a recovery of such even-numbered sections, and parts thereof, for the reason that the appellant's right thereto is solely dependent upon the establishment of its superior right to the odd-numbered sections which were relinquished by the appellee companies, and it was determined in the former suit, where the question was distinctly drawn in controversy, that it had no such superior equitable right. We have accordingly concluded that the plea of a former adjudication interposed by the appellee companies, should be sustained as to all of the lands which are claimed in the present suit.

It is further to be observed, that the case at bar presents other features which bring it fully within the rulings recently made by this court in *Railroad Co. v. Sage*, (8th Circuit,) 4 U. S. App. 160-191, 1 C. C. A. 256, 49 Fed. Rep. 315. The same considerations which induced us to hold in the case last referred to, that the right to relief in that action was barred on the ground of laches are equally applicable to the facts disclosed by the present record, and we might well rest our decision upon that ground alone. But

as the plea of a former adjudication has been strenuously urged in this court, and as the title to a large body of land is affected by the litigation, we have deemed it advisable to consider the merits of the additional defense which has in this case been interposed. For both of the reasons heretofore indicated, the action of the circuit court in dismissing the bill is approved, and its decree is therefore affirmed.

BROOKS-WATERFIELD CO. v. BROOKOVER et al.

(Circuit Court, S. D. Ohio, W. D. May 12, 1893.)

No. 4,337.

1. CREDITORS' BILL—COLLATERAL TO SECURE ADVANCES—PRIORITIES.

Defendants deposited a note with a commission merchant as collateral security for advances to be used in the purchase of tobacco to be consigned to him for sale, and advances were made pursuant to the agreement. Thereafter, and while the agreement was in force, a creditors' bill was brought against defendants, and the commission merchant was served with process, in order to subject the note as assets in his hands. *Held*, that as to advances made in good faith before the suit was brought, he was entitled to hold the note as collateral for their repayment, whether they were used for the purchase of tobacco or not.

2. SAME—ADVANCES PENDING SUIT.

As to advances made after he was served with process, however, the pendency of the suit amounted to an equitable attachment of the note in his hands, and he was entitled to hold it as collateral for the repayment of only so much of such advances as was actually used by defendants in the purchase of tobacco to be consigned to him.

3. SAME—APPLICATION OF PROFITS.

The net proceeds of sales of tobacco so consigned should be applied to the payment of advances made before the merchant was served with process, and of so much of the advances made thereafter as was actually used in the purchase of tobacco; and he could not appropriate such proceeds wholly to the payment of such subsequent advances, and so reimburse himself therefor, without regard to whether they were used by defendant according to the agreement or not.

In Equity. Creditors' bill, brought by the Brooks-Waterfield Company against Robert C. Brookover and others. On exceptions to master's report. Exceptions sustained.

Ramsey, Maxwell & Ramsey, for complainant.

Avery & Avery and Joseph W. O'Hara, for defendants.

SAGE, District Judge. There are 24 exceptions. It is not necessary to consider them in detail. Among the assets of the defendants Brookover & Co., which the bill seeks to apply to the payment of the complainant's judgment, is a promissory note for \$2,219.60, pledged as collateral to H. H. Hoffman, a leaf tobacco merchant of Cincinnati, to secure future advances for the purchase of tobacco by defendants, to be consigned by them to him for sale. Hoffman was made a party defendant, and served with process May 6, 1890. He filed his answer July 7, 1890. By its terms, the agreement between Brookover & Co. and Hoffman, which was made January 18, 1890, was to continue until the close of the tobacco season of that year; that is to say, until the following December

or January. Prior to the service of process upon him, Hoffman had advanced to Brookover & Co. \$7,329, and had on hand in tobacco, at the purchase price, and in cash, proceeds of sale of tobacco, \$4,186.21; and Brookover & Co. had on hand of the advances, or had expended for purposes other than the purchase of tobacco, \$3,133.58. Hoffman advanced, after May 6, 1890, an additional sum, including interest and expenses, of \$2,955. Brookover & Co.'s total purchases of tobacco prior to May 6, 1890, were \$4,186.42; after that date, \$1,913.22; and the expenses incidental to the business were \$642.78; making a total of \$6,742.42. The total amount of sales made by them and by Hoffman, and, since the institution of this suit, by the receiver herein, is \$8,135. This statement, taken from the master's report, shows a profit on the purchases and sales of tobacco during the year of \$1,392.58. As to the advances made by Hoffman for the purchase of tobacco before he was served with process, he is entitled to hold the note as collateral for their repayment, whether they were actually used for that purpose or not. As to advances made after the service of process, he can hold the collateral only for such as were actually used for the purchase of tobacco. With reference to prior advances, it is only necessary to show that they were made in good faith, because Brookover & Co. were bound by their receipt of the money, and could not release the collateral by proving their misuse of it; and the complainant is subject to all equities existing between the parties at the date of bringing their suit. With reference to subsequent advances, the pendency of the suit amounted to an equitable attachment of the collateral in Hoffman's hands, and limited his claim to the terms of his agreement; and therefore he could rely upon the collateral only to the extent to which those advances were actually applied to the purchase of tobacco.

It is claimed, however, on behalf of Hoffman, that the profits on the purchases of tobacco are sufficient to reimburse the advances made by him after May 6, 1890, and not used by Brookover & Co. for the purchase of tobacco, and that they should be so applied. This claim is not well founded. After Hoffman was served with process, he still had the right to make advances according to the terms of the contract; but he was bound to see to their application. As to the advances not applied to the purchase of tobacco, he can have no recourse on the collateral, and must be remitted to his right as a general creditor. The proper application of the net proceeds of the sales of tobacco is to pay the advances made before May 6, 1890, and such of the advances made thereafter as were used for the purchase of tobacco. Interest will be allowed on the advances, and incidental expenses of the purchases of tobacco will be reckoned as part of the cost.

If counsel cannot agree upon the amounts, there will be a recommendation to the master to state them. All findings of the special master inconsistent with this opinion are set aside; also the finding that the partnership of Brookover & Co. was limited. Whatever may have been the interests of the partners inter sese, they were, as to the public, and as to those with whom they dealt, general partners.

BALTIMORE & O. RY. CO. v. PITTSBURGH, C. & ST. L. RY. CO.

(Circuit Court, S. D. Ohio, E. D. May 10, 1893.)

No. 259.

1. RES JUDICATA—ESTOPPEL—CONTRACT.

The P. Co. brought its bill in equity against the B. Co., praying an account of profits arising from their joint ownership and operation of a section of railway under a contract executed by their predecessors in ownership. A decree was entered in favor of the P. Co. for profits arising from the passenger traffic under the contract, but the suit was dismissed, without prejudice, as to all questions relating to profits from local freights. Afterwards the B. Co. brought its bill for an accounting by the P. Co. for local freights. *Held*, that the P. Co., having obtained the benefit of the contract in its suit against the B. Co., was estopped to deny the validity of such contract in the second suit, and that the dismissal of the former suit, in respect to the freights, without prejudice, did not affect the estoppel.

2. CONTRACT—CONSTRUCTION.

A contract relating to local freight business "from and to N. and C., with stations on the line of said road between those points," does not include the carriage of freights from one intermediate station to another such station.

In Equity. Bill by the Baltimore & Ohio Railway Company against the Pittsburgh, Cincinnati & St. Louis Railway Company for an accounting, under a contract, as to certain freight business carried on over a piece of railroad owned by them jointly. Heard on respondent's exceptions to the special master's supplemental report. Exceptions sustained in part, and overruled in part.

J. H. Collins, for complainant.

Harrison, Olds & Henderson, for respondent.

SAGE, District Judge. The first 10 exceptions go to the whole case. They amount to an application for a rehearing, and present the questions whether the agreement mentioned in the bill, upon the validity of which the complainant's right to an accounting necessarily depends, ever had any binding force or effect; and whether, if it was or would have been otherwise valid, it was, in respect to the subject-matter for which an accounting is sought, *ultra vires*, illegal, and void; and, finally, whether the order for an accounting, and the findings of the court therein embodied, are erroneous, and should not have been made.

The complainant and respondent are joint owners of the railway between Columbus and Newark, Ohio,—the complainant, as lessee of one undivided one-half of the same; and the respondent, as the owner of the other undivided one-half. The agreement referred to in the exceptions was made by and between the Central Ohio Railroad Company and the Steubenville & Indiana Railroad Company. By its terms, the railroad between Columbus and Newark was to be known as the Columbus & Newark Division of both said roads, and to be under their joint control. It was provided in the thirteenth and fifteenth paragraphs of the contract that the local freight business should be done by the Central Ohio Railroad

Company, and that its general freight agent should keep an account of the earnings arising therefrom, and that for such services said company should receive 65 per centum thereof, and the remainder should be equally divided between said company and the Steubenville & Indiana Company. By the fourteenth and sixteenth paragraphs, provision was made for the local traffic, which was to be done on the trains of either of said companies which would give the greatest encouragement and offer the best facilities for the same, and that the company rendering the service should have a certain percentage of the receipts therefor, and the balance should be divided equally between said companies. The complainant succeeded to the rights of the Central Ohio Railroad Company, and the respondent to the rights of the Steubenville & Indiana Company, under this contract. The bill sets forth that both the complainant and respondent recognized the validity and binding force of said contract, and continued to act thereunder, until the month of June, 1872, when the respondent entered upon and commenced the business of carrying local freights, and has continued to do so ever since, notwithstanding complainant's objection and insistence that, as lessee of the Central Ohio Railroad Company, it was entitled to carry all the local freights. The bill prays for an accounting.

The respondent, by its answer, denied the making of this contract, and also set up that, if made, it was ultra vires and invalid. Thereupon the complainant amended its bill, and pleaded an estoppel, setting up that on the 3d day of June, A. D. 1883, the respondent commenced a suit in this court against the complainant for the purpose of adjusting and settling the various matters of account growing out of the management and operation of said railway from the year 1867 up to and until the date of the commencement of said suit, and that in said suit the respondent recovered upon account of the maintenance of said railway, and of its claims for a division of the proceeds of the passenger traffic under said agreement, the sum of \$21,926.35, with interest. The final judgment in that case was entered on the 13th day of December, 1884. The respondent relies upon the order therein made, sustaining exceptions to the item of the report of the special master relating to local freight, and dismissing, without prejudice, all questions touching the same, for adjudication in any other action or proceeding. This dismissal left all questions relating to local freights to be determined, in any future litigation, upon their merits, precisely as if they had never been brought into that case. Looking at the question now presented in that light, it is clear, upon all the authorities, that the judgment of the court that the contract on which that action was based, and this suit is based, was a valid and subsisting contract, is *res judicata* in this case. The defendant, by coming into court as plaintiff in that case against the complainant in this case, asserted the validity and binding force of the very contract upon which the bill in this case is founded, and recovered some \$22,000; a large portion of the recovery being for its share of the passenger receipts, under the provisions of paragraphs 14

and 16, which, so far as relates to any question of validity or ultra vires, stand upon precisely the same ground as paragraphs 13 and 15, relating to the freight traffic. Now it undertakes to avoid liability under paragraphs 13 and 15 for the reason that the contract is illegal and ultra vires. Nothing can be plainer than that it is estopped to do so, and the dismissal without prejudice does not affect that estoppel. It merely leaves the way open to make any defense which goes to the merits of the claim set up by the complainant in this case, and does not rest upon the assertion of the invalidity of the contract. Bigelow, Estop. p. 36 et seq.; Hopkins v. Lee, 6 Wheat. 109; Cromwell v. County of Sac, 94 U. S. 351. See, also, Lovell v. Cragin, 136 U. S. 130, 10 Sup. Ct. Rep. 1024. In Cromwell v. County of Sac, Justice Field, in delivering the opinion of the court, refers to the difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand under a contract or transaction, and its effect as an estoppel in another action under the same contract or transaction. If it were the same claim, that judgment would have been an absolute bar; but, being a different claim, it operated as an estoppel only as to the matters in issue, or points controverted. Justice Field, on page 356, says:

"Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action, upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

On page 357 he quotes from Mr. Justice Willes in *Howlett v. Tarte*, 10 C. B. (N. S.) 813, as follows:

"It is quite right that a defendant should be estopped from setting up in the same action a defense which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defense in a second action because he did not avail himself of the opportunity of setting it up in the first action. * * * I think we shall do wrong to favor the introduction of this new device into the law."

But *Cromwell v. County of Sac*, and the cases therein cited, are clearly distinguishable from this case. It is true that, in the former case between the parties to the present suit, no question was made as to the validity of the contract, but the Pittsburgh, Cincinnati & St. Louis Railway Company, by bringing its action upon the contract, and prosecuting it to a judgment, which affirmed the report of the special master that the contract was valid and subsisting, was as effectually concluded by that finding, which was essential to the judgment, as the defendant would have been if it had pleaded the invalidity of the contract, and judgment had been rendered against the plea. It would be a gross perversion of justice to permit the defendant in this case to retain the local freight receipts upon the plea that the contract under which it

maintained an action for its share of the local passenger receipts is ultra vires and invalid.

The first 10 exceptions will be overruled.

The eleventh exception relates to the revenues received by the complainant and respondent, respectively, between points intermediate to Newark and Columbus. These are included in the master's account. As stated therein, the amount of such revenues received by complainant, and included in the account and report, is \$604.75, and the amount received by respondent, and included in the report, is \$647.49. This exception will be sustained. The contract relates to the local freight business "from and to Newark and Columbus, with stations on the line of said road between those points." This does not include the carriage of freight from one intermediate station to another such station. If counsel cannot agree upon the amounts, the report will be recommitted to the master, with instructions to make the corrections. In all other respects the report is confirmed.

Ex parte CHAMBERLAIN.

(Circuit Court, D. South Carolina. February 16, 1893.)

1. FEDERAL COURTS — JURISDICTION — ILLEGAL TAXATION — INJUNCTION — RECEIVER.

A federal court has power to enjoin a sheriff from distraining property in the hands of its receiver to enforce the payment of a tax which is alleged to be illegal, especially when the property seized many times exceeds in value the amount of the tax.

2. SAME—INJUNCTION—WHEN GRANTED.

The mere fact that, under the South Carolina statute (Gen. St. § 230) authorizing sheriffs to distrain for nonpayment of taxes "sufficient personal property of the party charged" to pay the same, a sheriff, in order to collect a tax of \$1,200, alleged to be due from a railroad receiver, has distrained property worth \$10,000, much of which belongs to third persons, is sufficient to require the interference by injunction of the court which appointed the receiver, regardless of any question as to the validity of the tax.

3. SAME—DUTIES OF RECEIVERS—ILLEGAL TAXATION.

Property in the hands of a receiver of a federal court is bound for the payment of state taxes in the same manner as any other property, but when a receiver believes a tax to be invalid it is his right and duty to apply to the court appointing him for protection.

4. SAME—RESTRAINING ORDER.

Where a receiver of a federal court applies to the court for protection against distraint of property in his hands for the payment of a state tax which he believes to be invalid, basing his action on a prior decision of the same court that the tax was illegal, the court will extend such protection by enjoining the sheriff, and requiring the property to be restored to the receiver, until the presumption of the soundness of such prior decision has been overcome.

In Equity. Petition by D. H. Chamberlain, as receiver of the property of the South Carolina Railway Company, asking the protection of the court as to certain property, which was distrained by a sheriff to enforce payment of taxes. Injunction granted.

Brawley & Barnwell, for petitioner.

D. A. Townsend, Atty. Gen., (Samuel Lord and Ira B. Jones, of counsel,) for the sheriff.

Before GOFF, Circuit Judge, and SIMONTON, District Judge.

PER CURIAM. Under an order of this court filed on the 5th day of December, 1889, in a cause within its jurisdiction, (Bound v. South Carolina Railway Company et al.,) D. H. Chamberlain, the petitioner, was appointed receiver of the South Carolina Railway Company. By this order all of the property of the railway company came and remained in the custody of the court, protected by injunction, and was placed in the care and management of the receiver as the organ and agent of the court. The petition sets forth that the possession thus confided to him has been disturbed, and that M. V. Tyler, sheriff of Aiken county, has distrained and has taken possession of a train of 14 freight cars in the custody and control of such receiver: that of these 14 cars 5 belong to the receiver and 9 belong to the roads outside of this state, but for the purposes of interstate commerce were in the care of the receiver as such; that 8 of them are laden with merchandise belonging to private persons in this state, in the hands of the receiver as a common carrier; that the property in the custody of the court and in the hands of its receiver has been assessed for taxation; that this assessment was illegal and void because of excessive valuation and discrimination; that the receiver had tendered and paid the full sum undoubtedly due on lawful assessment, and that there remained unpaid in the county of Aiken the sum of \$1,215.04, being the excess which is illegal and void; that for this sum of \$1,215.04 and costs the said Tyler, under a distraining execution issued by MacMitchell, county treasurer, had seized and detained the personal property aforementioned, worth in the aggregate \$10,000, a large part of it being the property of third persons, in the care of the receiver and in his custody as common carrier. The petition prays the protection of the court.

Upon hearing the petition a rule to show cause was issued and served on the said M. V. Tyler, with the usual restraining order. No attention or obedience whatever was paid to the restraining order. He has filed his return, justifying his action, and has not released or offered to release any part of the property detained, although the copy of the petition served on him stated the facts set forth above. The bare statement that property of the value of nearly \$10,000 has been distrained to pay \$1,215.04, and that much of it belongs to third parties, in no sense responsible for the tax, even if it be valid, would imperatively require the interference by injunction on the part of the court having this property in its custody. Section 230 of the General Statutes of South Carolina authorizes the sheriff to distrain for nonpayment of taxes sufficient personal property of the party charged with the tax to pay the same. This is the limit of his authority. Of course, he should not be confined to just enough property to pay the tax. But he

cannot, under cover of this, distrain upon \$10,000 for \$1,215.04. Nor under any circumstances can he distrain the property of persons other than the taxpayer. We cannot escape the conclusion that the purpose of the sheriff was not to follow the law, and that his action was the result of predetermination and intention to coerce the receiver and this court into the payment of the excessive tax, notwithstanding and despite of the claim that it was illegal and void.

But the case will not be rested on this ground. There can be no doubt that property in the hands of a receiver of any court, either of a state or of the United States, is as much bound for the payment of taxes, state, county, and municipal, as any other property. Persons cannot, by coming into this court, and, for the promotion of their interests, applying for and obtaining the appointment of receivers, obtain exemption from the paramount duty of a citizen. For this reason receivers in this district pay all just and lawful taxes without asking or needing the sanction of the court, and in their accounts such payments are passed without question. But, on the other hand, receivers are not bound to pay a tax in their judgment unlawful, without the order of the court; and when they consider the legality of the tax questionable it is their right—their manifest duty—to apply to the court either for instruction or protection. Especially is this the case when the question arises between the receiver and persons in the state, county, and municipal government as to the proper construction to be given to the law, upon which individuals may well differ, and it is his right and manifest duty to go to the court, whose creature he is, for instruction. He therefore pursued the proper course when he came in by this petition.

The research of counsel on both sides of this case has succeeded in finding five cases in which a receiver was driven to seek the protection of the court in the matter of taxation,—all of them of persuasive authority; none of them of conclusive authority. A petition was filed by a receiver before Judge Brewer in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 26 Fed. Rep. 11, praying protection from the payment of a tax. It appeared that the only reason for the application was that it was inconvenient to the receiver to pay the tax, and that its validity was in no way questioned. The petition was rejected. But the learned judge shows distinctly his opinion that upon proper showing he would have entertained the petition. This is his language:

"In levying and collecting taxes the state is exercising its sovereign power. There should be no interference with its collection of these taxes in its prescribed and regular methods, even by a court having property in the possession of its receiver, unless it is first charged that the taxes are in some way illegal or excessive.

A bill was filed in *Hewitt v. Railroad Co.*, 12 Blatchf. 452, by receivers, to test the legality of a tax. It was heard by Mr. Justice Blatchford, who entertained the question, discussed it in a long and elaborate opinion, and sustained the legality of the tax. The same receivers came before him again in *Stevens v. Railroad Co.*, 13

Blatchf. 104, and asked relief from the same tax, because of some irregularity. Naturally and properly, it having been decided that the tax was legal, he dismissed the petition. As we have said, a receiver must pay all legal taxes, and the court will not interfere to protect him if he attempt to escape from such payment. in *Georgia v. Atlantic & G. R. Co.*, 3 Woods, 437, Mr. Justice Bradley did interfere with the summary process of collecting taxes by the state, and in his well-considered and able opinion established the right of interference upon the highest grounds of public policy.

Two cases were found by state courts: *County of Yuba v. Adams*, 7 Cal. 35, and *Prince George's Co. v. Clarke*, 36 Md. 206. The first case distinctly shows that the court entertained jurisdiction of a claim of a county for taxes. The second annuls a sale made of property for taxes because the property was in the hands of the court. The decisions of all of the states of the Union and of the supreme court of the United States are full of cases determining the validity of a state tax, or of municipal taxes imposed under the authority of the state legislature. The supreme court of the United States has not only declared a state tax so imposed invalid; it has also reversed the decision of the court of last resort of the state sustaining the tax. *Hoge v. Railroad Co.*, 99 U. S. 349; *Tomlinson v. Branch*, 15 Wall. 460; *Tomlinson v. Jessup*, Id. 454,—are cases carried up from this court, each of them seeking injunction against the state auditor in the matter of taxation. In *Savannah v. Jesup*, 103 U. S. 563, the court decided a tax of the city of Savannah invalid. At the April term of this court, 1892, the case of *Richmond & D. R. Co. v. Blake*, 49 Fed. Rep. 904, (county treasurers and sheriffs,) involving the identical questions raised in this case, was heard by a full bench, and decided. The case came up on pleadings selected by the defendants themselves. Every question made as to legality of the valuation made in this case, and the discrimination and the right and duty of the court to interfere therein, was heard. The excess was pronounced void. This decision has not been reversed. It has not been appealed from. It is an authority of great weight with us. Indeed, as there is yet an opportunity of reviewing it in the supreme court, we would at all events await the result of such an appeal. When, therefore, the receiver comes into this court and asks instructions, predicating his action on the decision in this case, we grant him relief by suspending the collection of the tax until the presumption of the soundness of this decision has been overcome. Besides this, we would not in this collateral way on a rule pass upon the question either of the validity or of the invalidity of this tax.

The only remaining question is as to the jurisdiction of the court and its right to protect the property. By the case of *Bound* against the railway company, as we have seen, all the property of the South Carolina Railway within this state came under the jurisdiction of this court. It acquired possession of this property, and it thus has jurisdiction over the entire subject-matter, every part and parcel thereof. All property in the hands of a receiver is in the custody of the court. No one, whoever he may be, can interfere with it

without the sanction or permission of the court. *Wiswall v. Sampson*, 14 How. 52.

The learned counsel who replied for the sheriff with a frankness which does him great credit, admitted the general rule as to the sanctity of property in the hands of a court; and that, when jurisdiction has once attached in this circuit court in the original case, it can extend its protection to property, even if its value be less than \$2,000. He contends that to this general proposition there is one exception,—when the officers of a state come in and take the property for taxation. He argues that the taxing power is a high exercise of sovereignty, and that to permit a court to interfere with the collection of a tax is to invade the sovereign right, and to embarrass the government. But we have seen that courts all over this country have entertained cases involving the validity of a state tax, in many cases imposed by the legislature, and in very many instances have declared the tax invalid, even a tax imposed by a state legislature, in which is vested more of the attributes of sovereignty than any other department of the state governments. There are many cases of this kind in the reports of the courts of South Carolina. In *Hand v. Railroad Co.*, 17 S. C. 221, upon a claim made by the state for taxes upon property in the hands of a receiver, the court examined into the validity of the claim, and rejected it. In the very recent cases of *State v. Cromer*, 35 S. C. 230, 14 S. E. Rep. 493; *State v. Boyd*, 35 S. C. 233, 14 S. E. Rep. 496,—the supreme court of South Carolina examined into the validity of the action of the comptroller general in a matter of the assessment of property for taxation, and, after examination, set it aside. The court quotes with approval the language of *Moses, C. J.*, in *State v. County Treasurers*, 4 S. C. 520:

"The power to tax is the most extensive and unlimited of all the powers which a legislative body can exert. It is without restraint, except by constitutional restrictions. To tie up the hand [of the court] that can alone resist its unlawful encroachment would not only render uncertain the tenure by which the citizen holds his property, but make it tributary to the unrestrained demands of the legislature."

The language of *Miller, J.*, in *U. S. v. Lee*, 106 U. S. 220, 1 Sup. Ct. Rep. 240, is not inappropriate:

"The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative."

It is not claimed that the state, in order to obtain payment of its taxes, must come into court by petition, and get an order for their payment. On the contrary, as has been said, the paramount right of the state has always been and is acknowledged, recognized, and faithfully preserved. Without any interference whatever on her part, her priority is maintained and observed. But when persons assuming to act in the name of the state seize upon, without notice, and assert exclusive possession of, property in the hands of the receiver and under the protection of this court, and, while so assuming

to act, take property greatly in excess of the sum claimed, the court must and will interfere.

At the hearing a number of affidavits were read going to the issue, was this a legal tax? Upon a rule of this kind it is not competent for us to go into this question. It must be made in a direct proceeding. Such proceedings are already on file in this court. We recognize that the question has not been finally decided, and for this reason our injunction goes only until a further order. If testimony be offered in the orderly way, and if the fact be established that the assessment and the taxes levied thereunder are just and lawful, it will afford the court pleasure, and it will be its duty, to order the taxes paid forthwith, as a paramount lien on all the property and funds in the hands of the receiver.

The Injunction.

This cause came on to be heard on petition, rules to show cause, return thereto, and affidavits. Hearing the same, and upon due consideration thereof, it is ordered, adjudged, and decreed that an injunction do issue to M. V. Tyler, sheriff of Aiken county, his deputies and agents, enjoining and restraining them from further intermeddling, interfering with, keeping and holding the personal property distrained upon by him, belonging to the petitioner as receiver of the South Carolina Railway Company, or in his care and custody as receiver and common carrier, and that this injunction remain of force until the further order of this court. It is further ordered that the said property be restored to the custody of the receiver of this court, and that the marshal put him in possession thereof.

Ex parte HUIDEKOPER et al.

(Circuit Court, D. South Carolina. February 16, 1893.)

INJUNCTIONS—VIOLATION—CONTEMPT—PUNISHMENT.

Where a sheriff, in order to collect a tax, distrains property in the hands of a receiver of a federal court, and thereafter refuses to comply with an order of such court requiring him to restore the property to the receiver, he is guilty of a high contempt, and will be punished by fine and imprisonment. In *re Chiles*, 22 Wall. 168, followed.

Rule against M. V. Tyler and others, sheriffs and treasurer, to show cause why they should not be attached for contempt in violating an injunction.

I. S. Cothran, Hugh L. Bond, and Mr. Crawford, for the receivers.

D. A. Townsend, Atty. Gen., (Samuel Lord and Ira B. Jones, of counsel,) for the sheriffs, Nance and others.

Before GOFF, Circuit Judge, and SIMONTON, District Judge.

PER CURIAM. It appears that certain personal property in the hands of receivers of this court was distrained for an excess of tax; that the receivers had actually paid all of the admitted tax, and had not paid the excess, because it is alleged that it is not authorized

by law. The warrants or executions were issued by the county treasurers in each instance, and were executed by the respective sheriffs. Upon petitions filed in this court by the receivers it was alleged that an amount of property in each instance had been distrained greatly exceeding the amount of tax demands, and that in many instances property in the care of the receivers, belonging to other parties, had been included. At the hearing of the petitions, rules to show cause were issued to each county treasurer and sheriff complained of, and at the same time a restraining order was issued, forbidding them and each of them from disposing of or interfering with the property distrained. These orders were all personally served on the persons to whom they were directed. No attention to or obedience of any of the said restraining orders was paid by any one of the sheriffs served. On the contrary, they retained possession of the property in defiance of the orders, and still retain it. In their returns to the rules to show cause they justify their act, profess no desire to submit to the ruling of the court, and accompany this with a formal disclaimer of any contempt. It must be borne in mind, also, that the property distrained was not of a fugitive character, and that, as it always remains in this state, and is easily reached, there never could arise any difficulty in making a levy when such levy was adjudged to be lawful. In despite of this fact, and of the restraining order of this court, the property was detained. It was said at the bar that the sheriffs acted under the orders of the comptroller general in making the levy under statute of 1888, (20 St. S. C. p. 54.) If this be so, and if, after making the levy and having been served with the order of this court, the sheriffs had obeyed it, we could perhaps have treated this as a technical contempt, and have graduated the punishment accordingly. But, although the comptroller general is the person charged by law with the duty of directing sheriffs in collection of taxes, neither he, nor any one else, can direct or authorize the sheriffs, in the execution of the precept, to violate the rights of third parties, or to conduct themselves illegally. The sheriff is an independent officer, holding under a tenure created by the constitution, with a recognized right in this same statute to differ from the comptroller general, and to have such difference settled in a court of law. Whenever he acts, he acts on his own responsibility, and cannot shield himself by any instructions of the plaintiff in execution. We can deal with him only. In these cases we are of the opinion that there has been open and flagrant—perhaps, we fear, determined—disregard of the process of this court, and that the sheriffs are justly chargeable with high contempt. They cannot escape unpunished. Were this course to be followed, the dignity of the court would be impaired, and its usefulness in great measure destroyed. In our action in this case we will follow the precedent of the supreme court in *Re Chiles*, 22 Wall. 168. Under section 725, Rev. St., the courts of the United States have power to punish for contempt of their authority. Among the cases specifically enumerated are “disobedience or resistance of an officer of the court or by any party, juror, witness,

or other person to any lawful writ, process, order, rule, decree, or command of the said courts." Such has always been the power of the courts, both of common law and equity. The exercise of this power has a twofold aspect, namely, first, the proper punishment of the guilty party for his disrespect to the court or its order; the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform.

With regard to the county treasurers, as it does not appear that any act was done by them after the service of the orders of this court upon them, the rules against them are dismissed.

The Sentence.

M. V. Tyler, sheriff of Aiken county, having been served with two rules to show cause why he be not attached for contempt for the matters set forth in copy of petition to each rule attached, and sufficient cause having not been shown, and it further appearing that he notwithstanding continues to hold and detain said property, we adopt the precedent set in *Re Chiles*, 22 Wall. 157, by the supreme court of the United States: It is ordered, adjudged, and decreed that he is in contempt of this court, and of its orders and process. It is further ordered that he do pay a fine of \$500, and that the clerk of this court shall enter judgment thereon, and issue execution therefor, and also stand committed to the custody of the marshal of this court until he has paid said fine, or purged himself of his contempt herein.

NOTE. This case has been affirmed by the supreme court, so far as the imprisonment is concerned. 13 Sup. Ct. Rep. 785.

UNITED STATES v. WILLAMETTE VAL. & C. M. WAGON ROAD CO. et al.

(Circuit Court, D. Oregon. December 16, 1892.)

No. 1,611.

1. PUBLIC LANDS—GRANTS FOR WAGON ROADS—PERFORMANCE OF CONDITION.

The company to which the state of Oregon transferred the grant made to it in aid of a certain wagon road by the act of July 5, 1866, (14 St. p. 89, c. 174,) constructed a road which was regularly used as such, though the grades were heavy and the bridges few. It crossed the S. river by fords which were dangerous when the snows were melting in the spring, but at such times the snow itself in the mountains prevented through travel on the road. *Held*, that in view of the nature of the country, the needs of the time, the modes of travel then in use, and the value of the grant, the road was such as to satisfy the requirements of the granting act.

2. SAME—GOVERNOR'S CERTIFICATE—PERSONAL INSPECTION.

The provision of the act that the lands might be disposed of from time to time upon the certificate of the governor of Oregon that 10 continuous miles of the road were completed, did not require or contemplate that he should make a personal inspection of the road to determine the fact.

3. SAME—FRAUDULENT PROCUREMENT—EVIDENCE.

It was shown that the persons appointed by the governor to inspect the road were paid by the road company, and there was testimony that one

of the inspectors was under the influence of liquor furnished by the company. This he denied. It was shown, on the other hand, that there was no provision for their payment by the state; that the company, when it requested the inspection, was notified that it would have to compensate the inspectors; and that they were not appointed by its procurement or suggestion. *Held*, that these facts would not support a charge that the certificates were procured by the fraud of the company.

4. SAME—DEFECTS IN FORM.

One of the certificates was to the effect that a plat of one section of the road had been filed in the governor's office, and showed that "that portion of the road commencing and ending as designated on the map has been completed as required by the act of congress." *Held*, that this was not fatally defective where the evidence showed that the governor's agent had caused an inspection to be made of that part of the road, and that the certificate was made in pursuance of his report.

5. SAME.

A second certificate, to the effect that the governor had "examined and accepted" a certain section of the road, is sufficient, as it is equivalent to certifying that the road has been examined, approved, and accepted, because found to be constructed according to law.

6. SAME—GRANT IN PRESENTI—BONA FIDE PURCHASERS.

The act of July 5, 1866, (14 St. p. 89, c. 174,) which grants a portion of the public lands to the state of Oregon in aid of the construction of a wagon road, is a present grant of the fee simple upon condition subsequent; and bona fide purchasers of the land will not be denied protection as such on the ground that no patents had been issued for the land when they purchased.

7. SAME—CONDITION SUBSEQUENT.

Forfeitures for breach of the condition that the road should be completed in a specified time could only be enforced by legislative enactment or judicial proceedings of the United States, in the absence of which the road might be completed, and forfeiture thereby prevented, even after the time limited had expired.

In Equity. Bill filed by the United States in conformity to the act of March 2, 1889, (25 St. p. 850, c. 377,) against the Willamette Valley & Cascade Mountain Wagon Road Company, David Cahn, Alexander Weill, and others, for forfeit lands. Bill dismissed.

Franklin P. Mays and Albert H. Tanner, for United States.

Henry Ach and C. E. S. Wood, for defendants David Cahn and Alexander Weill.

GILBERT, Circuit Judge. By act of congress of July 5, 1866, there were granted to the state of Oregon, to aid in the construction of a military wagon road from Albany to the eastern boundary of the state, three sections of the public lands per mile for every mile of said road as the same should be constructed. The act provided that the road should be constructed "with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the state of Oregon may prescribe, and that it shall be and remain a public highway for the use of the government of the United States." The act further provided that the legislature of Oregon might dispose of the lands for the construction of the road as the work progressed, whenever the governor of the state of Oregon should certify to the secretary of the interior that 10 continuous miles of the road had been completed;

and that, if said road should not be completed in five years from the date of the act, no further sales should be made, and the land remaining unsold should revert to the United States. By act of the legislature of Oregon, approved October 24, 1866, the said lands so granted, and all rights under the grant, were transferred to the defendant the Willamette Valley & Cascade Mountain Wagon Road Company, a private corporation of the state of Oregon.

Within the time limited for the construction of the road, the whole line of the road, from Albany to the state line, 448.7 miles in all, was certified to have been completed in the manner required by the act by four several certificates of the governor of Oregon, the first bearing date April 11, 1868, and the last of date June 24, 1871. On June 18, 1874, congress passed an act recognizing the transfer to the wagon road company, and authorizing the issuance of patents to that corporation for all the lands so granted to the state, with the following proviso: "This shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for lands to which the state is already entitled." On June 19, 1876, under this statute, patent issued to the wagon road company for 107,893 acres of the lands. On August 19, 1871, the wagon road company sold and conveyed the land grant to H. K. W. Clarke, for a consideration, as recited in the deed, of \$75,000, and on September 1st of the same year Clarke conveyed the same to David Cahn, in trust for said grantor and for T. Egenton Hogg and Alexander Weill.

In March, 1878, complaint was made to the secretary of the interior by citizens of Oregon that the road had not been constructed according to the provisions of the original granting act, and two years later a special agent was appointed to investigate and report upon the matter contained in said complaint. In October, 1880, the agent made his report to the effect that the road, and particularly the eastern portion thereof, had not been constructed as required by the act of congress. His report, with the evidence accompanying the same, was placed before congress. In the house of representatives the matter was referred to the committee on military affairs, and that committee, after investigation, reported that no action be taken. Subsequently, in February, 1882, further charges and proofs were laid before congress, which, in the house, were referred to the committee on public lands, and, in the senate, to the committee on military affairs. Both committees reported that no action be taken by congress, alleging as a reason for that conclusion "that the executive department of the government had ample authority in law without any instruction from the legislative department." The secretary of the interior thereupon made an investigation of the matter, and as the result thereof directed the commissioner of the general land office to proceed and certify the lands for patent. In October, 1882, patents issued to the wagon road company for 440,856 acres of the lands which had then been selected. Since that date no patents have issued for the remaining lands claimed to have been earned by the wagon road company, and 312,691 acres of the same remain unpatented.

On March 2, 1889, congress passed an act directing the attorney general to cause a suit to be brought against all claimants of the lands so granted for wagon road construction, "to determine the question of the seasonable and proper completion of said road in accordance with the terms of the granting act, either in whole or in part, and the legal effect of the several certificates of the governor of Oregon of the completion of the road, and to declare forfeited to the United States all land not earned in accordance with said act, saving and reserving the right of all bona fide purchasers of such lands for valuable consideration," and providing that said suit or suits should "be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried." In pursuance of the authority so conferred upon the attorney general, this suit was commenced by the United States against the wagon road company and the subsequent grantees of the lands in question. The bill sets forth the facts above enumerated, and alleges that no portion of the road was constructed, as required by the act, within the time limited therein; that the certificates of the governor were fatally defective in form, and were procured by the fraud and misrepresentation of the wagon road company, and that the present grantees of the land from the wagon road company purchased the same with knowledge of said facts.

To this bill the defendants Alexander Weill and David Cahn make answer, setting forth the following defenses: (1) That the road was completed in all respects as required by the granting act, and within the time therein limited. (2) That the certificates of the governors of Oregon were by the act made conclusive evidence of the completion of the road, and that upon the strength of said certificates the defendants became bona fide purchasers of the lands. (3) That, conceding that the road may not have been completed within the time limited, nevertheless, subsequently, and before any declaration of forfeiture by the United States, the road was fully completed in the manner required by the act, and thereby the forfeiture was avoided. (4) That the defendants, after purchasing said lands, relied upon the action of congress in 1874 in directing the issuance of patents to said land, and upon the result of the investigation made by congress above referred to, and the action of the secretary of the interior after his investigation in 1882, directing the issuance of patents, and in consequence thereof expended large sums of money in and about said lands and in repairing said road, whereby the United States have become estopped to claim a forfeiture.

The first question to be decided under the evidence is whether the road was seasonably and properly constructed. Upon this point the evidence is voluminous and to some extent conflicting. The conflict arises mainly from a difference of opinion as to the nature and quality of road required to be constructed by the act. Was this road constructed of such width, gradation, and bridges as to permit of its regular use as a wagon road? It would seem that the question must be answered in such light as may be had from the nature of the country to be crossed, the needs of the time, the

means of travel then in use, the difficulties to be overcome, and the value of the land grant. In the light of such considerations and the testimony of the witnesses, I am convinced that within the time limited in the grant the road was fairly well constructed from Albany as far east as the Des Chutes river. It is true that it would have been a better road with more bridges, easier grades, and better turnouts for teams, but it does not appear that for want of these improvements its regular use as a wagon road was ever interrupted, or that any travel was diverted from the road on account thereof. The fords of the Santiam were difficult and dangerous when the snows were melting in the spring, but at such times the snow in the mountains prevented all through travel on the road. As soon as the snow was gone from the mountains the Santiam became fordable. There was an extensive travel upon the road in the earlier years of its use, and the evidence is that it compared favorably with other mountain wagon roads in the state, similarly located and similarly aided by grant of public lands, and that during those years there was no public complaint of its defective construction. The remainder of the road, from the Des Chutes to the eastern boundary of the state, was constructed without bridges, and with but little outlay of money or work. A line was surveyed through, and marked with mile stakes. Here and there some grading was done, and some rocks removed to facilitate the crossing of ravines or fords. There is no doubt that if wagon trains had passed along the line soon after the survey they could have followed the stakes to the end of the road, and, if any considerable travel had ensued, a passable wagon road would have been worn through the bunchgrass and the sagebrush of that open country, but no such through travel followed. There was at that time no necessity for a road further east than Harney valley.

The settlers going east of the mountains from the Willamette valley diverged in all directions soon after crossing the mountains, and, the extreme eastern portion of the road being wholly unused, its stakes and marks soon disappeared from sight, and a few years later a considerable proportion of it was fenced in by settlers. The principal defect in the road as originally built, east from the Des Chutes, was in the difficulty of crossing the streams. At ordinary stages they were all fordable, with more or less trouble, but much of the time they were impassable. The travel on this part of the road, especially in crossing the Des Chutes, Silver creek, and Silver river, was often interrupted on account of high water, and I am of the opinion that the evidence shows that, for want of bridges, this part of the road was not so constructed as to permit of its regular use as a wagon road. In arriving at this conclusion I do not in any way impugn the good faith of the inspectors. It is a matter upon which opinions may differ.

What is the legal effect of the certificates of the governors? It is claimed on behalf of the United States that all the certificates are void—First, because they are not and do not pur-

port to be based upon a personal inspection of the road; second, because they were obtained by the fraud and misrepresentation of the wagon road company, and that the first two certificates are otherwise fatally defective in form.

The contention that the act of 1866 required a personal examination of the road by the governors before they should issue the certificates is not supported by the language of the act or by any fair or reasonable construction of its terms. The grant was made to the state of Oregon, and was mainly for its benefit. The only advantage reserved to the United States was the free use of the road for transportation of troops and stores. It was necessary that some person or tribunal be designated to examine and receive the road. Congress justly assumed that the governor of the state—its highest official—would in a matter of such public importance, at the proper time, and before issuing the certificate, take such steps as might be necessary to ascertain whether the road had actually been constructed in the manner required by the act, and the decision of the governor was made the conclusive and only evidence of that fact.

The charge that the certificates were procured by fraud and misrepresentation has no support in the evidence. It is based upon the fact that the compensation of the inspectors for their services in that capacity was paid by the wagon road company, and that some of the witnesses testified that one of the inspectors, R. M. Powers, while inspecting the road, was under the influence of liquor furnished by the road company, and that one of them testifies that Powers said he was making a good thing out of the inspection, all of which is denied by Powers. It is shown that there was no public fund out of which to pay for inspection of the road. No appropriation had been made for that purpose, either by the act of congress or by the legislature of Oregon. The officers of the company, when applying for inspection, were informed by the governor that they must defray the expense of the examination. They accordingly did so, and the amount paid does not appear to have been more than a reasonable compensation. The inspectors in three instances accompanied the workmen while constructing the road and repairing the same, and caused the road to be completed to their approval. I fail to find in any of these facts any necessary impeachment of the integrity of any of the reports of the inspectors. There is no evidence that either of these inspectors was selected at the suggestion or by the procurement of the company or any of its agents, and there is no evidence whatever that either of the executive officers who made the certificate had any knowledge or intimation of any fraud or misrepresentation of the wagon road company, or had heard any rumor or complaint that the land grant had not been justly earned.

There are defects in the form of the first certificate, but not such as to avoid its legal effect as such. It certifies that a plat of that section of the road has been filed in the governor's office, "and shows that portion of the said road commencing and ending as designated on the map has been completed, as required

by the act of congress." This would indicate, from the language used, that there had been no inspection of the road itself, and that the officer certifying declared only what the map expressed. The testimony shows, however, that the governor's agent had caused an inspection of this portion of the road, and that the certificate was made in pursuance of his report. It was the evident intention of the maker of this certificate to certify that the road had been completed according to law. It was so understood and accepted by the wagon road company, and it was so received by the officials of the United States. Moreover, if there were serious defects in its form, the error was subsequently cured by the "omnibus" certificate issued by the governor in 1871, whereby the completion of the whole road was certified in due form.

The second certificate is alleged to be defective for the reason that instead of certifying that the portion of the road therein referred to has been completed, it states that the governor has "examined and accepted" the same. The difference is one of form, and not of substance. The language employed is equivalent to a certificate that the road has been examined and has been approved and accepted, because found to be constructed according to law. The evidence is clear that the defendants, in purchasing the lands in 1871, relied upon the certificates as conclusive evidence that the road had been completed and the land grant earned. There is no evidence that they had notice of any fraud or misrepresentation on the part of the road company, or that any fact came to their notice that would have imposed upon them the duty of examining the road to see whether it had been constructed according to law. The purchase was made without secrecy, and after open and extended inquiry as to the value of the lands. The price paid was not disproportionate to the market value of the lands at the time.

The contention of counsel for the United States that the defendants could not have occupied the position of innocent purchasers so long as patents for the land had not issued, is not supported by the authorities. The grant was a grant in praesenti. The language of the granting clause was "that there be and hereby is granted to the state of Oregon." This made it a present grant of an estate in fee upon condition subsequent, notwithstanding the fact that the lands were required to be subsequently selected. *U. S. v. Wallamet Val. & C. M. Wagon Road Co.*, 42 Fed. Rep. 357; *Schulenberg v. Harriman*, 21 Wall. 44; *Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336. Patent was not necessary to convey the title, and when it issued it was only evidence of a title that had already passed. *Rutherford v. Greene's Heirs*, 2 Wheat. 196; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985; *Van Wyck v. Knevals*, *supra*. The defendants are clearly shown to be bona fide purchasers. As such, their rights would be conserved in a court of equity under the general principles of jurisprudence governing the court irrespective of the statute, but in this case congress has seen fit to expressly declare, in the act

authorizing the prosecution of this suit, that the interests of all such purchasers, if any there be, shall be protected.

The third defense is also established by the evidence. The act of congress of July 5, 1866, required the completion of the road within five years from that date, and it provided that thereafter no further land should be sold, but that the land then remaining unsold should revert to the United States. Only the grantor could take advantage of the nonperformance of this condition subsequent. Until a forfeiture was asserted, the title remained unimpaired in the grantee. Here the condition subsequent was attached to a public grant. The forfeiture, instead of being asserted by re-entry, or its equivalent, as in the case of a private grant, could only be declared by judicial proceedings,—equivalent to an inquest of office at common law,—or by legislative enactment amounting to an assertion of title for a breach of the condition. *Schulenberg v. Harriman*, 21 Wall. 44; *U. S. v. Repentigny*, 5 Wall. 211. There was no attempt to demand or claim a forfeiture of this land grant on the part of the United States until congress passed the bill which authorized the prosecution of this suit. At any time prior to that date the grantee could lawfully comply with the condition subsequent, and thereby defeat the forfeiture. The evidence shows that this was done. In 1887 the whole road was repaired and completed by the erection of bridges and the construction of proper grades. The expenditure for that purpose was \$89,000, and there can be no doubt that then, if not before, the road was completed in all respects in compliance with the terms of the granting act.

On exceptions to parts of the answer it was held that the defense of estoppel as pleaded therein was available to these defendants as against the United States, and it is unnecessary here to repeat the reasoning or the authorities upon which that conclusion was reached. 54 Fed. Rep. 807. It is shown by the evidence that the defendants relied upon the action of congress as expressed in the act of 1874, directing the issuance of patents, its subsequent treatment of the complaint against the road, and its report that no action be taken, the result of the investigation by the secretary of the interior and the subsequent issuance of patents, and that in consequence thereof they altered their relation to the subject-matter of this suit by expending large sums in repairing the road, in paying fees to the government, in payment of taxes, and expenses of caring for the lands, amounting in the aggregate to \$142,315.38.

These facts render it inequitable that the United States should at this late date, and after such long nonaction and acquiescence, assert title to the lands, or claim a forfeiture of the same for a failure to construct the road within the five years succeeding the land grant of July 5, 1866. The bill will therefore be dismissed.

MCKELVEY v. TUCKER et al.

(Circuit Court, N. D. New York. May 18, 1893.)

No. 3,019.

ACTION ON GUARANTY—AUTHORITY OF AGENT—EVIDENCE.

T. & Co., desiring to attach the property of their debtor, J., in another state, telegraphed to a bank there: "Please provide bondsmen, T. & Co. v. J. See N.," (T. & Co.'s attorney,)—and afterwards, "We guaranty you against loss on bond of \$2,000, T. & Co. v. J." T. & Co.'s attorney having levied an attachment on the debtor's goods, M., president of the bank, at the request of the attorney, and relying on T. & Co.'s guaranty, executed an indemnity bond required by the sheriff, the goods being claimed by a chattel mortgagee. *Held*, in an action on such guaranty by M., that it was no defense that defendants had not authorized their attorney to procure the execution of any other than the attachment bond.

At Law. Action by John McKelvey against Henry Tucker, Sarah Griffith, and others to recover damages sustained by the plaintiff by reason of his having signed indemnity bonds for the defendants, they being under an implied obligation to indemnify the plaintiff against loss. The complaint alleges that the sum thus lost by the plaintiff amounts to \$4,733, and interest from February 10, 1892. The case was tried to the court, jury being waived by written stipulation. Judgment for plaintiff.

Statement by COXE, District Judge:

In the autumn of 1883 the principal defendants were doing business at Utica, N. Y., under the firm name of Tucker, Calder & Co. At this time the firm of J. K. Johnson & Co. were doing business at Grand Forks, Dakota territory, now North Dakota. They were indebted to Tucker, Calder & Co. in about the sum of \$1,430, for goods sold and delivered. Tucker, Calder & Co. placed their account in the hands of R. G. Dun & Co. for collection and they sent it to Noyes & Noyes, attorneys at Grand Forks. On the 20th of November, 1883, Noyes & Noyes telegraphed R. G. Dun & Co. as follows:

"Tell Tucker to instruct their (bank) to wire bondsmen to First National Bank, Grand Forks, we will attach Johnson. Noyes & Noyes."

The plaintiff, John McKelvey, was the president of the First National Bank of Grand Forks. On the same day Charles S. Symonds, who was cashier of Tucker, Calder & Co.'s bank, telegraphed the First National Bank of Grand Forks as follows:

"Charles P. Clarke will be bondsman for Tucker, Calder & Co., he is responsible. C. S. Symonds, Cashier Utica City National Bank."

The bond was mailed to Noyes & Noyes, November 23, 1883, and thereafter the following telegrams passed between the parties:

"Nov. 27th, 1883, Grand Forks, Dakota.

"To Tucker, Calder & Co.: Bond received. Cannot use. Wire through your bank First National Bank of Grand Forks for bondsmen.

"Noyes & Noyes."

"Nov. 28, 1883.

"To First National Bank of Grand Forks, Dakota: Please provide bondsmen, Tucker v. Johnson. See Noyes. C. S. Symonds, &c."

"Dec. 1, 1883, Grand Forks, Dakota.

"To Tucker, Calder & Co.: Bank received telegram. Insufficient. Bank must wire guaranty of two thousand dollars to First Nat. Bank here to remain harmless. Noyes & Noyes."

"Utica, N. Y., Dec. 3d, 1883.

"To First National Bank of Grand Forks: We guaranty you against loss on bond of two thousand dollars, Tucker v. Johnson.

"C. S. Symonds, Cashier."

"Dec. 7, 1883, Grand Forks, Dakota.

"To Tucker, Calder & Co.: We need thirteen hundred dollars more bonds. "Noyes & Noyes."

"Utica, N. Y., Dec. 8, 1883.

"To First National Bank of Grand Forks: We guaranty thirteen hundred additional, Tucker vs. Johnson. C. S. Symonds, Cashier."

With the exception of three letters to Noyes & Noyes, in confirmation of the foregoing dispatches, this ends the correspondence. Nothing further seems to have passed between the parties orally or in writing until long after their legal status had become fixed. On the 7th and 10th of December, 1883, Tucker, Calder & Co., by Noyes & Noyes, their attorneys, began suits and levied attachments upon the goods of said Johnson & Co., the plaintiff signing the attachment bonds. Prior to these suits other creditors had commenced suits and levied attachments. On the 12th of November, 1883, Johnson & Co. executed to Seymour S. Titus, cashier of the Citizens' National Bank at Grand Forks, a chattel mortgage covering all their stock, as security for certain notes and drafts discounted and held by said bank. At the time of the commencement of the said attachment suits said Titus was in the possession of the said stock of goods under this mortgage. Before the sheriff would consent to attach and sell the property under the warrant of attachment he demanded bonds of indemnity. Such bonds were given on the 7th and 10th of December, 1883. They were in the sum of eight hundred and seven hundred dollars respectively, and conditioned as follows: "If said sheriff shall hold said goods for Tucker, Calder and Company, by virtue of said attachment, and in case the court shall finally decide that said attachment should not have been made and the sheriff aforesaid shall be obliged to pay said claims or the value of said goods for unlawfully holding the same, if the court shall finally decide that said holding by said sheriff was unlawful, and if said Tucker, Calder & Co. shall pay all costs he shall sustain in said matters, not exceeding the sum of eight hundred dollars, then this obligation shall cease and be void, otherwise to remain in full force and effect." They were signed, "Moritz Heim for Tucker, Calder & Co., John McKelvey and C. E. Burrell." The plaintiff, John McKelvey, signed the bonds upon the request of Noyes & Noyes, the attorneys for Tucker, Calder & Co., and upon the strength of the telegrams above quoted, as a matter of business accommodation, without any knowledge as to the controversy or the merits of the claim of Titus, the mortgagee, to the stock of goods. Upon the receipt of said indemnity bonds the sheriff proceeded to dispossess the said mortgagee and took possession of the stock of Johnson & Co. under the writs of attachment as aforesaid. In February, 1884, judgments were entered in the several attachment suits against J. K. Johnson & Co., including the two actions brought by Tucker, Calder & Co., executions were issued and the goods were sold by the sheriff. None of the money realized on this sale reached Tucker, Calder & Co., as it was all applied in payment of prior judgments. After the execution sale Titus brought an action against the sheriff for conversion and recovered judgment for about the sum of \$15,000, but collected nothing, as the sheriff was insolvent. Thereafter Titus sued McKelvey and the other sureties on the various indemnity bonds as wrongdoers for having, by reason of said indemnity bonds, induced the sheriff to seize and hold said property, and, after trial, recovered a judgment against the said McKelvey for \$15,017.81. Execution was issued on said judgment and a large part of McKelvey's real estate was sold thereunder. In February, 1892, McKelvey redeemed said property, paying to the sheriff the sum of \$3,733.10. For this sum and \$1,000 additional for expenses, etc., the plaintiff demands judgment. There is no evidence, other than a slight presumption, that Tucker, Calder & Co. knew that indemnity

bonds were given to the sheriff. They did not expressly authorize or ratify the giving of such bonds. The theory of the action is that the defendants having induced the plaintiff to sign the bonds for their advantage and benefit, and having agreed to guaranty bonds signed by him, are under an implied obligation to reimburse him for the loss sustained. The defense is that the defendants only requested the plaintiff to sign attachment bonds, that in asking the plaintiff to sign indemnity bonds their attorneys exceeded their authority, and the defendants are not liable for the loss occasioned thereby.

Edwin H. Risley and Guy C. H. Corliss, for plaintiff.
Frederick G. Fincke, for defendants.

COXE, District Judge, (after stating the facts as above.) Although a great mass of evidence is presented, the facts, upon which liability rests, are few and simple. Tucker, Calder & Co. employed Noyes & Noyes to collect a claim of \$1,400 against J. K. Johnson & Co., of Grand Forks, Dak. Noyes & Noyes proposed to levy an attachment if Tucker, Calder & Co. would induce the First National Bank of Grand Forks to furnish the necessary bonds. Thereupon Tucker & Co., through their bank at Utica, N. Y., requested the First National Bank at Grand Forks, to furnish bondsmen in the suit of Tucker v. Johnson. For particulars the bank at Grand Forks was referred to Noyes & Noyes. The Utica bank agreed to guaranty the bondsmen from loss to the extent of \$3,300. Upon the receipt of this request and guaranty the plaintiff, who was president of the Grand Forks bank, signed the bonds presented by Noyes & Noyes, and because of this act he suffered the loss which he now asks the defendants to make good.

In contemplation of law it is as if the defendants had requested the plaintiff to sign bonds in Tucker v. Johnson which Noyes & Noyes would prepare and had agreed to pay all loss—to the extent, at least, of \$3,300—which he should sustain by reason of such signing. It would seem that the action should be based upon the defendants' promise direct to the plaintiff, and not upon the theory that Noyes & Noyes, as attorneys, had authority to bind their clients by requesting McKelvey to sign the bonds. In this view it is quite immaterial whether the attorneys acted within the scope of their authority or not. Assume that they had no authority to give indemnity bonds to the sheriff, that the defendants never intended to give such bonds, and that the acts of Noyes & Noyes in this regard were entirely unauthorized by them. The defendants are still liable on their promise. The difficulty with their contention is that it assumes that the plaintiff knew what was passing in the minds of the defendants. So far as the record discloses the first intimation that the plaintiff had of the matter was when he received the dispatch of November 28, 1883, requesting him to provide bondsmen in Tucker v. Johnson. He did not know whether Tucker v. Johnson was an attachment suit, a foreclosure suit, or a patent suit. He did not know whether the bond required was one on attachment or appeal, as indemnity or as security for costs. He knew simply this: That there was a suit pending between Tucker and Johnson; that a bond of some

kind was needed, and that Noyes & Noyes, the plaintiff's attorneys, would inform him as to the particulars. If the telegram had said, "Please provide bondsmen for attachment in *Tucker v. Johnson*," the principle contended for by defendants might apply. But the request was not limited in any way, except that the bondsmen were to be in the suit of *Tucker v. Johnson*. In all other respects it was a broad request to sign whatever bonds Noyes & Noyes presented. The plaintiff was fully justified in assuming, after this general reference to Noyes & Noyes, that they knew their clients' wishes, and were acting in conformity to their clients' instructions. Having been directed by the defendants to Noyes & Noyes he could do nothing else than sign the bonds which they assured him were required in the suit of *Tucker v. Johnson*.

It seems to the court that the defendants do not meet the issue by the assertion that they are not liable upon this unqualified promise, because the bonds which the plaintiff signed for their benefit were not the bonds which they expected him to sign, and not the bonds which they thought he had signed. They could have limited their liability to a specific bond. This they did not do. It was conceded on the argument that the judgment against McKelvey in the suit brought against him by Titus cannot be attacked in this action. In other words, it is not disputed that McKelvey's property to the extent of nearly \$4,000 has been taken from him by due process of law for the sole and only reason that he became bondsman for the defendants. It was purely a matter of accommodation on the part of the plaintiff. He acted without a particle of interest in the matter and in entire good faith. He received the defendants' request to sign the bonds, and on their promise to hold him harmless, he signed, and he lost. The question is whether he or the defendants shall suffer this loss. To this question it seems to the court that but one answer is possible. The defendants must reimburse the plaintiff for the injury which he has sustained solely on their account. They induced him to sign the bonds, and promised to pay the loss if he did sign. That promise is now invoked and must be enforced.

There must be a judgment for the plaintiff.

CABOT v. McMASTERS.

(Circuit Court, N. D. Illinois. March 18, 1893.)

ACTION ON BOND—DECLARATION—EXTENT OF SURETY'S LIABILITY.

Plaintiff entered into an agreement to consign goods to an agent for sale, and defendant executed a bond conditioned that the agent should duly pay for all goods consigned "under said agreement, or otherwise." *Held*, in an action on said bond, that a declaration which did not state whether the goods for which the agent failed to pay were consigned before or after the date of the agreement was demurrable, since defendant was not liable on the bond for goods consigned before the agreement was made.

At Law. Action by Samuel Cabot against William L. McMasters upon a bond. Defendant demurs to the declaration. Demurrer sustained.

Dent & Whitman, for plaintiff.

Hand, Milchrist & Smith, and Shedd & Underwood, for defendant.

GROSSCUP, District Judge. This action is brought to recover of the defendant, on account of a bond executed by him, to secure the performance of a certain contract on the part of one Edwin A. Mason, entered into between said Mason and the plaintiff. The declaration sets forth, at large, both the agreement and the bond. The agreement was executed on the 25th day of January, 1889, and provides, in substance, that the plaintiff shall consign to the said Mason, as his agent, through a period of three years from that date, certain shingle stains, and allow to said Mason, as commission for their sale, certain discounts or percentages. In consideration of this, Mason agrees to pay for the stains ordered by him, less the discounts, freightage, etc., on the 1st of each succeeding month, and to render an account of stock and sales every two months. The bond executed by the defendant to the plaintiff is dated the 14th of February, 1891, and is conditioned that, if the said Mason "shall well and truly perform and keep each and every promise, agreement, undertaking, and stipulation on the part of said Mason to be performed and kept in and under said agreement, and if the said Cabot shall duly receive payment for all stains consigned or sent by said Cabot to said Mason, or on his order, under said agreement, or otherwise, then this obligation to be void." The breach assigned is that on the 25th of January, 1889, and on divers days thereafter, before the 25th of January, 1892, the plaintiff consigned to Mason stains to the amount of \$5,000, for which Mason has refused to make payment, whereby an action has accrued, etc. To this declaration the defendant demurs.

It is obvious that the purpose of the bond was to secure to plaintiff, prospectively, Mason's promises and obligations under the agreement. The bond must be construed strictly in favor of the obligor, and there is no term which shows an intention on his part to respond for past delinquencies, or stand responsible for past-due promises, of Mason. Such a purpose could only have been effected by an agreement showing, in plain and apt words, an intention to assume such responsibility. The breach set out in the declaration may have been for stains consigned after the date of the bond, or for those consigned prior to the bond, the payment for which, by Mason, under the terms of the agreement, fell subsequent to that date; but it is not averred that such was the case. So far as the declaration discloses, all the delinquencies may have occurred prior to the execution of the bond. It is the duty of the plaintiff to allege a cause of action which, if proven to be true, would entitle him to a judgment. The breaches set forth in this declaration might all be true, and yet the plaintiff be entitled to no judgment. It would be manifestly unjust to subject the defendant to the costs and an-

advances of a trial until some fact is alleged upon which he is compelled to take issue or suffer judgment. Such, indeed, is the sole purpose of pleadings in a cause. For the foregoing reasons the demurrer to each of the counts of the declaration is sustained.

GRAYDON v. HURD.

(Circuit Court of Appeals, Sixth Circuit. May 9, 1893.)

No. 73.

1. ADVERSE POSSESSION—POSSESSION OF OWNER AFTER FORECLOSURE—TENANCY BY SUFFERANCE.

If lands are sold under a decree of foreclosure, the grantee of the mortgagor being made a party to the foreclosure suit, the sale extinguishes the title of such grantee; and if he remains in possession after the sale his possession is that of a tenant by sufferance, in subordination to the title of the purchaser at the sale, and does not become adverse until the relation of tenant by sufferance is disavowed, and the purchaser has knowledge or notice of the disavowal.

2. SAME—EJECTMENT—INSTRUCTIONS—NOTICE OF DISAVOWAL OF TENANCY BY SUFFERANCE.

Where the possession of a defendant in ejectment was originally in subordination to the title of the plaintiff, an instruction that if the defendant's possession was so notorious and open and visible as to be known to the people generally in that vicinity, and if it was of such a character as to be hostile to, and inconsistent with, the plaintiff's title, the jury may find that the plaintiff had notice of its adverse character, although there may be no proof of actual notice or knowledge, ignores the distinction between the essential elements of adverse possession on the part of a person who entered in subordination to the plaintiff's title, and adverse possession on the part of a person who originally made a hostile entry, and is erroneous.

3. RES JUDICATA—FORECLOSURE OF MORTGAGE OF EQUITABLE TITLE—ESTOPPEL OF OWNER OF LEGAL TITLE.

Where the owner of the legal title to lands contracted to convey them, and the owner of the equitable title under the contract thereafter mortgaged his interest in the lands, and sold and assigned it, and his assignee took title to the lands by warranty deed from the holder of the legal title, a decree of foreclosure of the mortgage of the equitable title, in a suit to which the assignee of the mortgagor and grantee of the legal title is made a party, is a final adjudication that such assignee's interest is subject to the mortgage, and he is estopped from asserting against the purchaser at the foreclosure sale that the legal title which he acquired from the original owner was paramount to the mortgage when the foreclosure suit was begun.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

At Law. Action of ejectment by William Graydon against Lovell Hurd. Verdict and judgment for defendant. Plaintiff brings error. Reversed.

Cahill & Ostrander, for plaintiff.

Geer & Williams, for defendant.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

BARR, District Judge. This is an action of ejectment brought by William Graydon, a resident and citizen of the state of New Jersey, against Lovell Hurd, a resident and citizen of Michigan, to recover possession of a fractional quarter of a section of land lying in Genesee county, Mich. The title of this land was vested in William McKay in 1841. Subsequently, McKay sold the land to O'Donohue, and gave him a contract to convey. O'Donohue assigned this contract to Albert Swift, who mortgaged the land to Hope, Graydon, and Seeley on November 15, 1856. Afterwards, Swift, owing part of the purchase money to McKay, assigned his contract to Lovell Hurd, defendant, and he in May, 1857, paid McKay the balance of this purchase money, and obtained from him a warranty deed to the land. Hurd went into the possession of this land in 1856 or 1857, and in 1858 Graydon and Seeley brought suit in the circuit court of the district of Michigan against Albert Swift and Lovell Hurd. This suit was to foreclose the mortgage given by Swift on the land in controversy, and to foreclose a mortgage executed by Hurd to Swift on other land, which mortgage had been assigned by Swift to William Graydon and George H. Seeley, complainants therein. A subpoena was issued and executed on Swift and Hurd, and both entered their appearance, but did not answer. In February a decree of foreclosure was rendered, in which the court decreed that Hurd held his title to the land in controversy subject to complainant's mortgage, and as to said mortgage his claim was a subsequent incumbrance, and ordered the land sold to pay the mortgage debt. The court also decreed that when the sale was made, and confirmed, the purchaser should be delivered possession of the land by those in possession, "on the production of the deed for such premises, and a certified copy of the order confirming the report of such sale, after such order has become absolute."

The land was sold June 8, 1859, to Graydon and Seeley, and the sale confirmed and deed executed August 30, 1859. Subsequently, Seeley conveyed to Graydon, who brought this suit January 25, 1890. Hurd was in possession of the land when the suit for foreclosure was brought and sale made and confirmed, and remained in possession, either in person or by tenants, until the present suit was tried. He, both before and after the sale, in 1859, continued in possession, and there was no change in the character of the possession; but he continued to clear, stump, drain, and improve this land after the sale as before, and at the time of the bringing of the ejectment suit it was an improved farm. Hurd paid taxes on it for the years 1862, 1863, and 1864, and from 1880 until the institution of the ejectment suit. He claimed, on the trial, he had, by his adverse possession of more than 20 years, acquired title to the land. The plaintiff, William Graydon, and George H. Seeley lived in New York and New Jersey during the entire time possession was held by Hurd, and had no knowledge or information that Hurd claimed adverse possession or any title to the land after sale, or, indeed, was in possession, until 1878, when Graydon was informed of the fact by letter. Graydon paid taxes on the land

prior to 1862, and from 1864 to 1877. There are other facts shown in the record, but they are not material.

There are a number of assignments of error, some to the admission of testimony, but the most material are to the charge of the court upon the question of adverse and hostile possession. The court, after instructing the jury that the foreclosure suit against Swift and Hurd settled conclusively that the right of Hurd was subordinate to the mortgage, and that after the sale and confirmation thereof the title of Hurd came to an end, said to the jury:

"Now, then, if Hurd had done nothing more in this case than simply to retain the possession which he had then, he would be regarded as holding over after foreclosure. He would be regarded as a tenant by sufferance of the plaintiff, and the plaintiff would still recover, notwithstanding the length of time—nearly thirty years—which had elapsed since the foreclosure. But a person, though holding in that way, may acquire adverse possession. Now, what do we understand by adverse possession? Well, I will illustrate it. Suppose that the defendant, after this foreclosure, had written to the plaintiff, saying to him: 'I deny your right under this foreclosure. I propose to claim and hold this land adversely to your title. You will please take notice of this.' From that time his possession would be adverse, and hostile to the possession of the plaintiff. Now, then, nothing of that kind was done in the case. The plaintiff did not have any direct notice of the continued possession, and the adverse character of the possession of the defendant there. But I think that the plaintiff is bound by such notice as the public had generally with regard to what was going on on that land. Now, then, what is the evidence in this case upon that point? It is that Hurd not only continued his possession of the land, but he went on and improved it at very considerable expense. He cut down much of the standing timber. He put up the frame of a barn. There seems to have been a small house put up. He cleared the land. He has gone and cultivated it. And the question I shall submit to you is this: Whether these acts indicate to your minds an intent on his part to claim this land adversely to the title of the plaintiff. If you find in this case that for twenty years before the beginning of this suit the defendant's possession had been open, notorious, adverse, hostile, and continuous, then you are at liberty to find a verdict for the defendant, notwithstanding the title which the plaintiff had by reason of these foreclosure proceedings. On the other hand, if you find that such possession is not adverse,—and the object of my remarks has been rather to define to you what an adverse possession is,—if you shall find that his possession has not been adverse, then the plaintiff is entitled to your verdict. The statute of limitations does not begin to run until the possession became hostile, and the jury is instructed that they can render that verdict only after the possession has become hostile, no matter how long continued the actual and adverse possession may have been. It is not enough that the possession of Hurd has been actual and continued and notorious for a period of twenty years or more. Unless, in addition to all these, such possession was also hostile for the full period of twenty years before the beginning of the suit, plaintiff must recover. * * * And the question of the adverse character of the possession depends upon the further question whether you find that his acts done upon that land in the shape of improvements, and the taking of the profits of cultivation, etc., have been such as he would not take had he been a tenant. You must find that it was done under the theory that he was entitled to—to make it adverse or hostile—that the possession was such as to be inconsistent with the idea that he was holding over under the mortgage. It must be such a possession as one would not take unless he believed that he was the owner of the land, and not a tenant. If you find such to be the case, then you are at liberty say that it was an adverse possession. If, however, you are able to reconcile the acts of the defendant with the idea that he was simply holding over after foreclosure of this mortgage as the tenant of the plaintiff, then your verdict shall be for the plaintiff. Now, then, as

I said before, I think the plaintiff is bound by notice of such acts as the public generally in that neighborhood could take notice of. And if you find that his possession was so notorious and open and visible as to be known to the public generally in that vicinity, then you are authorized to find that the plaintiff had notice of it, although you may not be able to put your finger upon any actual notice."

Juror: "You add to 'adverse,' 'hostile.' What is the discrimination between the two?"

The Court: "It is more a matter of words than anything else. An adverse possession must be a possession hostile to the title of the owner of the land. It must be asserted against him, and not in subordination to that title."

This extended quotation from the charge presents clearly the propositions of law announced by the court, and embraces the alleged errors complained of by the plaintiff to the charge. There can be no doubt that the foreclosure suit, and the sale thereon, when confirmed, and a deed made thereunder, put an end to Hurd's right and interest in the land in controversy. He could not thereafter claim possession under color of title, because he had none, nor could he claim as a stranger until or unless his relation of tenant by sufferance was relinquished or disavowed, and, in addition, knowledge or notice of such relinquishment or disavowal brought home to Graydon. Hurd was not made a trespasser upon this land by the sale, confirmation, and the execution of the deed, but by operation of law he became a tenant by sufferance of the purchaser. The decree of sale recognized this relation when it directed that persons in possession of the land should deliver possession to the purchaser "on production of the deed to the premises, and a certified copy of the order confirming the report of such sale after such order has become absolute."

The supreme court has in *Zeller v. Eckert*, 4 How. 290, stated the rule clearly and distinctly. The court, after stating that a trustee may disavow and disclaim his trust; a tenant, the title of his landlord after expiration of his lease; a vendee, the title of his vendor after breach of the contract, etc.,—said:

"The only distinction between this class of cases and those in which no privity between the parties existed when the possession commenced is in the degree of proof required to establish the adverse character of the possession. As that was originally taken and held in subserviency to the title of the real owner, a clear, positive, and continued disavowal of the title and assertion of an adverse right, and to be brought home to the party, are indispensable before any foundation can be laid for the operation of the statute."

The case of *Woolworth v. Root*, 40 Fed. Rep. 723, decided by Justice Brewer, is not unlike the one under consideration. There, Root entered into possession of certain real estate, claiming title, in 1869, and a suit to quiet title was brought by Morton, claiming title to the land then in possession of Root. Morton obtained a decree in 1873, sustaining his title, and requiring Root to convey to Morton his right and title. This conveyance was not made by Root, but by a special master under order of court. Many years afterwards a suit was brought by Woolworth, claiming under Morton, to enforce the decree in the former suit against Root; and he sought to defend by a plea of 10 years' adverse possession under

the statute of limitation, alleging he had acquired title by more than 10 years' possession after the decree of 1873. The court say:

"He does not pretend that the character of his possession has changed, or that any notice was ever given to the Mortons or to this complainant of the title or claim under which he was holding possession. * * * By the decree, and the deed made in pursuance of it, all title and right of possession in Root was transferred to complainant. Under these circumstances, no retention of possession was adverse to the title conveyed, and he could not bolster up a title based upon that possession until he had first given notice of his intention to claim adversely."

In *Willison v. Watkins*, 3 Pet. 43, the question was whether the tenant who went into possession under a title could acquire title, or get the benefit of an adverse possession, at all, unless he first surrendered the possession to the landlord, and took possession thereafter. The court held an actual surrender of possession was not necessary, but the holder of the title under which possession was originally taken must have had knowledge or notice of the changed relation and the adverse holding before the statute of limitation began to run.

While the decisions of the Michigan supreme court are not so distinct upon this question, we think they concur, substantially, in the view taken by the supreme court of the United States. *Bloomer v. Henderson*, 8 Mich. 405; *Jeffery v. Hursh*, 45 Mich. 59, 7 N. W. Rep. 221; *Paldi v. Paldi*, 84 Mich. 346, 47 N. W. Rep. 510; *Allen v. Carpenter*, 15 Mich. 25. See, also, *Quinn v. Quinn*, 27 Wis. 170; *Ringo v. Woodruff*, 43 Ark. 470; *State v. Conner*, 69 Ala. 212. There is some conflict in the decisions of the state courts upon this question, but both reason and the weight of authority sustain the view indicated.

The necessity for Graydon to have had knowledge or notice of the acts which were claimed to have made Hurd's possession adverse and hostile after the sale under the foreclosure decree seems to have been recognized by the court, to its fullest extent, in parts of the charge; but the manner in which the jury were allowed to infer or find such knowledge or notice to have been had by Graydon is, we think, fatally misleading. Thus, the court said to the jury:

"The plaintiff did not have any direct notice of the continued possession, and the adverse character of the possession, of the defendant there. But I think that the plaintiff is bound by such notice as the public had generally with regard to what was going on on that land."

This instruction is not modified, but rather emphasized, in a subsequent part of the charge, where the jury were instructed that—

"If Hurd's possession was so notorious and open and visible as to be known to the people generally in that vicinity, then you are authorized to find that the plaintiff had notice of it, although you might not be able to put your finger upon any actual notice."

In view of the fact that the purchasers resided in another state at the time of the sale in the foreclosure suit, and continued non-residents of Michigan, and there was not the slightest evidence that Graydon had any knowledge or notice of Hurd's continued possession of this land, or of the acts which are claimed to have made

his possession adverse, until 1878, this instruction was material, and probably decisive of the case. It was, in effect, entirely ignoring the distinction between what is necessary to acquire an adverse and hostile possession of land by those who have entered under and in subordination to the title of another, and commenced to hold thereunder, and those whose entry was adverse, and whose possession had never been subordinate to the title against which the possession is sought to be adverse. This distinction is material, and should not be ignored.

But it is insisted by appellees that Hurd had acquired the legal title of McKay, and that, although the equitable right of Swift had been mortgaged when Hurd took an assignment of the equitable right from him, yet the legal title was paramount to the mortgage when the foreclosure suit was brought; hence Hurd was never the tenant of Graydon and Seeley after their purchase, and had no such relation to them. It may be that Hurd would, in the foreclosure suit, have had some claim to be repaid the money which he had paid McKay; but whatever claim he might have had in that suit was settled adversely to him by that decree, and as he entered into possession under his assignment of Swift's right and title, which was then mortgaged, his possession was subordinate to the right of the mortgagees, and such was his possession when the sale was made, and deed executed, in the foreclosure suit.

It is not necessary to consider the other errors assigned, as the case must go back for a new trial. The verdict and judgment of the court below must therefore be set aside, and the case remanded for further proceedings in conformity with this opinion, and it is so ordered.

SEAWELL et al. v. CRAWFORD et al.

(Circuit Court, S. D. Ohio, E. D. May 11, 1893.)

Nos. 501, 502, and 503.

OPENING DEFAULT—JUDGMENT ON AMENDED PLEADINGS.

In an ejectment suit amended petitions were filed, being complete in themselves, and showing on their face that they were not mere amendments, but new pleadings, stating new causes of action, and bringing in new parties. Defendants thereupon took leave to answer in 30 days. *Held*, that a judgment for plaintiff by default would not be set aside after the end of the term on the ground that the original answers making up issues of fact were still on file; for the taking leave to answer was an abandonment of the original issues.

At Law. Actions of ejectment by J. Hairston Seawell and others against Nancy Crawford and others. On motions to set aside default judgments in favor of plaintiffs. Denied.

Matthews & Cleveland, for plaintiffs.

Gardner & Jones, for defendants.

SAGE, District Judge. These cases are before the court on motions filed August 27, 1892, to set aside default judgments taken

December 16, 1891, and for leave to file answers to the amended petitions. The motions are made under section 5354 of the Ohio Revised Statutes. There having been no trial by jury, section 726 of the Revised Statutes of the United States does not apply, and the practice may be according to the state law. *Clark v. Sohler*, 1 Woodb. & M. 368. The term at which the judgments were taken closed on the first Monday of June, 1892. The original petitions were filed in 1889, and the answers of some of the defendants August 20, 1890. In January, 1891, the amended petitions were filed by leave of court. In case 502 new parties were added, and in all the cases new causes of action were stated. The amended petitions are complete, and show on their face that they are not mere amendments, but new pleadings. Defendants' counsel were notified, and moved to strike the amended petitions from the files for that they were for different and other causes of action from those set forth in the original petitions, and that they purported to entirely change the cases from actions at law to suits in equity. On the 21st of February, 1891, these motions were overruled, and the defendants were given 30 days in which to answer the amended petitions. The leave expired. No answers were filed. Counsel for plaintiffs waited more than eight months, and then, the defendants being still in default, took judgments. Finally, in August, 1892, eight months later, and more than two months after the expiration of the term at which the judgments were rendered, they filed their motions for new trial on the ground that the judgments were irregularly obtained, in that the answers to the original petitions were still on the files and made up issues of fact in the cases, so that they were not in default. If this were so, there is no showing of any reason or excuse for the failure to move for new trial during the term. But it was not so. The amended petitions were new pleadings, substituted for the original pleadings. They added to the original petitions in ejectment a claim in each case for mesne profits and a prayer for partition at law. Counsel for defendants were not misled. They might have had an order that the answers to the original petitions be taken as answers to the amended petitions, but they did not choose to take such an order. They took, instead, leave to answer in thirty days, and then apparently took leave of the case, until eight months after judgment, and two months after the term. If there was any irregularity in the proceedings it certainly was not on the part of the plaintiffs or their counsel.

In *Robinson v. Keys*, 9 Humph. 144, leave was given to plaintiff to amend his declaration, and to defendant to plead to the declaration as amended. It was held that by these leaves there was an abandonment of all existing issues, and that, if the defendant failed to plead to the amended declaration, the plaintiff was entitled to judgment by default, notwithstanding the plea of the general issue to the original declaration remained on file. The court said that the question might be otherwise had the defendant not shown such abandonment by taking leave to plead. This decision is in accord with *Huckvale v. Kendal*, 3 Barn. & Ald. 137. In that case

there was a failure to plead to an amended declaration, and a judgment by default was taken, to which the court said the plaintiff was entitled, although the defendant had pleaded the general issue to the original declaration. In *Brown v. Railroad Co.*, 18 N. Y. 495, 496, it was held that, when a pleading is amended, the original pleading ceases to be a part of the record, because the party pleading, having the power, has elected to make the change. So, also, filing an amended answer is an abandonment of not inconsistent defenses in the original answer. *First Nat. Bank v. W. U. Tel. Co.*, 30 Ohio St. 555, 569. *Stevens v. Thompson*, 5 Kan. 305, cited by counsel for defendants, does not apply. There a reply had been filed to the original answer. A new party plaintiff was added, and there was no leave to plead anew. The citation from *Cohen v. Hamill*, 8 Kan. 621, is obiter. It appeared from the record before the supreme court that there had been no judgment by default, and that the case had been tried on its merits. There was no leave or rule to plead in that case. In *Cavanaugh v. Tuller*, 9 Kan. 233, the plaintiff, after filing an amended petition, under leave obtained by him, replied to the original answer, thus recognizing it as an answer to his amended petition. *Kostendader v. Pierce*, 37 Iowa, 645, turned upon the construction of the Iowa Code.

The motions for new trial will be overruled, with costs.

SEAWELL et al. v. BERRY et al., (five cases.)

(Circuit Court, S. D. Ohio, W. D. May 4, 1893.)

Nos. 2,399, 2,402, 2,404, 2,405, 2,410.

1. HUSBAND AND WIFE—PROPERTY RIGHTS—DISABILITIES OF COVERTURE—PARTITION.

The owner of an undivided interest in Ohio lands was entirely incapable, while under the disabilities of coverture, of making a valid voluntary partition in the years 1821-24.

2. SAME—PARTITION OF WIFE'S LANDS BY HUSBAND.

In Ohio a husband was competent, in 1821-24, to make partition of his wife's real estate, which was binding on the inheritance during the continuance of his estate by the curtesy, but the right which he or his grantee acquired by the proceeding did not extinguish the right of the wife which survived to her or her heirs.

3. SAME—LIMITATIONS—RUNNING OF STATUTE.

Where a husband made partition of his wife's land, the running of the statute of limitations against her heirs, as to the lands not partitioned to her, did not begin at the date of her death, but was suspended during the continuance of the husband's estate by the curtesy.

At Law. Suits in ejectment by J. Hairston Seawell and others against Mehale Berry and others. General verdicts for defendants, and special findings relating to a partition. Plaintiffs move to set aside the general verdicts and special findings, and for judgment. Motions granted.

Matthews & Cleveland, for plaintiffs.

Gardner & Jones, for defendants.

SAGE, District Judge. Five cases, brought by the same plaintiffs against different defendants, but involving substantially the same questions of fact and of law, were consolidated for trial, under section 921, Rev. St. Insurance Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. Rep. 909. The jury returned a general verdict for the defendants in each case. In accordance with a provision of section 5201 of the Revised Statutes of Ohio, they made written findings upon particular questions of fact. These findings were: First. That the original plaintiffs were the descendants of Margaret Ann Munford, (afterwards by marriage Margaret Sinclair,) who was a daughter of Robert Munford, who was a son and heir at law of William Green Munford. The present plaintiffs, with the exception of Seawell, who is a grantee, are, it is admitted, the descendants and heirs at law of the original plaintiffs. Second. That Margaret Ann Munford inherited from her father, Robert Munford, with her brothers Samuel and Robert Munford, one undivided one-third of the land described in the several petitions; and that subsequently, by the death of her brothers unmarried and without issue, she became vested with the entire title to said undivided one-third of said lands. Third. That a voluntary parol partition was made between the years 1821 and 1824, by and between the heirs and legal representatives of said William Green Munford, of the lands described in the original land warrants issued by the government of the United States in their favor as such heirs, including the lands in the petitions herein described; and, fourth, that the parties thereto respectively then took possession in severalty of the portions of said lands thereby assigned to them, and that they and their grantees have since that time continuously and exclusively so occupied said lands. Fifth. That under said partition the lands in the petitions herein described were assigned to Robert Munford, Ann Munford, and Stanhope H. Munford, and that the defendants hold and claim under them, and under Edward Stubblefield. Sixth. That the patents for said lands were issued to the heirs and legal representatives of William Green Munford in the years 1821 and 1822; that Margaret Ann Munford married July 4, 1819, at the age of 19, and died September 13, 1837, leaving children surviving her; that her husband was John Sinclair, and that he died in August, 1875. The surveys for which the patents were issued were seven in number, being respectively for 1,500, 1,300, 1,299½, 437, 410, 120, and 100 acres. The jury found: Seventh. That in said partition the 1,300-acre survey was assigned to Margaret Ann Sinclair and her husband, John Sinclair, "and a portion of other surveys to heirs of William Green Munford; and some of the tracts we do not know." The plaintiffs now move to set aside the general verdicts, for the reason that they are not sustained by the evidence, and that they are contrary to the charge of the court; and for judgment in their favor upon the special verdicts.

From the undisputed evidence it appears that these patents were issued on account of services rendered by William Green Munford as an officer of the United States army in the Revolu-

tionary War, and that the plaintiffs, as descendants and heirs at law of Margaret Ann Munford, who was his granddaughter, were the owners of and entitled to recover the possession of one undivided one-third of the lands described in the several petitions, unless there was a valid partition, as claimed by defendants; it being an undisputed fact that the defendants had acquired the other two-thirds of said lands by deed from Edward Stubblefield. The jury were instructed in the charge of the court to return their general verdict without reference to the alleged parol partition. They disregarded this instruction, and, finding that there was a parol partition, evidently based their general verdict upon that finding. The case turns now upon the decision of the question whether the evidence sustains the finding that there was a parol partition, and, if there was, whether it is sufficient to defeat the plaintiffs' actions. William Green Munford was the father of six children, of whom only three—Robert, John, and Mary—survived him, the others having died unmarried and intestate. Robert married Margaret Wardrope, and Mary married Edward Stubblefield. Robert had three children,—Samuel, Robert, and Margaret Ann. Samuel and Robert died unmarried and intestate in the lifetime of Margaret Ann, who married John Sinclair. John Munford had three children,—Robert, Stanhope, and Ann. The children of Mary are unknown. On the 8th of September, 1809, the United States issued in favor of the representatives of William Green Munford a land warrant directed to the principal surveyor of the land set apart for the officers and soldiers of the commonwealth of Virginia, for 6,666 $\frac{2}{3}$ acres of land, by virtue of which Margaret Ann Munford, the daughter of Robert Munford, was entitled to one-third; Robert, Stanhope, and Ann, children of John Munford, one-third; and Mary Stubblefield, daughter of William Green Munford, the remaining third. On this warrant appears an assignment from Mary Stubblefield to Edward Stubblefield, and on November 23, 1809, an assignment from Edward Stubblefield to Duncan McArthur, of 1,500 acres. There appears also, under date March 18, 1822, an assignment from Robert, Stanhope, and Ann, children of John Munford, to Duncan McArthur, of 583 acres. Patents founded on this land warrant were issued as follows:

No. 6,538, for 1,300 acres, Nov. 14, 1822, to heirs and rep. Wm. G. Munford.				
6,538, 1,500 acres, Aug. 1, 1821,	"	"	"	"
9,901 & 10,780, 1,299 $\frac{3}{4}$ a., Nov. 14, 1822,	"	"	"	"
6,538, 437 acres, Nov. 14, 1822,	"	"	"	"
6,538, 100 acres, "	"	"	"	"
6,538, for 410 acres, Nov. 14, 1822,	"	"	"	"
6,538, for 120 acres, "	"	"	"	"

—Being a total of 5,166 acres to the heirs and legal representatives of William Green Munford. The remaining 1,500 acres were patented at various times between November 20, 1822, and August 1, 1836, to Duncan McArthur.

The original patent, dated August 1, 1821, for the 1,500-acre survey, is indorsed as follows: "We, the undersigned, heirs and legal representatives of William Green Munford, hereby assign our interest in the within patent to Robert W. Munford." This

is signed Stanhope H. Munford, John Sinclair, Margaret W. Munford, Margaret Ann Sinclair. Between the signatures of Stanhope H. Munford and John Sinclair there is a space for another signature, but if any was written there it has been obliterated by time. This assignment is without date, and there is no evidence that any consideration was paid for it. Who Robert W. Munford was is not shown. So far as the evidence discloses, the only Robert Munford then living who was an heir and legal representative of William Green Munford, was Robert, son of John Munford, and he is spoken of in four deeds,—three dated in June, 1823, by Robert H. Munford and others to Edward Stubblefield, and the other dated February 20, 1843, by Robert H. Munford and others to John Sinclair. No facts appear from which it may be inferred that Robert W. and Robert Munford were the same person. Stanhope H. was the son of John Munford. Margaret Ann Sinclair, as has already been stated, was the daughter of Robert Munford, (who was the son of William Green Munford,) and the wife of John Sinclair. Margaret W. Munford was the widow of Robert Munford. This assignment is the foundation of the claim that there was a parol partition between the heirs of John Munford and the heirs of Robert Munford, whereby the heirs of John Munford took the 1,500-acre survey, and the heirs of Robert Munford the 1,300-acre survey. That the 1,300-acre survey was embraced in the partition is evidenced, it is contended, by a deed dated May 1, 1824, made by John Sinclair and Margaret Ann, his wife, and Margaret W. Munford, to Solomon Salmon, whereby they convey the entire survey by general warranty deed in fee simple; and it is further contended that Edward Stubblefield, assignee of Mary Stubblefield, the other heir, got the 120, 410, and the 100 acre surveys. Two deeds, made on the 25th of June, 1823, and one deed made on the 27th of June in the same year, by Robert Munford and Mary, his wife, and Stanhope and Nancy Munford, and Margaret Munford, John Sinclair, and Margaret, his wife, to Edward Stubblefield, are relied upon to establish this contention. The names appear as above in the granting clauses of those deeds. The signatures are Robert H. Munford, and Ann Munford, as the wife of Stanhope R., instead of Nancy. "Nancy," however, is a diminutive of "Ann." The deeds are all quitclaims of the right, title, and interest of the grantors to the surveys named. They contain no covenants whatever. It is a fair inference that Robert H. Munford, as the name appears in the signature, was the same as Robert Munford, son of John Munford, and grandson of William Green Munford. These items of evidence make up the case of the defendants in support of their claim that there was a parol partition. As to the assignment of the original patent for the 1,500-acre survey, if it was one of the steps in the execution of a parol partition, it is claimed for the plaintiffs that it should have been from Margaret W. Munford, widow of Robert Munford, and John Sinclair, and Margaret Ann, his wife, who inherited the interest of Robert Munford, to Robert, Stanhope, and Ann Munford, who inherited the interest of John Munford, whereas it is not only from

the three former, but also from Stanhope Munford to a Robert W. Munford, whose name does not appear anywhere in the roll of descendants of William Green Munford.

The consideration expressed in the deeds above referred to, made in June, 1823, was that Stubblefield, the grantee, was entitled to a certain proportion of the land warrant aforesaid, granted to the heirs and legal representatives of William Green Munford, "and we, the said Munfords and Sinclairs, acknowledge the said title." The execution of those deeds left the title to the undivided two-thirds of the 1,300 acre, the 1,299 $\frac{2}{3}$ acre, and the 437 acre surveys in the heirs of Robert Munford, who were entitled to one undivided one-third, and the heirs of John Munford, who were entitled to one undivided one-third. This conclusion is reached by recognizing the indorsement on the original patent as an assignment of the interest of Stanhope H. Munford, Margaret Ann Sinclair, and Margaret W. Munford in the 1,500-acre survey to Robert W. Munford. The assignment on the warrant by Mary Stubblefield to Edward Stubblefield conveyed to him only the equitable title of her one-third interest in the entire quantity of land embraced in all the surveys. The execution of the deeds above referred to in June, 1823, conveyed to him the legal title of the other two-thirds of the 120, the 140, and the 100 acre surveys, containing altogether 630 acres. Now, let us see how the 1,500, 1,300, 1,299 $\frac{2}{3}$, and the 437 acre surveys were disposed of. The conveyance of the 1,300-acre survey to Solomon Salmon by deed of March 1, 1824, has already been referred to. On the 23d of March, 1822, six months before the patents were issued by the government (November 14, 1822) for the 1,300, 1,299 $\frac{2}{3}$, 437, 410, 120, and 100 acre surveys, Robert Stanhope and Ann Munford deeded the 1,500-acre survey to Edward Stubblefield; but in 1841 John Sinclair paid to Robert and Ann \$1,000—\$500 each—for all their right, title, and interest in and to all the lands undisposed of in the state of Ohio, "wherever situated, or in whatever county or counties they may be, to which they are entitled, and which have not heretofore been disposed of and conveyed by them;" and on the 15th of April, 1824, Stanhope made a similar conveyance to John Sinclair. Those deeds contain the following recital:

"And they, the said Robert H. and Ann Munford, (Stanhope,) having heretofore disposed of and conveyed their interest in a portion of said lands, but a portion thereof, to which they are entitled, still remains undisposed of and unconveyed by them."

When those deeds were made, the lands undisposed of by Robert, Stanhope, and Ann were their interest in the 1,300, the 437, and the 1,299 $\frac{2}{3}$ acre surveys. As has already been shown, they had disposed of their interest in the 1,500, 410, 120, and the 100 acre surveys. At common law, voluntary partitions between joint tenants were not valid unless made by deed, excepting where the estate was for years only, but they could be made between tenants in common by parol, provided they were executed in severalty, with livery

of seisin. *Freem. Coten*. § 396. It was very early decided that estates in joint tenancy do not exist in Ohio. *Sergeant v. Steinberger*, 2 Ohio, 306. There has been a conflict of authority upon the question whether an oral partition can be recognized as valid under the statute of frauds. But even under the authorities denying the validity of such partitions it has been held that parol evidence may be sufficient to indicate that a valid partition had been made in cases where there was long-continued possession in severalty. *Freem. Coten*. § 397 et seq. In *Piatt v. Hubbell*, 5 Ohio, 245, decided in 1831, it appeared that an equal partition was in fact made between the parties in 1814, and that all the adult parties took possession of their respective shares, and had held them in severalty, and built upon and improved them on the faith of its validity. The court, sitting in chancery, refused, even as to parties who were minors when it was made, to disturb a partition in which there had been so long acquiescence accompanied by such acts of confirmation. This seems to have been a plain and logical application of the doctrine of part performance, which would avail also in an action at law, especially if the proof was of long-continued possession. The reason for the purchase in 1841 by John Sinclair from Robert and Ann Munford of their remaining title and interest to all lands in the state of Ohio is quite apparent. Margaret Ann Sinclair, and John Sinclair, her husband, by their deed of conveyance of the 1,300-acre survey to Solomon Salmon, conveyed in law only a third interest, but the conveyance was in terms of the entire title, with a covenant of warranty. It is easy to see that the purchase from Robert and Ann, which inured under the warranty to the benefit of Solomon Salmon and his grantees, was to protect Margaret Ann and John Sinclair against liability under their warranty. No deeds of conveyance of any part of the 1,299 $\frac{3}{4}$ -acre survey have been shown, and there is no evidence indicating that there has been any transfer of the title to that survey. After the deeds of 1841 and 1842, it belonged one-third to the representatives of Margaret Ann Sinclair, and one-third to her husband, John Sinclair. So, also, one-third of the 437-acre survey belonged to the representatives of Margaret Sinclair, and one-third, after the deeds of 1841 and 1842, to John Sinclair. The 1,500-acre survey belonged two-thirds to Edward Stubblefield, by virtue of the deed from Robert, Stanhope, and Ann to him, and of the assignment of the warrant by Mary Stubblefield; but the other third remained in Margaret Ann Sinclair, and was never deeded by her. This is the survey which includes the lands involved in these actions. No interest in this survey passed under the deeds of 1841 and 1842 from Robert, Stanhope, and Ann Munford to John Sinclair, because they had theretofore, to wit, in 1822, conveyed their interest in it to Edward Stubblefield. The only evidence, therefore, that bears on the question of partition is the fact that in 1822 and 1823 the heirs of Robert Munford deeded the 1,300-acre survey, and the heirs of John Munford the 1,500-acre survey; but the facts above referred to, and the subsequent purchase by John Sinclair of the interest of the heirs of Robert Munford in the 1,300-acre survey, and the recitals in the

deeds of those heirs, make it clear that the finding that there was a partition is not supported by the evidence.

There is another objection which is fatal to the validity of the partition claimed, even if it was in fact made. If made at all, it was between the years 1821 and 1824, as found by the jury, and as established by the dates appearing in evidence. But Margaret Ann Munford was married at the age of 19, on the 4th of July, 1819, and died September 13, 1837. See the sixth special finding by the jury. She was, at the date of the alleged partition, under the disabilities of coverture, entirely incapable of making a valid voluntary partition. To overcome this objection, it is contended for the defendants that her husband could make the partition. In support of this contention, and of the further proposition that a voluntary partition may be made of the wife's lands by the husband, which will, if equal, bind the inheritance, *Foster v. Dugan*, 8 Ohio, 87, 106, is cited. There the husband and wife joined with other cotenants in a petition for partition under the statute of 1804. Before any proceedings, the wife died. The court held that during her life her husband was a necessary party to represent her interest, and that by her death his estate by the curtesy continued him the tenant of the freehold, without determining his right or interest. The commissioners appointed to make partition reported an appraisal of the land, with a finding that no division could be made without impairing its value, and, the husband and a cotenant who was a party to the proceeding having elected to take the land at its appraised value, the sheriff, under authority conferred by the statute, conveyed it to them. The action was in ejectment by the heirs of the wife, and the validity of the sheriff's deed was denied. The court held that the irregularities which were alleged to exist in the proceedings—one of them being the failure to make the heirs of the wife parties—were not of such a character as to render them liable to attack in a collateral proceeding. But it was also held that the interest of the heirs of the wife was not included in the sale nor in the deed, and, as the estate by the curtesy had determined by the death of the husband, the remainder—upon which the action was based—had become an estate in possession, and could be recovered. Judgment was accordingly given for the plaintiffs. This is in harmony with the decision in *Foster v. Dennison*, 9 Ohio, 121, that a husband, who is also one of the tenants in common, is competent to make partition of the wife's real estate, but that the right he or his grantee acquires by the proceeding does not extinguish her right, which survives to her or her heirs. It is claimed, however, that if the husband has the right to partition the wife's lands, the possession was vested in him, and that consequently the statute of limitations began to run against the plaintiffs as to the lands not partitioned to her, but to the other heirs, from the date of her death. This is ingenious, but not sound. The right of the heirs of the wife to assert their claim to possession of any portion of the lands inherited from her was subject to the estate by the curtesy. But for the partition,—conceding, for the sake of the argument, that it was made,—that estate would

have attached to the wife's undivided interest in all the lands. By reason of the partition it was fixed upon the lands set apart to him, with the result to free all the other lands in the hands of the cotenants from that estate, and at the same time to protect them against any claim to possession by the heirs of the wife during its continuance. That is what is meant by the statement that the partition by the husband binds the inheritance. But it is unnecessary to pursue this subject further, for the evidence is not sufficient to support the finding that there was a partition.

The plaintiffs move also for a judgment non obstante veredicto. Were it not for the conclusion, above stated, that, even if a parol partition was made, it was invalid, for the reason that Margaret Ann Munford was under the disabilities of coverture, this motion would have to be overruled. But it results from that conclusion that it is immaterial whether there was or was not such a partition, and upon the other special findings of fact the right of the plaintiffs to recover is incontestable. Their actions were brought in 1877, less than two years after the death of John Sinclair terminated the estate by the curtesy.

The motion to set aside the general verdicts for the defendants and the special findings relating to a partition will be granted, and also the plaintiffs' motion for judgment.

FLEISCHNER et al. v. PACIFIC POSTAL TELEGRAPH CABLE CO.

(Circuit Court, D. Oregon. December 21, 1893.)

1. TELEGRAPH COMPANIES—DELAY IN TRANSMISSION—LIABILITY.

Upon presentation of a telegram, which the sender states to be important, and requests that it be sent immediately, it is the duty of the telegraph company, if its line is down, and it is not known how soon it may be restored, either to inform the sender of that fact, that he may transmit it over a competing line, which is equally available to him, or to itself cause the immediate transmission of the message over the competing line, and the failure of the operator to do so is not excused by the fact that he believed, or thought he had reason to believe, that the line would soon be in working order, the line having already been down for an hour, and the place or cause of the break not having been located.

2. SAME.

A telegraph blank contained the usual statement that, to guard against mistakes or delays, the sender should cause the message to be repeated; that the company would not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; that it should not be liable therefor, in the case of any repeated message, beyond 50 times the sum received; and that it should not in any case be liable for delays arising from unavoidable interruption in the working of its lines. *Held*, that this stipulation did not protect the company against liability for damages which such repetition could have no tendency to prevent; and that, notwithstanding the stipulation, the company was liable for the failure of its operator to inform the sender of an important message that its line was down, or to send it by a competing line.

3. ATTACHMENT—FAILURE TO FILE INVENTORY—AMENDMENT.

2 Hill's Code, Wash. § 308, requires the sheriff on attachment to make a full inventory of the attached property, and to return the same with his

writ. Section 322 declares that "no attachment shall be quashed or dismissed, or the property attached released, if the defect in any of the proceedings had been, or can be, amended, so as to show that a legal cause for the attachment existed at the time it was issued, and the court shall give the plaintiff a reasonable time to perfect such defective proceedings." The sheriff's return in attachment proceedings was not accompanied by an inventory of the attached property. *Held*, that subsequent attaching creditors were not entitled to priority over the defective attachment, their only remedy being to compel an amendment.

4. TELEGRAPH COMPANIES—DELAY—MEASURE OF DAMAGES.

A telegraphic message instructing the levying of an attachment was delayed in transit, and in consequence other creditors obtained priority over the sender's attachment. The debtor's property was not sufficient to pay the amount of the debt of the first attaching creditors, but would have been sufficient to satisfy the debt due to the sender of the telegram if his attachment had obtained priority. The telegraph company was informed by the terms of the message of the danger of loss to the sender, and was expressly requested to transmit the message immediately. *Held* that, in an action against the telegraph company for damages, the measure of damages was the amount of the sender's debt.

At Law. Action by L. Fleischner and others, copartners of the firm of Fleischner, Mayer & Co., against the Pacific Postal Telegraph Cable Company, for damages for delay in transmitting a telegraphic message.

Joseph Simon and Joseph N. Teal, for plaintiffs.

Frederick V. Holman, for defendant.

GILBERT, Circuit Judge. On June 24, 1891, H. & B. Greenbaum, of Seattle, were sued, and their property attached, upon a debt of \$16,000. At 9:15 o'clock on the following morning a member of the firm of Fleischner & Mayer, the plaintiffs herein, delivered at the office of the defendant at Portland a message, signed by the plaintiffs' attorneys, and addressed to Preston, Carr & Preston, attorneys, at Seattle, in the following words:

"H. B. Greenbaum owe Fleischner, Mayer & Co. \$3,876.21. Reported closed by sheriff. Protect claim, and report at once.

"Cox, Teal & Minor."

The plaintiffs directed the attention of defendant's clerk to the word "rush" written on the message, stated that it was an important telegram, and requested that it be sent immediately. This the clerk promised to do. The plaintiffs then paid the regular tariff for transmission. At that time the defendant's wire to Seattle was down, and had been down since 8 o'clock. By an accident for which the defendant was in no way responsible, a tree had been felled across the wires. As yet neither the place of the obstruction nor its cause was known at the Portland office. The chief operator at Portland had been endeavoring since 8 o'clock to restore communication. He continued his efforts until the wire was repaired, which was some time after 12 o'clock. He testified that during all that time he believed the interruption was only temporary, and that the line would soon be in working order. The Western Union Telegraph Company had a line from Portland to Seattle, which during all that day was in operation, and ready to transmit messages between said points.

The plaintiffs' message, if sent either by the Western Union, or by the defendant at 9:15, or within a reasonable time thereafter, in the usual course of business, would have reached the attorneys at Seattle before 10 o'clock. If it had reached them then, or at any time before 11 o'clock, suit would have been brought upon plaintiffs' claim, and plaintiffs would have been the second attaching creditors, and their claim would have been paid in full. At 10 o'clock of that day a message was placed in the San Francisco office of the Western Union Telegraph Company, addressed to Preston, Carr & Preston, at Seattle, directing them to attach the property of H. & B. Greenbaum, upon claims amounting to \$36,000. This message, after being repeated at Portland in transit, was received by the attorneys at Seattle at 11 o'clock. Thereupon they sued, and attached and secured a second lien upon the property of said debtors for \$36,000. The plaintiffs' message reached the attorneys at about 12:45, and plaintiffs' attachment was third in order. Upon sale of the attached property the plaintiffs realized nothing, and it appears that the judgment debtors have no property out of which the plaintiffs' claim can be paid.

The liability of telegraph companies for errors and delays in the transmission of messages has been the subject of numerous adjudications in the courts, and the decisions are not altogether harmonious. The weight of modern authority supports the rule that while telegraph companies are not to be held as common carriers, and therefore insurers of the safe and timely transmission of messages, yet that their obligations are to some extent analogous to those of common carriers, having their source in the public nature of the employment, the public rights conferred upon them, and the business and social necessity of the service rendered. They are therefore held to the exercise of care, the degree of which is variously expressed, but is generally declared to be in substance such care and caution as is reasonably within their power to employ. That rule has been adopted in this court in *Abraham v. Telegraph Co.*, 23 Fed. Rep. 315, where Judge Deady held that a telegrapher is "bound to the exercise of care and diligence adequate to the discharge of the duties thereof, and cannot, by any notice, regulation, or contract, limit or control his liability for the negligence of himself or servants."

The interruption of defendant's line upon the morning of June 25th did not result from any negligence of the defendant or its servants. Its inability to transmit the plaintiffs' message resulted from causes which the degree of skill and care the defendant was called upon to exercise could not have guarded against or avoided, and, if there had been no other line by which the message could have been sent, no legal liability could attach to the defendant for damages in this case. But the defendant's liability arises from the fact that there was a competing line to Seattle in good working order, equally accessible to plaintiffs, and by which their message could have been sent without delay. The defendant's duty under the circumstances was plain. Upon receipt of plaintiffs' message for transmission, it should have either informed plaintiffs

that its line was down, or it should have immediately forwarded the message by the other line. The defendant not only had the authority to transfer the message to the other company by the express terms of its printed blanks, but its regular usage had been so to do whenever its own lines were down. The fact that the chief operator in charge of defendant's Portland office believed, or thought he had reason to believe, that his line would soon be in working order, is no excuse. His communication with Seattle had been shut off for more than an hour. He had not yet ascertained the place or the cause of the obstruction. He had no right to expect its immediate removal. If the truth had been disclosed to plaintiffs, there can be no doubt but that they would have immediately taken the message to the other line. The defendant not only gave plaintiffs no opportunity to do this, but, on the other hand, knowing the importance of the message and of its immediate transmission, it not only failed to inform plaintiffs of its present inability to transmit, but gave plaintiffs the positive assurance that the message should be sent at once.

The terms of the contract under which the message was sent are relied upon by defendant to relieve it from liability for damages in this case. The blank upon which the message was written contained the following printed matter:

"To guard against mistakes or delays, the sender of this message should order it repeated,—that is, telegraphed back to the originating office for comparison. For this one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that this company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery or for nondelivery of any repeated message beyond 50 times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption of the working of its lines."

This stipulation is substantially that used by all telegraph companies. By its terms the telegraph company undertakes to discharge itself of all liability for mistakes and delays in the ordinary transmission and delivery of messages at the usual rates, unless the message be repeated at an increased cost, and in that case the liability for damages is limited to 50 times the cost of the message. No court has given effect to this stipulation according to its literal terms. Many decisions have gone to the extent of holding that such a stipulation excludes liability for all grades of negligence short of gross negligence or willful misconduct. But there are numerous precedents which hold, with better reason, that while a telegraph company may, by special agreement, or by reasonable rules and regulations printed upon its blanks, limit its liability for damages for errors and delays resulting from atmospheric changes or from disarrangement of its line or instruments, from causes which reasonable care would not avoid, it cannot stipulate for immunity from liability where the error or delay results from its own negligence; that such a stipulation would be contrary to the principles of a sound public policy, and therefore void. *Tyler v.*

Telegraph Co., 60 Ill. 421; *Fowler v. Telegraph Co.*, 80 Me. 381, 15 Atl. Rep. 29; *Telegraph Co. v. Short*, 53 Ark. 434, 14 S. W. Rep. 649; *Harkness v. Telegraph Co.*, 73 Iowa, 190, 34 N. W. Rep. 811; *Telegraph Co. v. Griswold*, 37 Ohio St. 301.

But a stipulation for immunity from liability for error or delay in sending an unrepeatd message could not, in any view of the case, be held to protect the company from damages for injuries which such repetition could have no tendency to prevent. The repetition of a message might prevent errors in its transmission, but it could have no tendency to prevent delay in transmitting or delay in delivering. If this particular message had been repeated back, it is not perceived how that additional precaution could in any degree have tended to prevent the injury which the plaintiffs sustained, or could have added in any way to the obligation which the defendant assumed when it received the message from plaintiffs and promised to forward the same immediately.

It is contended that the two prior attachments upon the property of H. & B. Greenbaum were void for the reason that the sheriff's return was unaccompanied by an inventory of the attached property, as required by law, and that therefore the plaintiffs cannot recover damages in this case. The statute of Washington (2 Hill's Code, § 308) requires the sheriff on attachment to make a full inventory of the attached property, and return the same with his writ. Section 322 makes liberal provision for amendment of attachment proceedings, as follows:

"No attachment shall be quashed or dismissed, or the property attached released, if the defect in any of the proceedings has been or can be amended, so as to show that a legal cause for the attachment existed at the time it was issued; and the court shall give the plaintiff a reasonable time to perfect such defective proceedings."

The suits at Seattle were all brought in the same court, and the writs were all levied by the same officer. Jurisdiction of the defendants in the suits was had by personal service. Legal cause for the attachments existed at the time the writs were issued. There was jurisdiction of the rem in the attachment proceedings by the legal issuance of the writ and the levy thereunder. The failure to file an inventory with the returns could not render the attachments void. The defect was clearly one which could have been cured by amendment. No way is suggested by which the plaintiffs, who were the attaching creditors third in order, could have taken advantage of these defects, or could have gained a priority over either of the attachments which were prior to them in point of time. The most they could have done would have been to compel an amendment of the prior attachment proceedings, to no advantage to themselves.

The plaintiffs are entitled to recover from the defendant the damages which are the natural and proximate result of the defendant's act, provided (1) that the damages are certain both as to their amount and the cause from which they proceed, and (2) that they were such as may fairly be supposed to have entered into the contemplation of the parties as the injury to result from a breach of

the contract. *Griffin v. Colver*, 16 N. Y. 489; *Leonard v. Telegraph Co.*, 41 N. Y. 544; *Abraham v. Telegraph Co.*, *supra*. The damages in this case are certain and fixed. They are the amount of the debt which the firm of H. & B. Greenbaum owes the plaintiffs. That amount was lost to the plaintiffs by the wrongful act of the defendant. The language of the message apprised the defendant of the amount of plaintiffs' claim, the danger of its loss, and the necessity for its prompt protection. These facts were further emphasized by the verbal statements of plaintiffs, and their stipulation that the message be forwarded at once, which stipulation was made before the message was left with defendant or paid for by plaintiffs, and became part of the contract.

Judgment will be rendered for plaintiffs for \$3,707.37, with legal interest from June 25, 1891, and their costs and disbursements in this action.

HAZELTINE v. MISSISSIPPI VAL. FIRE INS. CO.

(Circuit Court, W. D. Tennessee. April 14, 1893.)

No. 2,557.

1. ACTION AGAINST NONRESIDENT INSURANCE COMPANY—SUBSTITUTED SERVICE.

Rev. St. Me. tit. 4, c. 49, § 63, providing that "any person having a claim against a foreign insurance company may bring a suit therefor in this state," etc., and that, in case no agent can be found, on whom such service can be had, service may be made on the insurance commissioner of the state, is applicable only to insurance companies which are, or have been, doing business in the state.

2. SAME—ACTION ON FOREIGN JUDGMENT—JURISDICTIONAL AVERMENTS.

In an action brought in another state on a judgment so recovered, the record of such judgment must affirmatively show such jurisdictional fact.

3. SAME—DOING BUSINESS IN STATE—INSURANCE BROKER—EVIDENCE.

In such an action it appeared that the insured resided, and the property was located, in the state of Maine; that the insurance company was a Tennessee corporation having no office nor agent in Maine; and that the insurance was effected by correspondence through the mails. *Held*, in consideration of a further provision of such statute requiring insurance companies "doing business" in the state to procure a license for that purpose, that these facts did not constitute a carrying on of business in the state of Maine by defendant so as to entitle plaintiff to substituted service.

At Law. Action by William Hazeltine, for the use of another, against the Mississippi Valley Fire Insurance Company on a foreign judgment obtained by plaintiff against defendant. Verdict for plaintiff set aside, and judgment entered for defendant.

Statement by HAMMOND, J.:

This action was brought in 1878 by the plaintiff, for the use of another, upon a judgment rendered against the defendant in the state of Maine in 1876. The defendant pleads—First, nul tiel record; second, that it is and was, etc., a corporation of Tennessee, having its situs at Memphis, "and was not served with process, and had no notice whatever of the pending of said action, [in Maine,] and that it never appeared thereto in person or by attorney;" and, third, "that neither through its officers or agents had it been a citizen of the state of Maine, nor had it, through its officers or agents, ever entered into a contract of insurance, or done or performed any act or thing whatever, within

the state of Maine; and at all times from its organization to the present time defendant has been a nonresident of the state of Maine, and never had an agent in said state, and had never authorized any one in the state of Maine to accept service of process for it," etc. The record of the judgment sued on shows that the writ commanded the sheriff "to attach the goods and estate of the Mississippi Valley Insurance Company, of Memphis, Tennessee, a corporation existing by law, and having no agent in this state that can be found, to the value of two thousand dollars, and summon the said defendant (if he may be found in your precinct) to appear * * * to answer unto William Hazeltine, of Lovell, in said county of Oxford." The sheriff's return to the writ is as follows: "By virtue of this writ I have summoned the Mississippi Valley Insurance Company, of Memphis, Tenn., within named, to appear at court, as within directed, by giving to Joshua Nye, insurance commissioner for the state of Maine, an attested copy of this writ, said company having no agent in this state on whom to make service." There was no attachment of defendant's property by the sheriff, and no appearance by or for the defendant company, and the judgment was by default. The suit was brought upon the defendant's \$1,000 fire insurance policy, for one year, upon a sawmill building in the state of Maine belonging to the plaintiff, to recover thereunder its loss by fire; and the declaration alleges that, the plaintiff being the owner of the building, the defendant, "in consideration of a premium in money then and there paid to them therefor by the plaintiff, made a policy of insurance upon the same," etc., "and thereby promised the plaintiff to insure upon said property the sum of one thousand dollars, * * * to be paid sixty days after due notice and proofs of loss shall have been made by the assured, and received at the branch office of the company in New York." There is no allegation of the place where this contract of insurance was entered into. The policy was "countersigned at New York city" and dated November 28, 1874, and the summons was served on the insurance commissioner May 22, 1876, and the judgment rendered September 29, 1876. The policy sued on is not exhibited in the transcript of the record.

The following provisions of the Revised Statutes of Maine, (title 4, c. 49.) relating to "Foreign Insurance Companies and Agencies," as amended previously to the cause of action so sued upon, are relied upon to support the service of process in the case. "Sec. 63. Any person having a claim against any foreign insurance company may bring a suit therefor in the courts of this state, including trustee suits, and service made on any authorized agent of said company shall be valid and binding on the company, and hold it to answer to such suit; and the judgment rendered therein shall bind the company as a valid judgment in every respect, whether the defendants appear or not. In case no agent of such company can be found, such notice or service served on the state insurance commissioner, who shall immediately notify said insurance company by mail, shall be valid and binding on the company as though served on their agent. Unless any such judgment is paid within thirty days after demand made upon any such agent or the insurance commissioner, the commissioner may, on notice and hearing of the parties, suspend the power of the company to do business in this state until it is paid; and if the company, or any agent thereof, issues any policy in this state during such suspension, said company and agent shall each forfeit one hundred dollars. Sec. 64. All notices and processes which, by any law, by-law, or provision of any policy, any insured or other person has occasion to give or serve on any such company, may be given or served on its agent, or on the insurance commissioner as provided in said section 63, with like effect as if given or served on the principal. Such agents, and the agents of all domestic companies, shall be regarded as in the place of the company in all respects regarding any insurance effected by them. * * *

Foreign insurance companies are by statute prohibited from transacting any insurance business in the state of Maine without obtaining license therefor, which authorizes it to do such business "subject to the laws of the state;" and the agents of foreign companies so licensed must themselves be licensed by the state, as well as insurance brokers, "to negotiate contracts of insurance, and to effect insurance for others than himself for a compensation, and

by virtue thereof he may place risks or effect insurance with any company of this state, or with the agents of any foreign insurance company who have been licensed to do an insurance business in this state, but with no other." Rev. St. Me. c. 49, §§ 49-51.

This record does not show that the defendant company or any agent or broker for it, was ever licensed by the state under its statute. Upon the trial of the suit here upon this record, a verdict was directed for the plaintiff, and judgment rendered thereon, under the following stipulation: "But this judgment is rendered by the court with the distinct agreement of the parties, made in open court, that if, upon investigation by the court hereafter, the court should be of the opinion that the service of process in the suit in which the judgment here sued on was illegal and of no effect, then this verdict and judgment are to be set aside, and judgment for the defendant entered in place thereof." Before the trial defendant filed an amendment to his declaration, by an additional count upon the insurance policy, in the very language used in stating his cause of action in the Maine court, and made proffer here of the policy there sued on. To this the defendant demurred, and its demurrer was allowed.

Miller & Gillham and R. D. Jordan, for plaintiff.
L. B. Eaton, for defendant.

HAMMOND, J., (after stating the facts.) The policy which is the basis of the judgment here sued on, as well as the proof on the subject, showed that it was signed by the president and secretary here in Memphis, at its home office, and sent to New York city, where the company had a branch office and agent, to be countersigned there by the agent before it took effect and before delivery; that it never had an office or agency or an agent in the state of Maine; that it was never licensed to do business in that state, nor was any agent ever so licensed to do business for it, and that no broker was ever licensed in Maine, so far as the company knew, or with its authority or consent, to effect insurance with it, either directly or through its agents. In the late case of *Construction Co. v. Fitzgerald*, 137 U. S. 98, 106, 11 Sup. Ct. Rep. 36, the general doctrine of service upon a foreign corporation is thus stated:

"Where a foreign corporation is not doing business in a state, and the president, or any other officer, is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354; *Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. Rep. 364; *Ex parte Schollenberger*, 96 U. S. 369."

In *St. Clair v. Cox*, so cited, the validity of the judgment in controversy was denied for want of proper service on the defendant foreign corporation, the same having been made on an alleged "agent" of the company. By the laws of Michigan, service in attachment suits against a nonresident corporation could be made "on any officer, member, clerk, or agent of such corporation within this state," which language the supreme court construes as not "authorizing the service of a copy of the writ, as a summons, upon the agent of a foreign corporation, unless the corporation be engaged in business in the state, and the agent be appointed to act there." The Maine statute here provides that service may be "made on any authorized agent" of a foreign insurance company, and, in case judgment is not paid, the insurance commissioner may "suspend

the power of the company to do business in this state." It is conceded by the plaintiff that there has been no decision by the Maine supreme court construing this legislation, so far as service upon the insurance commissioner is provided for, viz. "in case no agent of such company can be found." It will be observed that, in the record of the judgment sued on, the writ commands the sheriff to attach the property of the defendant, "having no agent in this state that can be found," and to summon the defendant, "if he [it] may be found," and that the officer's return shows that there was "no agent in this state on whom to make service." This Maine statute, taken altogether, shows affirmatively, and not by implication merely, that its various provisions were only intended to apply to such foreign insurance companies as "shall transact any insurance business in this state," and only such could be licensed. Chapter 49, § 49. Its agent can be licensed only when the company itself "has received a license to do an insurance business in the state," (Id. § 50,) and a like limitation is imposed on the granting of licenses to insurance brokers, (Id. § 51,) and under certain circumstances the commissioner may suspend the right of a licensed foreign insurance company "to do business in the state," (Id. § 52,) and the legal procedure is provided for appointing receivers "when any foreign insurance company doing business in the state is dissolved," (Id. § 53.) "Every foreign insurance company doing business in the state" must make annual report of its condition, and publish the same. Id. §§ 54, 55. The commissioner is required to report to the legislature the condition of all such companies "doing business in this state, with the names and locations of their authorized agents in this state," (Id. §§ 56, 57,) and no such foreign company "shall be permitted to do business in the state" unless it has certain paid-up capital, (Id. § 62.) Hence it would seem that the provision quoted, by which substituted service is authorized to be made upon the insurance commissioner, was intended by the legislature to apply only to such foreign insurance companies as were at the time, or at least had been, doing business in the state, or had at the time, or had had, agents therein doing business for it, who could not be found. Such is the literalism of the statute, said service being provided "in case no agent of such company can be found." This construction is certainly a reasonable one, and would and does provide against the inconvenience and hardship, otherwise, and in the absence of any such or kindred legislation, of compelling the citizens of the state to follow to its domicile of incorporation the insurance company with which he had done business at home, in order to collect a loss under its policy to him, after the company had ceased to do business in the state, or had withdrawn its agents, either voluntarily or by act of the state under its insurance laws shown above.

If, therefore, the construction given by the supreme court to the Michigan legislation in *St. Clair v. Cox*, supra, be correct, it follows irresistibly that substituted service, or service upon an "authorized agent" even, in Maine, can only be supported in case the defendant company is at the time of suit, or has previously been, "doing busi-

ness" in the state. The record here does not show that fact, but in effect substantially negatives it, while the pleas and proof of the defendant affirmatively show that it never did business, or had an agent or officer or attorney, in the state. In that decision the supreme court of the United States says:

"We are of the opinion that, when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ or accompanying its service, or in the pleadings or finding of the court—that the corporation was engaged in business in the state."

The record of this judgment shows only that the property insured was located in Maine, and that the plaintiff resided there, and "was interested" in it. It does not show where the policy was executed, where it was delivered, where he gave notice to defendant of the loss, or where he delivered to it the proofs thereof, though presumably, if at all, (which is denied by defendant,) the notice and proofs were sent to New York, where the policy was countersigned, and where the loss was "to be paid, sixty days after due notice and proofs of the same shall have been made by the assured, and received at the branch office of the company in New York, in accordance with the terms and conditions of said policy."

But the plaintiff here contends that "the very act of insuring property situated in the state of Maine is of necessity 'doing business in the state;'" and he necessarily concedes that the defendant company did not have "an office or an agent in the state." There is no proof here that the company ever issued other fire policies covering property in that state, and the question simply is whether the insurance, by correspondence, of property in a state belonging to a resident therein by a foreign insurance company, is carrying on or doing business in such state. If A., a resident of Maine, should, while at Memphis, personally procure insurance on his property there, in a Memphis company, and immediately pay the premium, could it be insisted that the transaction was a Maine one? Or if the owner of a ship or cargo at sea, or in a foreign port, should himself, at Memphis, so effect insurance thereon in such company, would it be contended that the transaction was other than a contract made in Tennessee, or that the business was done elsewhere than in this state? Or, in the case first put, would the fact that the business was negotiated by correspondence make it any less business done here? In the familiar case of *U. S. v. American Bell Tel. Co.*, 29 Fed. Rep. 17, 35, Judge Jackson, in treating of this subject, says:

"It cannot be held sufficient to give this court jurisdiction in personam over a foreign corporation, that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. It must itself be carrying on business in its own right, on its own responsibility, and for its own account, and through or by means of its own agents, officers, or representatives, in order to bring it within the operation of the laws of a state other than that in which it is incorporated, making it amenable to a suit there as a condition of its doing business in such state."

An Ohio statute was involved in that suit, which the court construed as applying "only to such foreign corporations as carry on business in the state," using this language:

"When a foreign corporation carries on its corporate business, or some substantial part thereof, in this state, by means of an agent or representative appointed to act here, and having the charge and management of such business, it impliedly assents to be found and sued here in the person of such agent."

In *Clews v. Iron Co.*, 44 Fed. Rep. 31, the president of an Alabama corporation, who resided there, was in New York city for the purpose of negotiating its bonds, and it was held that service upon him in New York was invalid in a suit against the corporation, as by this transaction the defendant could not be held to be engaged in business in the state. "The only business which it did," says the court, "was the borrowing of money upon its bonds and mortgage, and the obtaining from the stock exchange of the privilege of having such bonds called on the list of securities dealt in on its floor. It could apparently have secured this privilege, and could have sold its bonds by correspondence. It kept no office here. It did not continuously, or even for a period of some duration, carry on here the business which it was organized to carry on, and by the regular transaction of which it gave evidence of its continued existence." So, in *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 635, where service was made on the president of the defendant foreign corporation which had no office or place of business within the state, and was not engaged in business there except occasionally, to purchase goods by an agent sent there for that purpose, the service was vacated, although when made the president was in the state to adjust a controversy with the plaintiff growing out of such a purchase; the decision being based on the ground that "the corporation had never been practically engaged in business here. It had made purchases here occasionally, but it could have made them by correspondence as well as by the presence of its agents here. If the purchases had been made by correspondence, it could be as logically urged that the corporation was engaged in doing business here as it can be now." And on the same principle, under similar facts, was the like decision in *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.*, 32 Fed. Rep. 802. Judge Brewer ruled, in *Carpenter v. Air-Brake Co.*, Id. 434, that valid service could not be had upon the foreign defendant corporation by service upon its officers and agents who were running a train of cars in Iowa for the purpose of exhibiting its air brake, the train not carrying freight or passengers for hire; *Love and Shiras, JJ.*, concurring in the decision.

The question here presented was considered by this court quite at length in 1886 in the case of *Henning v. Insurance Co.*, 28 Fed. Rep. 440, which was a suit on a judgment obtained in Illinois against the defendant upon service on an agent of the company there, which was a Tennessee corporation, whose home office was in Memphis. It had no office in Illinois, and no agent there, as required by the law of that state. The insurance was effected

through a broker in Chicago, "the business all being done by mail." The policies were executed here, and "sent to and delivered at Chicago." The "agent" served was the broker, and the property insured was in Minnesota, but the residence or citizenship of the plaintiff was not shown. Following *St. Clair v. Cox*, supra, the defendant's objection to the introduction of the record was sustained, because it did not show that the defendant was doing business in Illinois. What facts are necessary to constitute doing business within a state was not considered by me in the opinion in that case, because the judgment on the preliminary question presented made such an inquiry unnecessary. In *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. Rep. 739, the plaintiff, an Ohio corporation, sued the defendants, who were citizens of Colorado, in the latter state, on a contract made there to sell and deliver to them on the cars in Ohio certain machinery. The statute of Colorado required a foreign corporation, before doing business in the state, to file a certain certificate in the county "in which such business is carried on, designating the principal place where the business of such corporation is carried on in the state, and an authorized agent or agents in the state residing at its principal place of business upon whom process may be served." The defendants pleaded that the plaintiff had not filed such certificate, and had no place of business in the state, nor agents upon whom process could be served. Plaintiff's demurrer to this plea was overruled below, and the judgment of the circuit court reversed in the supreme court after two arguments. The constitution of that state provides that "no foreign corporation shall do any business" in the state without having a known place of business, and agents on whom process may be served. Mr. Justice Woods, for the court, in the opinion says:

"Reasonably construed, the constitution and statute of Colorado forbids, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent, as required by the statute. * * * The making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery, and the other party to pay for it, did not constitute a carrying on of business in Colorado."

While the facts of the case at bar are not identical in every respect with those in any of the cases just cited, the principles which controlled those judgments apply here, and are controlling, in favor of the defendant.

The English cases also support this judgment, and it may be useful to refer to them as showing how the elastic phrase "carrying on business" or "doing business" gives trouble everywhere, and seems to need legislative definition, or else that it should be abandoned for something more explicit. I have gathered some of the more important English cases, though by no means all of them, and they show there as here a curious vacillation of understanding of this phrase. Until very recent years no case of suing a foreign corporation in the common-law courts of England could be found, it is said; but from very early times corporations were allowed to sue as plaintiffs. The judges began to protest against the want of recipro-

cal fairness in this, and, by an enlargement of the language of modern practice and procedure, acts of parliament, and rules of court prescribed in pursuance of them, they were subjected to suit as defendants. But the narrowest possible limitation was evolved out of the perplexities of the subject, somewhat due, no doubt, to the sensitive jealousy of the Scottish courts to the exercise of jurisdiction over Scottish companies by the English courts. They established the rule, finally, that the foreign corporation must be, in a sense, domiciled in England, very much as if it had been chartered there. The courts say, in trying to define the limitation: Carrying on trade or trafficking in England, even by the instrumentalities of permanent local agents or other appliances, does not necessarily establish this suable domicile for the company; it depends largely upon the nature of the home and foreign business,—what is done in either or both places in carrying on the enterprise of the company; and even the perpetual running of a foreign railroad upon English soil is held not to be enough,—not to be “doing business” in England in the sense of this suable quality or liability in a foreign corporation. There must be a managing, controlling, or governmental business done by the corporation in England,—a sort of “branch” of the foreign company established there. The phrase is also instructively considered in cases relating to the suits brought against domestic English companies in the several counties of England under acts of parliament regulating the jurisdiction or venue for the local courts. There it received the same construction, though there was some relief against this by a separate rule of jurisdiction in places where the cause of action arose or the injury was done. I cite the cases chronologically, without attempting to distribute them here. *Wilson v. Railroad Co.*, 5 Exch. 822; *Iron Co. v. Maclaren*, 5 H. L. Cas. 416, 458; *Ingate v. Lloyd Austria Co.*, 4 C. B. (N. S.) 704; *Shields v. Railroad Co.*, 7 Jur. (N. S.) 631; *Newby v. Von Oppen*, L. R. 7 Q. B. 293; *Mackereth v. Railroad Co.*, L. R. 8 Exch. 149; *Jones v. Insurance Co.*, 17 Q. B. Div. 421; *Lhoneux v. Banking Corp.*, 33 Ch. Div. 446; *Watkins v. Insurance Co.*, 23 Q. B. Div. 285; *Haggin v. Comptoir d'Escompte de Paris*, Id. 519; *Palmer v. Railroad Co.*, [1892] 1 Q. B. 823.

The truth about the matter is that while the obvious spirit of the thing contemplated by our states is that, in the exercise of their dominion over the persons and things situated within their territory, and their conceded power to regulate the terms upon which foreign corporations shall be admitted to traffic with those persons and about those things, they desire to provide, with commendable justice, that whenever the cause of action arises or relates to the persons and things within their respective dominion by the destruction of the property insured, or other injury or breach of contract, these companies shall submit to judgment there, and the citizens of that state shall not be forced to go to a distant jurisdiction, to the corporate domicile, to bring their suit or to get their money. But they do not use apt words to compel this, and the courts, on the language we have here, must rule, upon the cases we cite, that that

object has not been accomplished. The remedy is to amend the legislation, and define the conditions upon which the companies may act, more explicitly.

Without attempting to decide or define what would be, in any given case, the doing of business by a foreign insurance company in a state other than that of its incorporation, it is sufficient for the purposes of this decision that the facts here do not constitute the carrying on of its business by this defendant in the state of Maine; and especially is this so in view of the legislation of that state upon the subject. It follows, therefore, that the service upon the insurance commissioner was not valid to support the judgment sued upon. This would certainly be so in the absence of such legislation, and is probably as certainly so under it. Let the judgment heretofore entered in favor of the plaintiff be set aside, and a judgment entered in favor of the defendant under the stipulation entered into at the time, with costs against the plaintiff and the surety on his cost bond. So ordered.

ROMAINE et al. v. UNION INS. CO. et al.

(Circuit Court, W. D. Tennessee. April 22, 1893.)

No. 404.

ACTION AGAINST NONRESIDENT INSURANCE COMPANY—JURISDICTION OF COURT.

Application for insurance was made to an insurance broker in Memphis, Tenn., who applied by mail and telegram to one N., another insurance broker at Cincinnati, Ohio, for the same insurance. N. procured policies from companies having no office nor agents in the state of Tennessee, forwarded the policies to the broker at Memphis, and shared with him the commissions on the premiums. N. was agent of one of these companies at Cincinnati, but he neither had authority to appoint, nor did it appear that he had appointed, subagents at Memphis. No other transactions by defendant companies in Tennessee were shown. *Held*, that defendant companies were not "doing business" in Tennessee, or "found" or resident there, so as to render them liable to substituted service, or to service upon the Memphis brokers.

In Equity. Bill by B. F. Romaine & Co. against the Union Insurance Company and others. Motion to quash service of process and to dismiss the cause. Granted.

Statement by HAMMOND, J.:

This cause was brought by the filing of plaintiffs' original bill in this court in March, 1886, against the Union Insurance Company, the Insurance Company of the State of Pennsylvania, both "corporations and citizens of the state of Pennsylvania," and the Merchants' & Manufacturers' Insurance Company, "a corporation and citizen of the state of Ohio;" the bill alleging defendants to be "residents and citizens of the various states" set forth in the caption, and plaintiffs to be "residents of the city of New York and citizens of the state of New York." There were other defendants to the bill, but the cause has been dismissed as to them. Service on these defendants was attempted respectively by the marshals in Ohio and Pennsylvania, under writs directed to the marshal of this district, but the same was set aside by the court. Afterwards, under alias process, service was made at Memphis, Tenn., by the marshal here, "personally on Herman Bendsdorf, as agent of the within-named Union Insurance Company, and on James E. Beasley and Colton

Greene, (Greene & Beasley,) as agents of the within-named Insurance Company of Pennsylvania and of the Merchants' & Manufacturers' Insurance Company of Ohio."

Complainants in November, 1886, filed an amended bill, upon which process issued against each defendant under the twelfth equity rule, and the writs were returned without any service on the Union Insurance Company, with service on "J. E. Beasley, agent for the Insurance Company of the State of Pennsylvania;" and, under the subpoena commanding the marshal to summon the Ohio company, the return shows a service only upon "Colton Greene, agent of the Insurance Co. of State of Pennsylvania." Again, alias writs of subpoena issued to require defendants to answer the amended bill. Those for the Ohio company and the Insurance Company of the State of Pennsylvania were each returned with service on "J. A. Harpham, chief agent," and that for the Union Insurance Company with service simply on "H. Bendsdorf," he not being named as agent by the officer. None of the persons so served with process as "agent" was named as agent in the writs, nor in the original or amended bills. By permission of the court the Merchants' & Manufacturers' Insurance Company appeared "specially and solely to object to the jurisdiction and power of this court to compel it to appear and answer in the aforesaid action," and filed a formal plea to the jurisdiction of the court, alleging that at the times of the aforesaid service defendant "was not an inhabitant nor found" in this state or district; that it was an Ohio corporation, with its domicile in that state, and an office at Cincinnati, where it "transacted all its business;" that it never was "an inhabitant or nor a resident of, nor present in nor found" in, this state or district; that it never "was doing business" in Tennessee, and never had "any place of business, office, officer, agent, nor any transaction in respect to its business, in whole or in part," in this state; "neither did it have any transaction with persons or concerning any property situated in this state, through any agency whatever, acting for it within this state, but its business was done in the place of its domicile" in Ohio. The plea further avers that the policy sued on "was issued by the company at its home office in Cincinnati, Ohio, upon an application made" at its home office by an insurance broker, and that the policy was delivered to the broker there, and the payment of the premium made by him; and "that the whole transaction was had in the state of Ohio," the policy having been issued "solely upon the application" of the Cincinnati broker. This plea is sworn to by the president of the company.

The two Pennsylvania companies, by their counsel, also appeared "for the sole purpose of moving the court to quash the returns as to said companies, on the ground that it appears on the face of the bill and proceedings that said companies had no residence in the jurisdiction of this court, and no agent within said jurisdiction;" and a stipulation between plaintiffs and these two companies has been filed, "that this case may be heard on the motion to dismiss, and to quash the service of the process as to the above-named defendants, as if a formal plea had been filed properly and in due form, putting in issue all matters of objection to the service of process or subpoena, and to the jurisdiction of the cause, so far as it affects the said two defendants;" and all the defendants have also joined in a formal motion to dismiss the cause for want of proper service upon them.

T. W. & R. G. Brown, for complainants.

Heiskell & Heiskell, for Pennsylvania defendants.

Taylor & Carroll, for Ohio defendant.

HAMMOND, J., (after stating the facts.) This action was brought to recover loss on inland marine insurance policies issued in February, 1883, and covering 180,000 staves on barges in the Hatchie river, in this state; the same to be floated down the Hatchie and Mississippi rivers to Memphis, and thence towed by steamer to New Orleans, La. Each of the three policies was for \$6,000. The Merchants' & Manufacturers' Insurance Company's

policy shows that it was issued at Cincinnati, Ohio, "at their office in the city of Cincinnati, state of Ohio," where it was signed by the president and secretary of the company, a corporation of that state. The certificate of insurance of each of the two Pennsylvania defendant companies provides that it "is not valid unless signed by the authorized agent for this company at Cincinnati, Ohio," and is signed, "George W. Neare, Agent," and bears on its face the statement, "Dimick & Crosby, General Agents, Buffalo, N. Y." Many affidavits have been filed by the parties on the issue presented by the pleas in abatement here, and several depositions have been taken, under stipulation, bearing upon the subject, and from all this proof, and from the record, the court finds the following facts:

1. That on January 2, 1882, the two Pennsylvania companies entered into a written contract or agreement with Dimick & Crosby, of Buffalo, New York, whereby they were appointed general agents of said companies "for the transaction of a general inland insurance business on the New York state canals, the great western and inland lakes, and the Illinois canals, and the western and southern rivers;" such agency to be located either at Buffalo, New York city, or Chicago. These general agents were thereby authorized to appoint "local agents" of the companies "in the above-mentioned territory," who were to be commissioned by the companies. Under this authority these general agents appointed George W. Neare agent for said companies at Cincinnati, Ohio, but no power was conferred upon him to appoint agents or subagents. Neither Greene, Beasley, Greene & Beasley, Harpham, nor Pensdorf, nor any one else, was ever appointed agent of said companies at Memphis nor in Tennessee by the companies themselves, nor by their general agents at Buffalo, nor by Neare at Cincinnati.

2. The Ohio defendant was a corporation of that state, and never appointed an agent in Tennessee, nor had an agency in the state, nor transacted any business with any persons whatever at Memphis, and its business is carried on exclusively at its home office in Cincinnati. The policy in question here was issued at the company's home office to George W. Neare, a marine insurance broker in Cincinnati, who verbally made the application in person to the president of the company, to whom the policy was delivered in its office upon payment of the premium by Mr. Neare, who was the only person known in the transaction to the officers of the company. The company paid no brokerage or commission except to Neare, but he paid a part of it to Harpham at Memphis, from whom he received the direction to insure, and to whom he sent the policy, and by whom the draft for payment of the premium was transmitted. This draft was drawn by one Leonard, the Memphis agent of the New York complainants, upon them, but to whose order it was payable does not appear.

3. Neare issued the certificates covered by the policies of the Pennsylvania companies and signed them at Cincinnati. It was done upon the application of J. A. Harpham, of Memphis, for insurance on the staves, the application having been sent by

him to Neare by mail, and the certificates of insurance returned by mail to Harpham by Neare, who was the agent of the companies at Cincinnati. Harpham transmitted by mail the draft of Leonard on Romaine & Co. for the premiums on these policies, also. All the business done by the Ohio company or Neare, in and about all this insurance, was transacted at Cincinnati, or by correspondence between Neare in that city and Harpham at Memphis, Tenn.

4. J. W. Leonard, or his bookkeeper, Mr. Titus, first applied to Greene & Beasley, insurance agents at Memphis, for marine insurance upon these staves, and was told that the companies they represented did not carry that kind of insurance. They occupied an office jointly with two Memphis local insurance companies, of which Harpham had been an adjuster for many years, and he occupied the same office. There is much dispute as to the exact conversations which took place in this office between Leonard or Titus and Harpham; but, as a result of it all, Hr. Harpham, who had no business connection whatever with Greene & Beasley, applied to Neare by mail and telegram for this insurance, procured the rates from him, and received from him by mail the policy and certificates, delivered them to Leonard or Titus, and transmitted to Neare the drafts in payment of the premiums, and was paid by Neare 5 per cent. of the same as his compensation for services in the premises. After the loss, Mr. Leonard handed the protests to Harpham, who sent the same by mail to the broker at Cincinnati. The evidence does not show any other instance of insurance of property in this state by any of the said defendants.

Under these facts, and upon this record, the case falls strictly within the principles enunciated in the opinion of this court in the case of *Hazeltine v. Insurance Co.*, 55 Fed. Rep. 743, (just filed,) and it is unnecessary to consider the questions of defective service, nor whether the marshal's returns may be now amended so as to cure such defects as might be found to exist, nor whether the substituted service prescribed by the statutes of this state has been effected. The provisions of the act of the legislature of Tennessee, passed March 29, 1887, (Acts 1887, c. 226, p. 386,) do not seem to have been complied with here, and hence we are not called upon to decide whether the facts found above would constitute "doing business" within this state by these defendants under the definition of that act, which includes "any transaction with persons or any transaction concerning any property situated in this state through any agency whatever acting for it within the state." A decree will therefore be entered sustaining the pleas in abatement, and granting the motions to quash the service attempted to be made on these defendants, with costs against plaintiffs and the sureties on their prosecution bond; and it is accordingly so ordered.

PLUMMER v. GRANITE MOUNTAIN MIN. CO.

(Circuit Court, D. Montana, April 3, 1893.)

1. NEW TRIAL—WHEN GRANTED—CONTRADICTORY EVIDENCE.

Plaintiff brought an action against defendant company, alleging that he, as defendant's manager, had paid to it the sum of \$30,000, to be refunded if his accounts should be found correct, and seeking to recover such money. Defendant claimed that the money was paid absolutely as restitution for plaintiff's wrongful act in letting a contract for the delivery of wood to defendant by which plaintiff was benefited, such restitution being at the rate of one dollar per cord. The evidence on this point was conflicting, but it appeared that there was extended public notice of the proposals for the contract with invitations to bid; that defendant was notified of the terms of the contract before it was consummated; and that, at the time the payment was made, only a small portion of the wood had been delivered. *Held* that, plaintiff having recovered judgment for the full amount, defendant's motion for a new trial should be denied.

2. SAME—IRRELEVANT TESTIMONY.

The court properly excluded evidence offered to show the large amount realized from the contract by one who took an assignment thereof from the original contractor after it had been partly executed, also evidence showing at what price a subsequent contract for delivery of wood to defendant was taken by such assignee, since it did not appear but that the contract was completed by the assignee under exceptionally favorable circumstances, nor that plaintiff could have let the contract to a person as efficient as the assignee.

At Law. Action by John W. Plummer against the Granite Mountain Mining Company. Judgment for plaintiff. Heard on motion for new trial. Denied.

Toole & Wallace, for plaintiff.

Forbis & Forbis and McConnell, Clayberg & Gunn, for defendant.

KNOWLES, District Judge. The issue presented in this cause was tried at the last term of this court by a jury which rendered a verdict in favor of plaintiff and against defendant for the sum of \$30,000. Defendant now comes into court, and petitions the court for a new trial of the cause. The principal ground assigned in support of the petition, and the one chiefly presented in the brief of defendant, is that the verdict was against the weight of evidence. It is admitted that there was a material conflict in the evidence upon the most material point in the case, and this cannot be disputed. The dispute pertained to the contract under which the money was paid to defendant. The plaintiff claimed and testified that the money was paid to the defendant conditionally; that the condition under which the money was paid was, in substance, that his accounts with and management of the affairs of the Granite Mining Company should be investigated, and, if they were found correct, the money should be refunded to him. Mr. L. M. Rumsey, who acted for defendant in this matter, claimed that the money was paid to defendant absolutely; the plaintiff admitting that he had wronged the company in letting a certain wood contract to one Hall for the

delivery of 30,000 cords of wood to the defendant, and wished to make restitution to the amount of one dollar per cord. Which was the correct version of this contract was fully and fairly left to the jury for its decision. It is claimed that the evidence of Rumsey is strongly corroborated by other evidence. This may be admitted. It is also urged on the part of plaintiff that his evidence was strongly corroborated also by other evidence. I think this may be admitted. Both of these witnesses are well known, and are men of character and reputation. Mr. Rumsey has been a prominent business man in the city where he has lived, and was the owner of a large amount of the capital stock of defendant, and one of its most efficient and trusted officers. Mr. Plummer was for years the trusted superintendent and agent of defendant in its mining operations in Montana, and before had filled similar positions of trust, and since that time has been so employed. The question as to whether there had been any official or intentional wrong on the part of plaintiff in letting the said wood contract to Hall was fully inquired into as one of the circumstances bearing upon the point at issue. It is not claimed that there was not an extended public notice of the proposal to let this contract, bids invited, or that Hall did not make the lowest offer to deliver this wood. It appears that the officers of defendant at their office at St. Louis, Mo., were fully notified of the letting and proposed terms of this contract before it was finally consummated. The evidence was such that the jury would not have been justified in finding anything wrong in letting that contract. It is difficult to see why, under such circumstances, the plaintiff, Plummer, would have agreed to pay as a restitution to defendant one dollar per cord absolutely on the amount of wood to be delivered under this contract, and especially is this the case when we learn that only about 5,000 cords of wood had been delivered up to that time thereunder.

I believe these facts materially influenced the jury in reaching its verdict. They have exercised a considerable influence upon the mind of the court in considering this matter. It is claimed by counsel for defendant in their brief that plaintiff wished probably to cover up some other dereliction of duty to the defendant, and wished to stop further investigation. The only thing which the witness Rumsey declares in his evidence that Plummer acknowledged he had wronged the company in was this wood contract. That was the talk, according to his evidence, between them. There is nothing in the evidence which would lead to any opinion that there was any other transaction plaintiff wished to cover up. As a general rule, when the evidence is conflicting, a court will not grant a new trial. 16 Amer. & Eng. Enc. Law, p. 557, note 5. It should be borne in mind that a federal court grants a new trial only in accordance with the rules of the common law in such matters. Statutory regulations do not control in the matter. Where the evidence is conflicting, and the witnesses are all proven to be men of good character, a new trial will not be granted. *Nonce v. Railroad Co.*, 33 Fed. Rep. 429-437. The jury are the judges of the weight to be

given to the evidence presented to them, and when they have done this, as it appears, fairly, without passion or prejudice, its verdict should not be disturbed, although the court might think a different result might be reached by another jury. *Pim v. Wait*, 32 Fed. Rep. 741. When there is a material conflict in the evidence upon the main issue in the case, the court will not grant a new trial, although it would have taken a different view from that of the jury.

It is urged that the court improperly excluded the evidence of Durand and Thomas, to the effect that Durand took an assignment of the contract above referred to to Hall, when only about 6,000 cords of wood had been delivered thereunder, and cleared some \$40,000 on the same. It appeared from the evidence that the weather was uncertain in the neighborhood of Granite, where this wood was to be delivered,—some winters were more stormy than others; that this was a material consideration in delivering wood. It was not offered to show whether at the time when Durand delivered this wood the weather was favorable or not. It was not proposed to show that Durand used the same appliances as Hall, or was a man of the same experience as Hall, or employed the same kind of men. These the court thought were material matters. It did not appear that plaintiff had a choice of letting the contract to such a man as Durand. It is true that one man is much more efficient in filling the same contract than another. There is nothing in the evidence to warrant the court in saying that plaintiff had the knowledge and experience to warrant him in coming to the conclusion that the contract for the hauling of that wood could be let for any less than the contract price. The evidence would warrant the conclusion that Hall made no money out of the contract. Under these circumstances I must maintain that it was proper to exclude the evidence of these two witnesses upon this point. And for the same reasons I think the evidence of what a subsequent contract for delivery of wood to defendant was entered into for by Durand was properly excluded. All of this evidence is based upon some kind of a supposition, not supported by the evidence, that plaintiff knew that the contract with Hall was excessive as to price, and that he had the choice of letting a contract to such an efficient man as Durand proved to be. It entirely ignores the evidence in the case that this contract was let to Hall after bids had been advertised for and solicited, and that defendant was fully apprised of the whole proceeding, and made no objection until some time afterwards. For the reasons assigned, the petition is denied.

ST. LOUIS S. W. RY. CO. et al. v. STARK.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1893.)

No. 170.

1. APPEAL—REVIEW—RECORD—FORECLOSURE.

In a railroad foreclosure suit a decree was entered January 31st, declaring that certain classes of claims therein specified were entitled to a lien prior to that of the bondholders, and directing the receiver to first pay the same out of the proceeds of the sale. A sale having been made, a judgment creditor intervened, asking that his judgment might be paid out of the proceeds of the sale before any payments on the bonds, and the court decreed that his judgment came within the classes of claims enumerated in the decree of January 31st, and directed payment accordingly. From this decree an appeal was taken, but the decree of January 31st was not incorporated in the record. *Held*, that in view of this omission the appellate court could not review the finding that the claim in question was entitled to priority as belonging to the classes enumerated in the decree of January 31st.

2. MORTGAGES—FORECLOSURE—ESTOPPEL OF PURCHASER.

Where a railroad foreclosure decree provides that certain specified classes of claims constitute a lien prior to that of the mortgage bonds, and directs that the sale shall be made subject to such lien, one who purchases at the foreclosure sale is estopped from objecting to the payment of a claim which belongs to one of the classes specified.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. Affirmed.

Statement by THAYER, District Judge:

The facts out of which this appeal arises, so far as it is deemed necessary to state them, are as follows: In certain suits brought to foreclose mortgages on the property of the St. Louis, Arkansas & Texas Railway Company in Missouri and Arkansas, receivers of said property were duly appointed, in May, 1889, by the United States circuit court for the eastern district of Missouri and the eastern district of Arkansas. The order appointing such receivers required them to pay out of the income of the property in their hands certain operating expenses of the mortgagor company, which had been contracted before the bills of foreclosure were filed, and which were adjudged to be superior in equity to the claims of the mortgage bondholders. In the progress of the litigation to foreclose the mortgages, and on the 31st day of January, 1890, another order or decree appears to have been entered by the United States circuit court for the eastern district of Arkansas, which declared that certain other claims against the mortgagor company were entitled to priority over the mortgage indebtedness, and by the same order the receivers were directed to pay said claims out of the income or proceeds of the sale of the mortgaged property in preference to the claims of the mortgage creditors. A decree of foreclosure and sale was thereafter entered on the 15th of July, 1890, and at the sale made thereunder the property was bid in by Louis Fitzgerald, who acted as purchasing trustee for a reorganization committee composed of mortgage bondholders. The property was conveyed to Fitzgerald on February 5, 1891, and was thereafter conveyed by him to the appellant the St. Louis Southwestern Railway Company in execution of a plan of reorganization. On the 16th day of January, 1891, the appellee, L. L. Stark, filed an intervening petition in the foreclosure suit then pending in the United States circuit court for the eastern district of Arkansas, wherein the intervener prayed that the amount of a certain judgment which he had recovered in the circuit court of Miller county, Ark., against the St. Louis, Arkansas & Texas Railway Company in Missouri and Arkansas, might be allowed and paid out of the proceeds of the sale of the

mortgaged property which had then been made. The circuit court allowed the claim, and the appellants, who had resisted the intervention, have appealed from such order.

J. M. Taylor, J. G. Taylor, and Samuel H. West, for appellants.
Oscar D. Scott, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

It is assigned for error that the circuit court erred in allowing the intervenor's demand, and in decreeing the same to be a superior lien upon the property which was conveyed by Fitzgerald, the purchasing trustee, to the St. Louis Southwestern Railway Company, and that it also erred in holding that the demand in question was one of those claims which the United States circuit court for the eastern district of Arkansas had decreed to be preferential, and had directed to be paid by an order made in the foreclosure proceedings on the 31st day of January, 1890. This assignment raises the only questions that we have to consider on the present appeal. By reference to the decree on the intervening petition, from which the appeal is taken, we find that it was adjudged that the intervenor's demand was "one of the debts of said defendant company, (i. e. the St. Louis, Arkansas & Texas Railway Company in Missouri and Arkansas,) which the said receivers are, by the terms of the order of this court, entered on the 31st day of January, 1890, authorized and directed to pay, and that said receivers should pay said judgment, interest, and costs to the said intervenor, or his solicitor of record, out of the first moneys coming into their hands, applicable to that purpose," etc. We are precluded, we think, from reviewing this finding by the fact that the order of January 31, 1890, is not found in the present record. We are not advised by anything which the record contains of the terms of that order, or of the class of debts which were thereby directed to be paid. Of the provisions of that order we know no more than is disclosed by the decree of the circuit court on the intervening petition, and by the seventh paragraph of the decree of foreclosure hereinafter referred to. The finding of the circuit court that the intervenor's demand is one of the debts which it had previously ordered to be paid must therefore be accepted as conclusive. It is further to be noted that the decree of foreclosure and sale, under which the appellants derive title to the mortgaged property, forms a part of the record which has been lodged in this court, and by reference to the seventh paragraph of that decree we find the following provision relative to the terms of sale:

"And the purchaser or purchasers of said property at said sale shall, as a part of the consideration of the purchase, in addition to the payments which may be ordered by the court of the sum bid, take said property upon the express condition that he or they will pay off, satisfy, and discharge the debts due from said St. Louis, Arkansas & Texas Railway Company in Missouri and Arkansas for ticket and freight balances, and for labor, materials,

machinery, etc., * * * and all such claims as were by order herein made on the 31st day of January, 1890, declared to constitute liens on said railroad, and all property appurtenant thereto, superior and paramount to the lien of the mortgages herein, and said road shall not be released or discharged from said liens until said debts and liabilities are paid."

It thus appears that prior to the present intervention the class of debts to which the intervener's claim belongs had been adjudged to be superior in equity to the claims of the mortgage bondholders, and that the property covered by the mortgages was sold upon the express condition that the purchaser or purchasers at said sale, as part consideration therefor, would satisfy and discharge all of that class of claims. In view of these facts the present appeal is evidently without merit. We cannot review the order of January 31, 1890, for the reason that it is not in the record, and for the further reason that the present proceeding is not an appeal from that order. For aught that we know, that order was made by consent of parties, and was at no time subject to an appeal on the part of any one who participated in the foreclosure proceedings. But in any event the appellants are not in a position to urge at this late date, with respect to the order of January 31, 1890, that the circuit court erred in holding that the debts therein mentioned were of a preferential character. With full knowledge of the terms of that order, and the class of claims to which it related, they became purchasers at the mortgage sale under a decree which required them to accept the property subject to the burden of those claims. It is clear, we think, that they must stand by the bargain they have made, and should not be heard to complain.

As the circuit court found that the claim now in dispute was in fact comprehended by the order of January 31, 1890, and as we cannot review that finding, it follows that the decree appealed from must be affirmed.

PACIFIC CABLE RY. CO. v. BUTTE CITY ST. RY. CO.

(Circuit Court, D. Montana. April 10, 1893.)

No. 20.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—CABLE CARS.

Letters patent No. 182,663 were issued to Andrew S. Hallidie for an invention known as "Improvements in Railways." The claim was: "In combination with the cars of a street or other railway, which are intended to be propelled by means of an endless cable moving in an underground slotted tunnel, the truck or dummy, E, having the permanently attached gripping device, H." The specification described a dummy in which the grip was located under the forward axle,—there being two,—and which was not provided with seats for carrying passengers. *Held*, that this is infringed by a car used for the same purpose, and similarly constructed, save that the grip is located midway between the two axles, and the car is arranged to carry passengers.

2. SAME.

The infringement is not avoided by so attaching the gripping device that it may be detached when required; for the terms "permanently attached," in the claim import, merely, that the gripping device is an essential part of the car, and not that it is incapable of removal.

3. SAME—ANTICIPATION.

This patent is not anticipated by the prior patents to G. T. Beauregard and to A. Ely Beach, or by the former patent for a similar device issued June 1, 1875, to Hallidie himself, as the evidence shows that the present device was perfected before such former patents were issued.

4. SAME—PRIOR USE.

Where the defense to an infringement suit is prior use, the burden is on defendant; and it is not sustained where the evidence shows that the alleged prior use was only for experimental purposes, and had with a view to perfecting the device.

In Equity. Bill by the Pacific Cable Railway Company against the Butte City Street-Railway Company for infringement of a patent. Decree for complainant.

Wm. F. Booth and Dixon & Drennen, for complainant.

Geo. H. Knight, F. T. McBride, and Geo. Haldorn, for defendant.

KNOWLES, District Judge. The above-named complainant filed in this court its bill of complaint against the above-named defendant, and setting forth therein that defendant had infringed certain letters patent, No. 182,663, and which granted certain rights to one Andrew S. Hallidie for an invention known as "Improvements in Railways." The said Hallidie, it appears from the bill, obtained the said patent for said invention, and assigned the same to complainant. The claim of said Hallidie, in his patent is thus described:

"In combination with the cars of a street or other railway, which are intended to be propelled by means of an endless cable moving in an underground slotted tunnel, the truck or dummy, E, having the permanently attached gripping device, H, substantially as and for the purpose described."

Respondent, in its answer to complainant's bill, makes the following defenses: First, noninfringement; second, anticipation and nonpatentability; and, third, two years' public use.

The first question presented, then, is, does the respondent infringe upon complainant's patented device? That is, does it substantially use the dummy car specified in complainant's bill in combination with the cars of its street railway? Respondent owns and is operating a street railway at Butte City, Mont., upon which the cars thereon are propelled by means of an endless cable moving in an underground slotted tunnel. The evidence shows that defendant is using a car which may be called a "dummy car," to which is attached a gripping device which seizes the said cable, moving in an underground slotted tunnel, and to this is attached a passenger car. The difference between the dummy car of complainant and that of respondent is thus described by Jesse M. Smith, a witness for respondent:

"Comparing the car used by the defendant with the dummy of the patent, it appears that the dummy is a car having two axles and four wheels, and in this particular it is like the grip car used by defendant. The grip of the car of the patent is located directly under one of the axles of the car, while in the car of the defendant the grip is located midway between the axles of the car; and, therefore, does not have the advantage claimed for the dummy car of the patent, with its grip located as specified. The dummy car of the patent is not provided with seats, and is not designed to carry passengers.

The grip car of defendant is provided with seats, and is designed to, and does, carry passengers, and is used with or without a trail car connected to it. The gripping device of the patent is stated to be permanently attached to the dummy car, while the gripping device used by defendant is not permanently attached to the car, and is designed to be readily detached from the car, and is so detached, as often as may be required."

Except, perhaps, as to the last specification of difference, this statement may be considered as stating correctly wherein the grip car of complainant and that of respondent differ. The first difference consists in the moving of the gripping device back from the front axle of the car to a point about midway between the two axles of the same. Is this a substantial variation? It is apparent, then, it operates the same as though it were placed under the first axle, unless it be upon very uneven ground. It can readily be seen that, in passing over a very short and abrupt rise or hillock in the car track, the gripping jaws attached to the grip arm or lever would always remain about the same distance from the bottom of the tube or tunnel through which the cable travels, if the gripping device was placed under the front axle of the car. When such an abrupt rise does not occur in the car track, the jaws of the gripping device of complainant and respondent would act in the same manner, and maintain about the same position in respect to the bottom of said tunnel. I cannot see that there would be any perceptible difference between their action or position. Recurring to the claim in complainant's patent as to what constituted the invention of Hallidie, and we find that it is not limited to a gripping device attached to the gripping car, under the first axle. Hallidie was required by the statute, (see Rev. St. U. S. § 4888,) in his application for a patent, as his invention must be classed as a machine, "to explain the principle thereof, and the best mode in which he had contemplated applying that principle, so as to distinguish it from other inventions." It will be seen that he was not required to state every mode in which the principle of his machine might operate, but only the best mode he had contemplated applying it. This would imply that an applicant for a patent is not confined to this best mode of applying the principle of his machine, and that he can claim other modes of applying the same. The part of the patent in which the mode of applying the gripping device under the first axle of the car appears is in the descriptive part thereof. As before stated, it is not in the claim. It is not evident that what is claimed as the invention of Hallidie is not alone the gripping device under the first axle, but the whole car, in combination with cable in an underground, slotted tunnel, gripping device, and passenger car. I find that in the case of *Tilghman v. Proctor*, 102 U. S. 707, the supreme court said of a patent for a process:

"There is, then, a description of the process, and of one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes, and by the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure to himself the exclusive right to the process, if he is really its inventor or discoverer; but he must describe some particular mode, or some apparatus by which the process can be applied with at least some beneficial result, in order to show that it is capable of being exhibited and performed in actual experience."

Taking this as a guide, and we come to the conclusion that when a person entitled to a patent, in his application therefor, describes one mode—the best—in which the principle of his machine acts, he should not be bound exclusively to that mode. If a variation from the best mode described in the application for a patent would prevent infringement, we are forced to the inquiry, how much of a variation would work this result? Take, for instance, the machine under consideration. Would the removal of the gripping device one foot back from the front axle of the car work this result? If one foot would not, how many feet would? A change of form does not avoid an infringement of a patent, unless the patentee specifies a particular form as a means by which the effect of the invention is produced. *Walk. Pat. § 363*; *Morey v. Lockwood*, 8 Wall. 230; *American Diamond Rock-Boring Co. v. Sullivan Mach. Co.*, 14 Blatchf. 119; *Ives v. Hamilton*, 92 U. S. 431. The change of the gripping device from the front axle to a place between the axles appears to me to be a change in form, only, from that indicated as the best form in which the car of complainant could be constructed. This change does not affect materially the principle embodied therein.

Respondent urges that there is also a material variation in the car described in complainant's patent and that of its car, in this: that its car is so constructed as to carry passengers, and that of complainant, as described in the patent, is not so constructed. The feature of respondent's car which furnishes seats for passengers is only an improvement, at best, on complainant's car. All the features of complainant's car are retained, and the passengers' seats are additional. When a machine embodies a patented device or combination with an addition thereto, it infringes the patented device. *Carter v. Baker*, 1 Sawy. 512-526; *Pitts v. Wemple*, 1 Biss. 87. It should be observed that the evidence in the case shows that, as finally perfected, complainant's car was so constructed as to have seats for carrying passengers, but the applicant, Hallidie, did not claim this as any feature of the car he patented. This contention of respondent cannot, upon the facts, and the law applicable thereto, be maintained.

The next point presented for consideration by respondent is its contention that the description and claim in complainant's patent states that the gripping device was permanently attached to the dummy car, while that of its car is not so attached, and that, as a consequence, there is here a material variation between them. Considering the construction of complainant's car with the language used in the patent, and I think that all that was intended by the claim of the patent, that the gripping device was permanently attached to the car, was that it was a part of the car,—one of its essential parts,—and was not to be taken off to be used on any other car, such as the passenger car. The idea sought to be expressed by the language was that it was not temporarily attached to the car, but constituted a permanent part thereof,—one of its essential characteristics. If it was attached to the same by bolts and screws, it would be permanently attached to the car, but could be removed.

This claim in the patent may be construed in the light of the fact as to the manner in which the inventor, Hallidie, did attach that gripping device to his car. The evidence shows that it was attached thereto in such a manner that it could be removed when necessary. The rule is that the language in a patent should be liberally construed, with the view of maintaining the validity of a patent. In the case of *Rubber Co. v. Goodyear*, 9 Wall. 788, the supreme court said:

"A patent should be construed in a liberal spirit, to sustain the just claims of the inventor. This principle is not to be carried so far as to exclude what is in it, or to interpolate anything which it does not contain. But liberality, rather than strictness, should prevail, where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius."

With this as a guide, I do not see how the contention of respondent can be maintained on this point. It would be a most narrow construction of the terms, "permanently attached," as they appear in the claims of the patent, to say that they imported that the gripping device should be so attached to the car that it could not be removed when necessary. I therefore find that the dummy car of respondent is substantially the same as that of complainant, and does infringe upon the letters patent owned by complainant therefor.

I now come to the point that the car of complainant was anticipated by previous inventions, and hence not patentable. It is urged by respondent that a patent granted to G. T. Beauregard, of New Orleans, La., for "improvement in machinery for propelling cars," and that granted to A. Ely Beach for "improvement in street railroads," anticipated the invention owned by complainant. The Beauregard patent is used for propelling a car by means of a clamp or grip attached thereto on the side, or above the car, clutched to an endless rope or wire. This rope or wire is to be suspended from framing along the road. The clamp is to be connected by brackets upon the top of the car, and to be worked by a screw which is moved by an operating pulley, over which a cord extends to the manager of the car. The Beach patent, I find, is somewhat difficult to describe, without an extended reference to its parts. In it there is no such gripping device as is used in complainant's patent, and no such cable combined therewith. In neither of these patents is there a dummy car. This is an important feature of complainant's patent. The patent of complainant is itself *prima facie* evidence of novelty, and that the patentee thereof was the first inventor thereof. This can be overcome only by evidence which shows want of novelty, and that Hallidie was not the first inventor of the car claimed in his patent, beyond a reasonable doubt. The burden of establishing want of novelty, and that Hallidie was not the first inventor of his car, as claimed, rests upon respondent. If, after weighing all of the evidence, the court has a reasonable doubt upon these points, he should find for claimant. *Walk. Pat. § 76*, notes 2, 3; *Coffin v. Ogden*, 18 Wall. 120; *Cantrell v. Wallick*, 117 U. S. 696, 6 Sup. Ct. Rep. 970. With this rule controlling me, I cannot

find that the said inventions of Beauregard and Beach anticipated that of complainant.

As to the previous patent obtained by Hallidie, it appears on its face that it was an improvement upon the very street railway described in the patent under consideration. It was obtained June 1, 1875. But before this Hallidie had invented the car alleged to be infringed in this case by that of respondent. The evidence shows that Hallidie had commenced his experimental use with this car as early as 1873, and was a year or a year and a half in perfecting the same. This would show that the car was perfected before the patent was issued, June 1, 1875, which respondent offers in evidence. Under such circumstances the patent of June 1, 1875, cannot be said to anticipate that of claimant's, under consideration, if it did refer to the same. *Plow Works v. Starling*, 140 U. S. 189, 11 Sup. Ct. Rep. 803.

The last point for consideration is the defense that the invention of Hallidie presented in this case was in public use for two years before he made application to patent the same. This is a defense which respondent must make out by a preponderance of evidence. There is such a thing as experimental use of a machine which is not a public use. As an experiment, a machine may be tried in public, as well as in private. "So long as an inventor is actually engaged, in good faith, in testing the operation of a machine, to ascertain if it will accomplish the desired result, and show it to be a practicable invention, it is not a public use." *Elizabeth v. Pavement Co.*, 97 U. S. 126. In regard to this invention, it appears that there was a period in which the use may be termed experimental. The car was first used about September 1, 1873. A. S. Hallidie, the inventor, in his evidence, said he thought it was a year or a year and a half after the first trial before the invention was considered perfected; that it was only after a considerable time, and various changes, that he succeeded in getting the dummy car to work; that during the time he was testing the car no other company than the one he was connected with used the same, nor did he sell it to any one, and that the cable road upon which he used it was the first one ever actually built, and put into practical operation. The witness Britton testified that they, referring to the company with which Hallidie was connected, had great trouble with the grip car at first; that after the first trials the whole affair was remodeled; that, for a year and a half or two years after they first started the grip car, it was changed and altered and fixed over until "we matured the thing in the shape in which it is used to-day."

Respondent relies upon the evidence of Peter H. Campbell, who says that when the Clay Street Hill road, in San Francisco, was started, in August, 1873, the first dummy car was a mere framework which carried the gripping apparatus; that the dummy, at first, would not run; that three or four months after starting the road the dummy car was fixed so it would carry passengers. He was not positive about this last statement, however. He finally said it might not have exceeded six months or a year. But nowhere in his evidence does this witness positively say that the dummy car

was perfected within a year after starting up the Clay Street Hill road, in San Francisco. According to the evidence, the said Clay Street Hill road was started about the last of August or the 1st of September, 1873. Hallidie made his application for the patent in question March 24, 1876. It was then about seven months after the starting of said road before said application was made. As it appears that when started the grip car was not perfected, and that for some time its use was experimental, I cannot say that the grip car was perfected, and in public use, for two years prior to said application. The burden of proof was upon respondent to show that the patented device was in public use for that time, and I think it has failed.

Some of the legal questions involved in this case, it would appear, must have been presented in a case tried by the circuit court of this circuit, sitting at San Francisco, entitled Traction Railway Co. v. Sutter Street Railroad Co. The judgment roll in that case was introduced in evidence in this case. So far as the court can see that the points of law necessarily involved in that case are the same as those involved in this, it will and has been treated as persuasive authority.

It will be seen that I have found all the issues presented in this case in favor of complainant. It is therefore ordered that complainant have a decree as prayed for in its bill.

THE COLUMBIA.

THE ELLEN HERON.

SULLIVAN v. THE COLUMBIA et al.

(District Court, E. D. Pennsylvania. May 9, 1893.)

1. SHIPPING—STEAMERS—INJURIES TO BARGES—SWELLS—EVIDENCE.

The barge E., loaded with brick, in tow with three other barges, going down the Delaware river in the customary course, well eastward of the channel, met the steamer C. at a narrow part of the channel, during ebb tide, going at full speed, and creating swells, the effect of which was to sink the E. by bringing her in contact with the barge in front. *Held*, that the steamer having failed to slow down, as was her custom when meeting these tows on their daily trips, was liable for the injury.

2. SAME—EVIDENCE.

The "swells" and violent commotion of the water, together with the positive testimony of libellant's witnesses, sufficed to overthrow the steamer's contention that she slowed down in time.

3. SAME—CONTRIBUTORY FAULT—EVIDENCE.

The steamer's claim of contributory fault on the part of the barge in being overloaded, in not having a longer hawser, and in the failure of her tug to sound a signal, could not be sustained; it appearing that the load was no more than usual, that a lighter load would have increased the danger from swells, and a longer hawser would have exposed her to other dangers; and, in respect to the signal, that the tug had every reason to believe, being in plain view, that the steamer would slow down as usual.

4. SAME—EVIDENCE.

The fact that another steamer passed down the stream to the eastward of the tow immediately after the C. had passed to westward was

unimportant, the former having taken an unusual course merely because the tow was in front, and having produced little disturbance of the water, in consequence of going down with the current.

In Admiralty. Libel by John J. Sullivan, master of the barge or lighter Ellen Heron, against the steamboat Columbia and Frank G. Edwards, master, for injuries from swells. Decree for libellant.

Henry R. Edmunds, for the Ellen Heron.

Alfred Driver and J. Warren Coulston, for the Columbia.

BUTLER, District Judge. On September 14, 1891, as the libellant, in tow of the tug John Wear, with three other barges, was passing down the Delaware river, laden with brick, (when nearly opposite Jack's island, three-fourths of a mile above Torresdale,) she met the steamboat Columbia, passing up; and in consequence of the commotion produced in the water by the latter vessel, was brought into violent contact with the barge in her front, whereby she was injured and sunk. The tide was ebb, and the customary channel narrow at that point. The tow was made up in the method usual for the voyage on which it was bound; and she was on the customary course down—well eastward of the channel. The Columbia was on the usual course up—one which she traversed daily—near the western side. She very frequently met such tows coming down in that vicinity; and theretofore had always slacked up so as to pass without endangering their safety. In consequence of the narrowness of the channel, and shallowness of the water with the tide down, the Columbia in passing up at full speed would necessarily create great commotion, sending chopping swells eastward, and creating "suction" westward, and thus endanger tows and other small craft passing down. This is not controverted; nor is it denied that she should have slowed down on this occasion as she had previously. She asserts that she did so; and thus is raised the principal question in the case. The evidence respecting it is conflicting; but its weight is clearly against the respondent. Indeed the very unusual commotion made in the water would, of itself, seem to leave no room for doubt. The commotion was made by the Columbia; there was nothing else to make it; and witnesses aboard the tow observed and mentioned this consequence of her passage at the time. It is not suggested that the tow created it, nor is any attempt made to account for its existence otherwise. I have no doubt the Columbia failed to slow down in time. The libellant's witnesses say her speed was not slackened until nearly abreast of them.

The respondent thinks the barges were overloaded, and the tow improperly constructed. The evidence does not sustain either allegation. The libellant was heavily loaded, but not more so than is usual with such vessels, passing between the points involved. And besides a lighter load would have rendered her more liable to mount the forward barge, as she did. The several vessels were carrying their customary daily loads, and but for the extraordinary commotion created in the channel would have encountered no

danger. The loading had no influence on the result. The tow as before suggested was constructed according to uniform custom for the voyage. What is a proper construction for towage upon one water and voyage may not be upon another. Experience has demonstrated that the method adopted here was proper for this voyage, so clearly that a material departure from it might possibly be considered unjustifiable. If the hawsers of the rear barges had been longer, as it is urged they should have been, it is possible the danger of libellant's mounting the barge in front would have been less; but it is probable that she would thus have been exposed to other dangers quite as serious. Being less under control of the tug, she would have been more likely to sheer and collide with other vessels, or to swamp or capsize in such water as she encountered.

Possibly the tug should have sounded some signal as the Columbia approached, but up to the last moment she had every reason to believe that the latter would slow down, as she had previously done. The consequences of her failure to do so could not be appreciated until after she had passed. The consequences were not realized until she was some distance away. She cannot complain of the absence of such signal,—having seen the tow in ample time; and if she could, the libellant would not probably be responsible for the failure to give it. It is urged that the tug should have gone further eastward. But it is at least doubtful whether she could have done so with safety. An attempt to do it in the emergency would probably have increased her danger from the waves, by placing her in a less favorable position to meet their force. She was in her customary and proper course, and had no reason to apprehend danger until too late to avoid it.

The circumstance that the Edwin Forrest passed down eastward of the tow directly after the Columbia passed up, does not seem important. It is not doubted that there was sufficient water where she passed, but it was outside the channel, was an unusual course for vessels bound in that direction, and the Forrest took it only because the tow was in front, and she could not properly pass to westward. Going down with the current she did not materially disturb the water and her passage had no influence in producing the accident.

The proofs do not justify the allegation that the libellant's anchor was hanging over her bow, and thus caused her injury. The opinions of the respondent's witnesses is successfully met, not only by the opinions of others equally reliable, but also by the positive testimony of persons who knew the anchor was elsewhere. A decree must therefore be entered sustaining the libel.

CENTRAL TRUST CO. OF NEW YORK v. VIRGINIA, T. & C. STEEL & IRON CO.

(Circuit Court, W. D. Virginia. May 11, 1893.)

1. CONSOLIDATION OF CAUSES—SUITS FOR APPOINTMENT OF RECEIVERS—DEPENDENT CORPORATIONS.

The C. Trust Co. filed a bill in the circuit court alleging the insolvency of the V. Iron Co., as evidenced by a judgment by confession on which execution had been returned nulla bona. By consent, a receiver was appointed. On the same day two other bills were filed,—one by the C. Trust Co. against the S. A. Railroad Co.; and the other by the V. Iron Co. against the B. Land Co.,—alleging the insolvency of the defendant companies, as evidenced by judgments by confession and executions returned nulla bona. By consent, receivers were appointed. Afterwards a petition by stockholders of the Iron Co. and one B., who claimed to be the "valid receiver" of the three corporations under an order of a state court, was filed, asking that they be made parties to the suits in the federal courts, and that the several causes be consolidated, and heard together. The petition alleged that the Iron Co. was the main corporation; that the S. A. Railroad Co. and the Land Co. were branches created by a diversion of the property of the Iron Co.; that practically they were all one corporation; that the judgments were confessed without authority, and were fraudulent and collusive; that the appointment of receivers by the federal courts was obtained by misrepresentation, fraud, and collusion. The allegations of the petition were denied under oath by the Trust Co., the insolvent corporations, and the receivers. *Held*, that the causes could not properly be consolidated, the interests involved in the several suits having reference to distinct corporations, so far as appeared on the face of the record.

2. JURISDICTION—DIVERSITY OF CITIZENSHIP—RESIDENCE OF CORPORATION.

A bill was filed in the circuit court for the western district of Virginia, alleging that complainant was a corporation created by the laws of New York, and that the defendant was a corporation created by the laws of New Jersey, and a citizen and resident of that state, having a principal place of business at Bristol, Va., in said district. *Held*, that the court had not jurisdiction of the suit by reason of the diversity of citizenship of the parties, neither of them being a resident of the district, as required by the acts of congress of March 3, 1887, and August 13, 1888.

3. SAME—CONSENT—WAIVER OF OBJECTION.

The requirement that one of the parties shall be a citizen of the state in which the suit is brought (Acts March 3, 1887, and August 13, 1888) cannot be waived by consent, or by appearing and pleading to the merits, although the parties are corporations organized under the laws of different states, and one of them has its principal place of business in the state and district where suit is brought.

In Equity.

Statement by PAUL, District Judge:

This is a suit in equity, brought by the complainant company, the Central Trust Company of New York, a corporation created by and existing under the laws of the state of New York, and a citizen and resident of said state of New York, against the defendant company, the Virginia, Tennessee & Carolina Steel & Iron Company, a corporation created by and existing under the laws of the state of New Jersey, and a citizen and resident of said state of New Jersey.

On the 8th day of August, 1892, the complainant company presented its bill to Hon. Hugh L. Bond, circuit judge of this court, praying for the appointment of a receiver to take charge of the lands and all other assets of the defendant company. It alleged the insolvency of the defendant company, as evidenced by a judgment obtained against it on the same day in this court,

on its law side, at Abingdon, by confession, on which judgment an execution had issued on the same day, and been returned on the same day *nulla bona*. The defendant company appeared by its president, John C. Haskell, and consented to the appointment of a receiver, and thereupon Judge Bond made an order appointing said John C. Haskell and D. H. Conklin receivers of said defendant company.

On the same day two other bills were presented to Judge Bond in suits styled as follows, to wit: "The Central Trust Company of New York v. The So. Atlantic & Ohio Railroad Co. In equity;" and "The Va., Tenn. & Car. Steel and Iron Co. v. The Bristol Land Company. In equity." In each of said bills the complainant company alleged the insolvency of the defendant company, as evidenced by a judgment obtained against it on the same day in this court, on its law side, at Abingdon, by confession; on which judgment an execution had issued on the same day, and been returned on the same day *nulla bona*. In the first-named of these two suits the defendant company appeared by its vice president, John C. Haskell, and consented that a receiver should be appointed, and in the last-named the defendant company appeared by its president, John C. Haskell, and consented that a receiver should be appointed; and thereupon Judge Bond appointed said John C. Haskell and D. H. Conklin receivers of each of said defendant companies, respectively.

On the 19th day of October, 1892, a petition was presented to this court by William McGeorge and others, claiming to be stockholders and creditors of the Virginia, Tennessee & Carolina Steel & Iron Company, and John M. Bailey, claiming to be "the valid receiver" of the corporations named by virtue of an order made by Hon. D. W. Bolen, judge of the fifteenth judicial circuit of Virginia, in vacation, on the 6th day of August, 1890, asking that they be made parties, complainants or defendants, as the court in its discretion might determine, and asking that the several causes named be consolidated, and heard together. In said petition it is alleged that the Virginia, Tennessee & Carolina Steel & Iron Company is the main and substantial company of the companies named; that the other companies, the South Atlantic & Ohio Railroad Company and the Bristol Land Company, are mere offshoots or dependent corporations, created and built up by a diversion of the property and assets of the Virginia, Tennessee & Carolina Steel & Iron Company for such purpose; that practically they are all one company. And the petition further alleges that the several confessions of judgment, referred to as having been made on the 8th day of August, 1892, in this court, on its law side, at Abingdon, were made by a person who had no power or authority to make such confessions of judgment; that said judgments were procured by fraud and collusion between the representatives, respectively, of the complainant and defendant companies; and that the orders awarded by Judge Bond appointing receivers for each of said defendant companies were obtained by misrepresentation, fraud, and collusion by and between said representatives of the complainant and defendant companies, respectively.

The said petition also alleges that in the cause of the Central Trust Company of New York v. the Virginia, Tennessee & Carolina Steel & Iron Company the court is without jurisdiction, the complainant company being a corporation created by and existing under the laws of the state of New York, and a citizen and resident of the state of New York, and the defendant company a corporation created by and existing under the laws of the state of New Jersey, and a citizen and resident of said state of New Jersey. The said petition was filed by leave of the court, and a rule awarded returnable at Harrisonburg on the 6th day of December, 1892.

The complainant company, the Central Trust Company of New York, has filed an elaborate answer to said petition, denying under oath all the material allegations therein. The defendant company, the Virginia, Tennessee & Carolina Steel & Iron Company, also has filed its separate answer to said petition, denying under oath all the material allegations therein; denying that the funds and assets of the Virginia, Tennessee & Carolina Steel & Iron Company have been diverted and used in the interests of the other corporations named; that there has been any intermingling or confusion of the assets

of the several corporations in question, but asserting that they are several, distinct, and independent corporations; that their officers are different, and that the business of the said several companies has been carried on separately and distinctly. The other two defendant companies, the South Atlantic & Ohio Railroad Company and the Bristol Land Company, also John C. Haskell and D. H. Conklin, have also filed their separate answers to said petition, and adopt as the greater part of their answers the answer of the Virginia, Tennessee & Carolina Steel & Iron Company.

R. A. Ayres, J. B. Richmond, Adrian H. Joline, and Henry W. Calhoun, (Butler, Hillman & Hubbard and Henry Crawford, on the brief,) for complainant.

Blair & Blair and A. H. Blanchard, (Richard C. Dale and Geo. H. Towle, on the brief,) for petitioner.

PAUL, District Judge, (after stating the facts as above.) The foregoing statement of the facts presents the questions involved in such a confused and unsatisfactory condition as to require the court to separate the several matters at issue, and consider them in their respective relations to the several causes. The causes are certainly not such, in their present condition, as can be consolidated and heard together. The interests involved in the several suits pertain to separate and distinct corporations, as far as the same appear from the record. The parties are different. The complainant in one of the causes appears as defendant in another of the causes; and the complainant in the two other causes brings suits against separate and distinct defendants in each of said causes. It is true that the petitioners for intervention have asked the court to consolidate all these causes and hear them together, and in the pleadings the counsel for said petitioners seem to have assumed that the causes have been consolidated. But this is anticipating the court, and is an assumption, in advance of the court's consideration of the question, that the court would decide as requested. In the condition of the record, and in view of the weight of authorities on the question, the court must decline to consolidate these causes, because it does not appear to the court that it would be reasonable to do so. Rev. St. U. S. § 921; Conk. Treatise, (5th Ed.) 385.

The cause of the Central Trust Company of New York v. the Virginia, Tennessee & Carolina Steel & Iron Company being the only one of these causes in which a full and elaborate answer has been filed, the court will proceed to consider that cause; and in doing so will treat the petition of William McGeorge and others as the answer of codefendants, in which character said William McGeorge and others, who have filed said petition, will be hereafter regarded. In the other causes the petitioners will be allowed to file amended petitions, if they so desire, showing to the court what interest, if any, they have in said causes.

The first question presented in the cause of the Central Trust Company of New York v. the Virginia, Tennessee & Carolina Steel & Iron Company is the question of jurisdiction, and, as will appear hereinafter, this is the only question which it will be necessary to consider. The complainant company in this cause alleges

in its bill that it is a corporation created by and existing under the laws of the state of New York, and is a citizen and resident of said state of New York; and that the defendant company is a corporation created by and existing under the laws of the state of New Jersey, and is a citizen and resident of said state of New Jersey, and has a principal place of business and does business and owns property at Bristol and elsewhere in the state of Virginia, and in the western district of Virginia. It therefore appears upon the face of the record that neither the complainant company nor the defendant company is a citizen of the state of Virginia, and the alleged fact that the defendant company has a principal place of business and does business and owns property in the state of Virginia does not affect this condition of the cause. Chapter 137, § 5, 18 U. S. Stat., reads as follows:

"Sec. 5. That if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit, * * * and shall make such order as to costs as shall be just."

And the supreme court has said:

"Where the record does not show a case within the jurisdiction of a circuit court, this court will take notice of the fact, although no question of jurisdiction had been raised by the parties." *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207.

The jurisdictional question is also directly raised in the petition of William McGeorge and others, which petition is now treated as an answer of codefendants, and was directly presented by said codefendants at the first opportunity they had to do so. The act of congress approved March 3, 1887, as corrected August 13, 1888, determining the jurisdiction of the circuit court, provides that "when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." This brief statement of the law as to where suits must be brought between citizens of different states in the circuit courts of the United States would seem to settle the question of jurisdiction in this cause.

But counsel for the complainant company contend that, while this is the statutory provision, yet it may be waived, and that it has been waived in this cause, by the voluntary appearance of the defendant company, and its confession of judgment on the law side of this court, and by its appearing and consenting to the appointment of a receiver. The court thinks that this view might possibly be correct in a cause wherein the defendant voluntarily appears and pleads to the merits of the cause, provided the cause be one in which there is a controversy between citizens of different states, and the suit is brought in the state of which either the plaintiff or the defendant is a citizen, but in a district of such

state other than that of which either the plaintiff or the defendant is a resident. Whenever the requisite citizenship exists,—that is to say, in any cause in which either the plaintiff or the defendant is a citizen of the state in which the suit is brought, and the adverse party is a citizen of another state,—the constitutional and statutory foundation on which the jurisdiction of the circuit courts of the United States must be based has been established, and, that being done, the privilege of being sued, in such a cause, in the district of the state of which the defendant is a citizen, is one which the defendant might waive by voluntarily appearing and pleading to the merits of the controversy; for in such a cause the jurisdiction of the court exists by provision of constitutional and statutory law, and nothing that either party to the suit could do could either give or take away that jurisdiction. The error of the counsel for the complainant company in this cause consists in ignoring the constitutional and statutory provision that the requisite citizenship must exist in order to confer jurisdiction on the court.

A careful examination of the cases cited by the counsel for the complainant company will make this clear. The first case cited is that of *Gracie v. Palmer*, 8 Wheat. 699. This was a controversy, not between citizens of different states, but between a citizen of one of the states and an alien, a subject of Great Britain; and the reasoning of the court in that case, maintaining the jurisdiction of the circuit court of the United States, is in no wise applicable to this cause. The second case cited is *Ex parte Schollenberger*, 96 U. S. 377. In this case the requisite citizenship existed to confer jurisdiction on the circuit court of the United States for the eastern district of Pennsylvania. It was a suit brought by a citizen of the state of Pennsylvania against a foreign insurance company doing business in that state. The next cases cited are those of *Lexington v. Butler*, 14 Wall. 282, and *Claffin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. Rep. 507. These were cases of removal of suits from a state court to the circuit court of the United States for the district of the state in which said suits were originally brought. The law as declared in the latter of these cases applies to both, and is conclusive of the questions raised therein. It is that the restrictions upon an assignee as to bringing a suit originally in a circuit court of the United States do not apply to his right to have his suit removed into such court from a state court in which it had been originally brought. The court does not see the bearing of these cases upon the question under consideration. The next case cited is that of *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. Rep. 982. In this case the requisite citizenship of the parties was established to give the circuit court of the United States for the western district of Arkansas jurisdiction. It was a controversy between citizens of the state of Arkansas and a railway company, citizen of the state of Missouri, and the suit was brought in the state of which one of the parties was a citizen. Justice Brewer, in rendering the decision of the supreme court, described the action as “one to recover money, the sum claimed being in excess of \$2,000, and was between citizens of different states, and was brought in

the district and state of the residence of the plaintiff. It was therefore within the general jurisdiction of the circuit courts of the United States, under section 1, c. 866, 25 Stat. 433; and, if the jurisdiction was founded only on the fact that the action was between citizens of different states, it was brought in a circuit court of a proper district." So the cases cited do not sustain the views of the counsel for the complainant company.

The provisions of the statute under consideration have recently been before the supreme court, namely, in the case of *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. Rep. 935, in which Justice Gray, speaking for the court, stated that "the single question in this case is whether, under the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, * * * a corporation incorporated in one state of the Union, and having a usual place of business in another state, in which it has not been incorporated, may be sued in a circuit court of the United States held in the latter state, by a citizen of a different state." And the supreme court in that case decided that question in the negative. In the case of *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. Rep. 44, the doctrine laid down in the former case is reaffirmed. But counsel for the complainant company further contend that, although the statute says: "Where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought in the district of the residence of either the plaintiff or the defendant,"—yet, notwithstanding this statutory provision, parties residing in any two different states, respectively, may, by consent, sue or be sued in a United States circuit court held in any other state, such state not being a state of which either the plaintiff or the defendant is a citizen. As has been said by the supreme court: "It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case. If this were once conceded, the federal courts would become the common resort of persons who have no right, either under the constitution or the laws of the United States, to litigate in those courts." *Bank v. Calhoun*, 102 U. S. 260. In order to give the court jurisdiction it is essential that a controversy should exist between a citizen of another state and a citizen of the state in which the suit is brought. This does not appear to be so in this suit, and the court is therefore clearly of opinion that it has no jurisdiction in this cause. It appears that the order appointing receivers in this cause was improvidently awarded for want of jurisdiction by the court, and must be vacated; the receivers must be discharged; and the suit must be dismissed, at the cost of the complainant company.

GILMER v. BILLINGS et al.

(Circuit Court, M. D. Alabama. January 9, 1890.)

1. PLEDGE—LIMITATION OF ACTIONS—LACHES.

Where stock in a corporation is pledged to a bank to secure an existing debt, and also future advances made to a firm or firms in which the owner of the stock is a partner, and such advances are in fact made in the course of business for a number of years, the pledge constitutes a continuing pledge, and the possession of the pledgee will not become adverse, so as to set the statute of limitations running, or to render laches imputable to the pledgor, until such time as by some positive act or declaration the pledgee repudiates the trust, and claims to hold in his own right. *Haywood v. Bank*, 96 U. S. 611, distinguished.

2. SAME—SALE—ESTOPPEL.

Defendant, owning stock in a corporation, either sold it to plaintiff, or gave him an option to purchase it. Defendant continued to hold it, and, after a considerable time, one half the stock was sold in payment of the purchase price, leaving due only the interest which had accrued to defendant. Thereafter it was agreed between the parties that defendant should continue to hold the stock as collateral security for such interest, and also for future advances, which advances were in fact from time to time made. *Held* that, although the original agreement was only an option to purchase, defendant had recognized the sale as accomplished, and was estopped from claiming that, inasmuch as the purchase money was never entirely paid, title had not passed to plaintiff.

3. RES JUDICATA—PLEDGE—BILL TO REDEEM.

In 1884 a bill was filed in an Alabama court to redeem certain shares of stock alleged to have been pledged in 1871. A demurrer to the bill, raising the questions of laches and of limitation, as permitted by the state practice, was sustained, and thereupon final judgment was entered dismissing the bill. *Held*, that this judgment did not bar a subsequent suit between the same parties in a federal court to redeem the same stock, upon a bill alleging a different pledge made in 1875 to secure moneys due and to become due for future advances, which advances were in fact made.

In Equity. Bill by James N. Gilmer against Josiah Morris and others to redeem certain shares of stock pledged as collateral security. Morris having died pending the suit, his executors, F. M. Billings, B. J. Baldwin, and Hewlett Baldwin, were substituted as defendants. Decree for complainant.

An opinion was heretofore rendered on a plea setting up a prior adjudication in an Alabama court. 46 Fed. Rep. 333. Prior to the institution of this suit a similar suit had been brought in this court, in which the same defense was overruled, (30 Fed. Rep. 476,) but on appeal to the supreme court the judgment was reversed, with directions to dismiss the suit for want of proper averments showing jurisdiction, (129 U. S. 315, 9 Sup. Ct. Rep. 289.)

W. A. Gunter, R. C. Brickell, and H. C. Semple, for complainant.
H. C. Tompkins, for respondents.

BRUCE, District Judge. The opinion pronounced on a former hearing of a cause involving the matter now in dispute contains all I care to say upon this submission, and that opinion, as shown below, and altered to suit the occasion, is adopted. The fair conclusion from the evidence in this cause is that on March 30, 1875, Josiah Morris agreed with F. M. Gilmer, who was at that time

acting for his son, J. N. Gilmer, the complainant, that the stock which is the subject-matter of this suit, to wit, 60 shares of the capital stock of the Elyton Land Company, should be held by him, (Morris,) or by his banking firm of Josiah Morris & Co., as collateral security for the payment of an interest account of about \$500, and for about \$230 which Morris about that time paid in discharge of an execution which had been levied upon the stock, which at that time stood in the name of J. N. Gilmer upon the books of the company. The execution was in favor of one Farley, a creditor of the firm of Gilmer, Browder & Co., of which firm J. N. Gilmer was a member, and, when paid, the stock was transferred by J. N. Gilmer to Josiah Morris on the books of the company. The certificate of stock was at that time in the possession of Josiah Morris, and had been in his possession since its issue in 1871, when it was pledged for the payment of the purchase money of the stock, which, some time thereafter, was paid by the sale of one half the original 120 shares, which left 60 shares of the stock in pledge for a balance of interest on the original cost of about \$500 due from complainant to Josiah Morris. It also appears from the evidence, as a fair conclusion therefrom, that the stock in question was not only to be held by Morris as a collateral security for the payment of the indebtedness which J. N. Gilmer then actually owed Morris and his firm of Josiah Morris & Co., but the stock was to be a basis of credit for future liabilities. In the language of F. M. Gilmer, at page 10 of his deposition in the former suit in this court, he (meaning Morris) "was to hold the stock for that advance," (meaning the amount paid to settle the execution which had been levied upon the stock,) and "for all future liabilities of the said J. N. Gilmer." At the time mentioned—March, 1875—there was in existence the firm of Gilmer & Donaldson. Donaldson died in the year 1876, and that firm was succeeded by the firm of J. N. Gilmer & Co., and the latter by the firm of Gilmer & Clanton, and the last by Gilmer & Merritt. J. N. Gilmer was a member of all these firms, all of which did business in Montgomery, Ala., and had bank accounts with the house of Josiah Morris & Co.

It does not very clearly appear from the evidence the precise period of time that these firms did business with Morris & Co., but that they all did business with and had accounts with Morris & Co., in the order named, is not questioned, and the last firm, of Gilmer & Merritt, seems to have carried their business into the year 1884, when a contention arose about a draft of \$100 drawn by Gilmer & Merritt, which Morris & Co. refused to pay. The evidence shows that F. M. Gilmer, on and after the 30th day of March, 1875, did make arrangements with Josiah Morris & Co. for advances and credit to his son, J. N. Gilmer, and some of the firms with which he subsequently became connected. The testimony is not clear as to the time when these arrangements were made, or when the last time was that the stock in question was alluded to between the parties as a security and basis of credit, but F. M. Gilmer says, on page 19 of his deposition: "These interviews and conversations extended down to the time that Clanton became a

partner in the business, and, indeed, I think, during Clanton's partnership; but after Merritt became a partner I never adverted to that stock as a security;" and to the question, "Why?" he answers, "Because Merritt was a very responsible man." While the testimony of the testator, Josiah Morris, is not entirely consistent with these conclusions, or with the testimony of F. M. Gilmer and J. N. Gilmer, whose testimony is in substantial accord, and does not seem to be strained or improbable, it is not on all points clear, and, taken in connection with the admissions of the answer, it may be said to establish the contention of the complainant that there was, in 1875 and afterwards, a pledge of the stock for other debts than the original cost, and as a security for such future debts as might be contracted by complainant and his firms. He admits, as does the answer, that the amount paid in March, 1875, to satisfy the Farley execution against complainant, and to save the stock from sale, was charged to complainant's firm of Gilmer & Donaldson, presumably with their knowledge and consent. He further states that he regarded F. M. Gilmer as a member and manager of complainant's firms, and that his (Morris') understanding was that the stock was not to be delivered until all his debts against all the Gilmer firms were paid, closing with the statement: "There never was a time, you may say, up to 1881,—possibly 1882,—that I would not have delivered the stock upon the payment of the several firms' indebtedness to me." The answer of the executors insists and claims that in no event could complainant claim the stock until he "had paid defendants' testator all sums which he or they might owe defendants' testator or his said firm of Josiah Morris & Co.; and defendants aver that on the 30th of March, 1875, said complainant was indebted to their testator, and to the firm of Josiah Morris & Co., in a large sum, which indebtedness complainant was bound in equity and good conscience to pay before demanding from defendants' testator a conveyance of said stock;" and in the next paragraph it is stated that complainant's indebtedness, through his firm of Gilmer & Donaldson, had not been paid at the date of the filing of the answer. It is clear that this claim involves an unqualified admission of the averment of the bill that the stock in question was pledged in 1875, and afterwards, for the debts of complainant's firms. Without quoting further from the testimony or referring to other admissions in the answer, it seems that they establish, without the aid of the Gilmer testimony, that the stock stood as collateral security for debts due, and to be created and to become due, after the 30th day of March, 1875.

We have, then, not merely the existence of a pledge, but we have the nature and character of the pledge, for it was not simply the pledge of stock to secure the payment of a debt or a specified amount maturing at a definite time in the future, but it was in the nature of a continuing pledge or security; and, so long as such relation and understanding existed between the parties in reference to the pledge, it must be admitted that the pledgee (Morris, in this case) was holding in virtue of the title and right of the pledgor, Gilmer, and could not be considered as holding adversely to such

title and right, for there is perhaps no principle of law better settled than that possession, to give title, must be "adversary." *Kirk v. Smith*, 9 Wheat. 288; *Maury v. Mason*, 8 Port. (Ala.) 222, 223; *Tyler*, Ej. 860, 861, 876, 877.

Whatever the difficulty may be, from the evidence, to fix the time or times after the 30th of March, 1875, when F. M. Gilmer negotiated with Morris for advances of money and credit to J. N. Gilmer or the firms with which he became connected, upon the faith of this stock as collateral security, it is certainly clear that Morris & Co., on and after the 30th of March, 1875, did hold the stock in question as collateral security for such advances and credit, and did have accounts and do business with the different firms with which J. N. Gilmer became connected, and did advance money to some of them by paying their checks when they had no money on deposit with Morris & Co. at the time the checks were drawn and paid, and we have seen that the answer claims some of such indebtedness is still unpaid.

The defense here is staleness of the demand, and laches on the part of complainant, and the statute of limitations of six years in the state of Alabama. The bill was filed on the 9th day of January, 1890, more than fourteen years after the pledge of March, 1875, but within six years after the firm of Gilmer & Merritt ceased to do business with the firm of Josiah Morris & Co.; and how long after the other firms with which J. N. Gilmer was connected ceased to do business with Morris & Co. is not clear, but certainly it was some years after the pledge of 1875. Defendants admit in their answer that the last collection from J. N. Gilmer & Co. was made on the 3d day of October, 1883. But, as matter of law, is it important to ascertain with more particularity as to the last date when arrangements were made for credit on the faith of this security, or when the last check was drawn on, and paid by, said Morris & Co. on the faith of this security? If it be true that on and after the 30th day of March, 1875, Morris & Co. held the stock as collateral, not only for debts then due, but also for debts to be created and become due, then we not only have the pledge, but also the character of the pledge and the relations of the parties to it; and, now, when was it after that time that these relations changed? When was it that Morris repudiated the trust in which he held the stock, and gave notice to Gilmer that in default of payment and redemption of the pledge he would sell the property, or seek the aid of a court to enforce his right in regard to it? There seems to be no fact or facts in the evidence that would fix such a time, unless it be in the month of June, 1884, when the check for \$100, which was drawn by Gilmer & Merritt, was refused payment by Morris & Co., and when Gilmer, in conversation with Morris, referred to his Elyton Land stock, and Morris replied: "Why, Jimmy, that never was yours; it was your father's;" and in the same conversation told him he had sold the property to pay an indebtedness his father owed him. Morris, in his deposition in the state court, fixes this date as the month prior to the filing of the bill in the state court, which bill was filed on the 7th of July, 1884. It is thus apparent that

six years had not elapsed between the repudiation of the trust and the filing of the bill in this case.

It is claimed, however, that the law is settled in Alabama that, in the case of the pledge of stock as collateral security, the contract partakes of the nature of a mortgage of personal property, and that the rules applicable to mortgages are to be applied, and not those applicable to a strict pledge; and the case of *Gilmer v. Morris*, 80 Ala. 78, and the authorities there cited, are relied on in support of this proposition. In the case cited, at page 83, the court says:

"It is not questioned by any authority, so far as we know, that the pledgor may always claim at least the period of six years, or the full period of time during which the pledgee is permitted to sue upon his secured debt or engagement. In *Humphres v. Terrell*, 1 Ala. 650, it was held that the right of both pledgor and mortgagor to redeem personal property would be barred in six years, and the plea of the statute of limitations of six years in that case was held good as a bar to the pledgor's right to redeem, without any positive evidence of an adverse possession."

The court, however, on the same page recognizes a distinction between a pledge and a mortgage, when it says:

"The case of a mere pledgee, it is apprehended, is different in some material respects from that of a mortgagee in possession, in whose favor the statute of limitations commences to run from the law day of the mortgage, because of his presumed adverse holding from that time."

It would seem doubtful, at least, if the court intended to settle the law in Alabama that, in the case of a pledge of stocks as a collateral security, the presumption of an adverse holding on the part of a pledgee would arise in his favor from the maturity of the secured debt, without demand or notice to the pledgor. In the case of *Nabring v. Bank*, 58 Ala. 204, it is said:

"We think the bank was pledgee, and not mortgagee, of these shares. They were put in pledge to it for the payment of money Nabring borrowed, and there remained in Nabring a legal right to demand and have them on the payment of the debt, [citing authorities, and going on to say:] As pledgee the bank had no right to sell the shares without first demanding payment of the debt from Nabring, or giving him notice of the intention to sell, [which seems to be the settled commercial law of the world. *Jones, Pledges*, § 602 et seq.]"

But, if the law was settled in Alabama as claimed, still the question remains, how far on a question of this kind, so intimately connected with the general commerce of the country, this court would be bound by it. But, not to dwell upon this point, it is clear that none of the cases cited by the supreme court of Alabama in the opinion in *Gilmer v. Morris*, *supra*, were cases of pledge of stocks as security of the character of that under consideration here. The court in that case had under consideration the pledge of 1871, for a distinct and definite debt then due; and, whatever the character of that pledge, and the rights of the parties under it, this court has held that the pledge of 1875 was a new and different pledge, involving a new and different trust from that of the pledge of 1871 for the purchase money of the stock.

If to the pledge now under consideration we undertake to apply the rule contended for, then we must inquire, when did the debt, the

payment of which was secured by this pledge, mature and become due? And when was the law day of this pledge, at which the presumption of adverse holding on the part of the pledgee would arise? The answer admits, and the testimony shows, that since 1883 large dividends have been received by the pledgee upon the stock in question, amounting, in the aggregate, to as much as 100 per centum per annum. It seems to be well settled that the reception of these dividends, on a security held under an express and continuing trust, stand precisely as if the pledgor had personally paid the dividends to the pledgee on the secured debt, since the collection and application of the dividends was by the pledgee as the trustee and agent of the pledgor; and it is also well settled that every such payment is a renewal of the trust, and an acknowledgment of its obligations. *Whetstone v. Whetstone*, 75 Ala. 502; *Perry, Trusts*, § 863, and note; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Bank v. Armstrong*, 50 Fed. Rep. 805; *West v. Bank*, 19 Vt. 409. It is thus manifest that each collection of a dividend on the stock held in pledge was a recognition and acknowledgment of the trust, if the rule invoked by the respondents was well founded, and applicable to the pledge under consideration, contemplating, as it did, future debts; but no such rule could be applied to a pledge for future dealings.

It is not deemed necessary to discuss the law on this subject further, for, if the conclusion reached in reference to the nature and character of the pledge in question be correct, then there is no time prior to the month of June, in 1884, when the statute of limitations of six years could begin to run in favor of Morris, and no room for the imputation of laches to the complainant in this suit. If the commencement of the litigation was stimulated by the rapid advance of the stock in question, it is not clear how that could give Morris the right, without notice and without demand, to treat the stock as his own, or sell and appropriate the proceeds, unless a much greater length of time had elapsed than is shown here, to justify a conclusion of the abandonment of the stock for the debt. This case does not fall within the rule of *Haywood v. Bank*, 96 U. S. 611. In that case the pledgee notified the pledgor that, unless the debt was paid, the stocks would be sold. The pledgor failed, after repeated demands, to pay the debt, and the stocks were sold under the agreement under which they were pledged, and the proceeds credited to the borrower on the loan. The pledgor was advised of the sale and credit, and made no objection until nearly four years after the sale, when, the stocks having in the mean time greatly increased in value, he sought to redeem the stocks. In this case the pledge was for future debts, and there was no notice or demand for redemption of the stock, and no notice that a sale had been or would be made; and it in fact appears that no sale ever was made, or a credit given for the proceeds of a sale.

It is insisted, however, that the evidence shows that the complainant never had any right to or interest in the stock which is the subject-matter of this suit; that the only interest he ever had in it was the mere option to purchase it at a given price, which

option was never closed by the payment of the purchase money. If it was a mere option in the first place, and based upon no consideration, which is by no means admitted, yet the fact remains that the stock was paid for, except as to the interest on the purchase money for the time Morris carried it, and his conduct in regard to it afterwards shows that, whatever may have been his strict legal rights in regard to the stock, he did not stand on such ground; and whether this arose from a desire to favor the elder Gilmer, or a desire to secure and hold his influence in favor of an enterprise, the success of which was vital to the value of the stock, of which he was a large owner, or whatever the motive may have been, certain it is he changed his position when he agreed to hold the stock as collateral security, and cannot now be heard to say that, because the last dollar of the purchase money was not paid, the stock is still his property, as he claims it originally to have been, and that no right to it ever passed to this complainant.

The respondents offer in evidence the briefs of counsel and the record of the cause in the state court, to show that the questions of the statute of limitations and staleness of the demand in suit were in point of fact heard and determined by the decree in the state court. To this evidence the complainant objected, and contends that these questions were not tendered in issue by his bill in the suit in the state court except as raised upon the demurrer of the respondents, and therefore are not pertinent here; that a decree of a court must be confined to the allegations in the pleadings upon which it is founded, and that arguments and proofs and decrees of the courts outside of the scope of the pleadings cannot be held to be matter of estoppel, and will be restrained, by construction, to the matter in issue in the pleadings. "The rule," says Mr. Freeman, "that no judgment is conclusive of anything not required to support it, is not a mere rule of construction, * * * but is an unyielding restriction of the powers of the parties, of the court, and of the jury." *Freem. Judgm.* § 271; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. Rep. 773. This is not a case of vagueness and uncertainty as to what the issues were which were matter of decision in the state court, nor is it a case of contention as to what matters were decided as between defendants to a bill, as in the case of *Corcoran v. Canal Co.*, 94 U. S. 744; and upon this hearing it does not seem that the question of *res adjudicata* is presented in other or stronger light in favor of the respondents than it was in the hearing on the sufficiency of the plea in bar of this suit.

My attention has been called to the case of *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 8 Sup. Ct. Rep. 495. There appears to be a mistake in the report of that case. On page 230, 124 U. S., and 498, 8 Sup. Ct. Rep., it is stated: "The judgment of this court 'sustaining' the demurrer * * * was, therefore, an adjudication that the bonds * * * were not binding obligations." But on referring to the former case (110 U. S. 165, 3 Sup. Ct. Rep. 555) it will be seen that "overruling" should have been used instead of "sustaining." This relieves the case of all difficulty as an authority; the point of decision being that a judgment in favor of a defendant, upon the

plaintiff's demurrer to his plea to the merits being overruled, and the refusal of the plaintiff to amend, is conclusive on the plaintiff. In that case the former suit was founded upon coupons of a series of bonds, the defendant answered, setting up the invalidity of the bonds from which the coupons were cut, the plaintiff demurred to the answer, the court overruled the demurrer, and thus established the sufficiency of the plea or answer, and the plaintiff, not amending or replying to the plea or answer, thereby admitted that no answer could be made, and thus final judgment for the defendant was conclusive as to the invalidity of the bonds. Upon a second suit, upon other coupons from the same bonds, this judgment was held conclusive against the plaintiff. It is evident that the suit in 124 U. S. 225, 8 Sup. Ct. Rep. 495, could not be sustained except upon the establishment of the validity of the bonds from which the coupons were cut; and, as that question had been directly presented and decided against the plaintiff in the former suit, the latter suit was properly held barred by the former adjudication. The former suit in the state court in this case was founded on the original pledge of 1871. The defendant demurred to the complaint as insufficient, because there was no averment of recognition of the pledge from the original transaction to the filing of the bill, in July, 1884. The court sustained the demurrer, holding that by the law of Alabama a pledge for a distinct debt is barred in six years from the maturity of the debt or the last recognition of the pledge. But this cause of action is founded upon the pledge of 1875, for the security of other and distinct debts then and thereafter to be created, with averments and proof of recognition avoiding any statute of limitations, and thus, though relating to the same subject-matter as the former suit, is not the same cause of action, and is not barred by judgment on the demurrer to the former cause of action. *Gould v. Railroad Co.*, 91 U. S. 526; *Cromwell v. Sac Co.*, 94 U. S. 351; *Hanchey v. Coskrey*, 81 Ala. 149, 1 South. Rep. 259.

The maintenance of this suit is entirely consistent with the adjudication in the former suit, which was merely that under the laws of Alabama no cause of action was stated in the bill. That judgment operates as a mutual estoppel upon the parties to say that averments of recognition were not necessary to state a cause of action, and the complainant, accepting the decision in the present suit, avoids the demurrer which was fatal in the former suit, by averring and proving a new, different, and subsequent cause of action, involving a continuous recognition of the trust until its repudiation, in June, 1884.

A decree will be entered for the complainant.

RAYNOLDS v. HANNA et al.

(Circuit Court, N. D. Ohio, E. D. January 18, 1893.)

No. 4,743.

1. WILLS—CONSTRUCTION—DESCRIPTION OF DEVISEES AND LEGATEES.

Testator's will, by which his entire estate was devised and bequeathed to his executor in trust, provided that after the payment of taxes, repairs, insurance, and an annuity to the widow, "the remainder of the yearly income of my estate shall be divided into two equal parts, one part to be expended by my executor for the benefit of my son, Cassius, and his family, so long as he (Cassius) shall live, or, in case my executor shall deem it proper, he may pay the whole or any part of such portion of the yearly income of my estate to my son, Cassius, in cash;" that "the other of said equal parts I direct my executor to expend for the benefit of the children of my deceased daughter Arrial;" and that "in the expenditure of income for the benefit of my son, Cassius, and his family, as well as for the children of my daughter Arrial, I desire my executor to have in view the maintenance and education of my grandchildren on a scale comporting with their condition in life; and if, in the judgment of my executor, the net annual income cannot all be judiciously expended or advanced to Cassius and his family and to the children of Arrial, I direct my executor to invest such surplus as may remain for the benefit of the child or grandchildren who would be entitled to it." *Held*, that the children of Cassius were the beneficiaries intended by the term "family," and that the trust fund should be apportioned one half to Cassius and one half to his children, thus making Cassius' share one fourth of the net annual income of the estate.

2. TRUSTS—SUBJECTION OF TRUST FUND TO PAYMENT OF BENEFICIARIES' DEBTS.

The interest of Cassius in the income, impressed with the trust, whether intended for his support or his general benefit, was subject to the payment of his debts, since, where the creator of the trust does not expressly or by clearly manifest intention restrict alienation or exclude the trust property or fund from liability for debts of the beneficiary, and there is no positive provision of law to the contrary, the beneficiary may assign his equitable interest or estate, and the same may be reached and subjected to the payment of his debts by a court of equity after his creditor has exhausted his remedy at law.

3. LANDLORD AND TENANT—LEASE—RENT.

By an agreement between the executor of an estate and a coal company the executor granted the exclusive right to enter upon a mine and remove the coal in the premises, and the right to occupy and use so much of the surface of said land as would enable the company to properly conduct said mining operations, and to make use of so much of the timber on the surface of the premises as might be necessary in mining; and the company agreed to mine the coal on said premises, to take therefrom or to pay a royalty on not less than 50,000 tons of coal per year, to continue to mine and pay royalty until all the coal that can practically be mined on said premises shall be mined and paid for, to pay the executor "as royalty for the coal to be mined and taken from the premises each month the sum of 10 cents per ton," which monthly payment, at least to the amount of \$416.67, shall be made regularly, whether the monthly proportion of coal on the basis of 5,000 tons per annum shall have been mined or not; to furnish a written report at the time of making monthly payments, so that the executor might be fully advised as to the "amount of coal which may have been taken from the premises under the lease, the amount paid thereon, and the place from which the same shall have been taken;" to allow the executor to inspect the books of the company relative to its operation "under the lease" for the purpose of verifying the accuracy of reports, and, if the company should fail, neglect, or refuse for 30 days

to make any monthly payment, "this lease may, at the option of the first party, be declared forfeited, and the party of the first part may at once re-enter upon and take and hold exclusive possession of the demised premises." *Held*, that the agreement was a lease, and that the monthly payment of \$416.67, whether the coal was mined or not, though called a "royalty," was a rental to be paid to the executor, and as such was part of the "income" of the estate.

4. EXECUTORS AND ADMINISTRATORS—POWERS—LEASE OF COAL LANDS.

Where the chief, if not the sole, value of land is for coal mining purposes, and the only profit to be derived therefrom is by sale or lease of the coal, either of which the executor, in his discretion, has power to do, the fact that the coal mines were not opened in the life of the testator does not affect the authority of the executor to lease the same, so as to make the rental thereof an income of the estate.

In Equity. Bill by F. A. Raynolds, a judgment creditor of Cassius B. Hanna, against said Hanna and others, to subject to the payment of his judgment the interest of said defendant in the estate his father, Robert Hanna, deceased. Decree for complainant.

Francis J. Wing and J. Wm. Ball, for plaintiff.
Estep, Dickey, Carr & Goff, for defendants.

JACKSON, Circuit Judge. Before taking up the exceptions of the defendant Brooks, trustee, to the master's report as amended, and filed herein May 4, 1892, it is proper to consider the question which is again strenuously urged on behalf of the respondents,—whether, under the will of Robert Hanna, deceased, the defendants Cassius B. Hanna and wife, Hattie L., or either of them, acquired any such beneficial interest or trust estate as can be reached and subjected by complainant to the payment of his judgment against them. The court has heretofore, in an opinion filed herein June 11, 1891,¹ given a construction to said will, which substantially answers this question in the affirmative, but at the request of counsel for defendants, and in the light of further argument, it has again re-examined the matter, with the result that the views already expressed and conclusions reached are rather confirmed than shaken. By the fourth item in the will the testator devised and bequeathed his entire estate to his executor, defendant Brooks, "in trust to be disposed of by him as hereinafter provided." The trustee was invested with full, ample, and complete power to manage, direct, and control the property bequeathed and devised according to his own best judgment and discretion; it being the expressed wish and purpose of the testator to invest said executor and trustee "with power to manage and control my entire estate according to his own judgment and discretion, the same as I could do myself, if living," and "subject only to, and be restrained only by, the special limitations herein imposed and expressed by me." Now, among the special limitations imposed and expressed by the testator to which the executor's discretionary power of management and control were to be subject are certain provisions made for the benefit of the testator's

¹The opinion referred to is superseded by the one here reported, and will not be published.

son, Cassius B., as for him and his family or children, set out in the seventh and eighth items of the original will and items 2 and 5 of the codicil, as follows:

"Item 7. I hereby authorize and direct my executor, as soon as convenient after my death, and in case my son, Cassius, shall so request, to purchase a home for him, at a cost not to exceed \$12,000, taking the title to himself as executor and trustee, as aforesaid; the same to be kept as and for a home for Cassius, free of rent, so long as he desires so to occupy the same. But in the final settlement of my estate, as hereinafter provided, I direct that the money expended by my executor in insurance, taxes, and assessments on the home so occupied by Cassius, together with six per cent. interest per annum on the cost of said home for the time it shall be so occupied by him, shall be deducted from the amount that is to be paid to Cassius or his children, as is hereinafter provided, or, if my said executor shall deem it best to deduct the amount of said annual insurance, taxes, assessments, and interest from the annual income that is to be paid to Cassius or his children, as hereinafter provided, he is hereby authorized and directed to do so.

"Item 8. So far as the same is practicable in conformity with the other provisions of this will, I desire the income of my estate each year to be applied as follows: First, to the payment of taxes, insurance, assessments, and repairs that may be levied or become necessary to be made on any part of my estate, together with the necessary expenses of the administration of the same, including the compensation hereinafter provided to be paid to my executor; secondly, to the payment of the annuity of \$2,000 hereinbefore provided for my wife, Harriet A. Hanna; thirdly, after the payment of all the items hereinafter mentioned, I desire the remainder of the yearly income or increase of my estate that shall be collected and received to be divided into two equal parts, one part to be expended by my said executor for the benefit of my son Cassius, and his family, so long as he, Cassius, shall live, or, in case my said executor shall deem it proper and best, but in no event otherwise, he may pay the whole or any part of such portion of the yearly net income of my estate (subject to the deductions as above provided for taxes, etc.) to my son, Cassius, in cash. The other of said equal parts into which the net yearly income of my estate is to be divided as provided in this section I direct my said executor to expend for the benefit of the children of my deceased daughter Arrial T. Whitacre, in such manner that each of said children shall have an equal and the same portion with the other. In case any of said children of my daughter Arrial should die without issue before the final division of my estate, then the share of the income of my estate of such child or children so dying shall be divided between the other children of my daughter Arrial, or the issue of them,—they, in such case, to take per stirpes, and not per capita; and in case any of the said children of my daughter Arrial should die before the final distribution of my estate, leaving issue, I direct that the share of the income of my estate which would be coming to such child of Arrial if living shall be paid to the issue of such child, share and share alike, and I hereby authorize my executor to pay in cash, if he shall deem best, the whole or any part of such share of the income of my estate as may be due to each of the children of my daughter Arrial, as aforesaid; he to take in such case the receipt of the guardian or other person who for the time being may be charged with the care or custody of said children, or either of them, for any payment made. And in the expenditure of income for the benefit of my son, Cassius, and his family, as well as for the children of my daughter Arrial, I desire my executor to have in view the maintenance and education of my grandchildren on a scale comporting with their condition and rank in life; and if, in the judgment of my said executor, the net annual income of my estate as above described cannot all be properly and judiciously expended or advanced to Cassius and his family and to the children of Arrial as hereinbefore described, I authorize and direct my executor to invest such surplus as may remain after what he deems a reasonable expenditure has been made for the benefit of the child or grandchild who would be entitled to it under the foregoing plan of distribution."

Item 2 of the codicil provides:

"In order to settle distinctly and make forever free from dispute that portion of item 8 of my said will which relates to the division and distribution of the annual net income of my estate, I hereby declare it to be my wish and will, and I do hereby accordingly direct, that the one half of said yearly net income which is to be expended for the benefit of my son, Cassius, and his family, is to be expended for his benefit only, until the time arrives when the final distribution of my estate shall be made under the provisions of said will, and to this extent are the words in said will directing said portion of income to be expended for his benefit, 'so long as he, Cassius, shall live,' to be modified and controlled; also the one half of said annual income which is to be expended for the benefit of Cassius, as aforesaid, shall, until expended or otherwise disposed of as provided in said item, be held and kept by my said executor in his possession in trust, to the end that the same may be applied as my said executor shall deem best, and not otherwise, for the benefit of my son, Cassius, and his family; also that any portion of said share of income which may be invested for the benefit of Cassius shall likewise be held and kept in his own possession, in trust by my said executor, the same to be expended for Cassius' benefit, or paid him at such times and in such amounts as he, my said executor, may deem best, and not otherwise."

By the third item of the codicil the final distribution of the estate, if not sooner made, under the powers conferred by the will is directed to be made "as soon as may be after the death of my son, Cassius, provided at that time the youngest child of my daughter Arrial then living shall have reached the age of majority;" and by the fifth item of said codicil it is declared that, "in the event of my son, Cassius, should have no children living nor grandchildren living at the time of the final distribution of my estate, as provided in my said will, I direct my executor to retain in his own custody and possession one half of the whole estate as it may then exist, and hold the same in trust so long as Cassius may live, giving to Cassius so much of the annual net income of said one half as he may deem best, and at the death of Cassius said one half of my estate so retained and held to be by said executor distributed per stirpes among the children and grandchildren of my daughter Arrial."

On the final distribution of the principal or corpus of the estate the children of Cassius then living and the children of the daughter Arrial or their issue were to share therein equally after equalizing advancements made to their respective parents by the testator. There has been no final distribution or division of the principal of the estate, and it is not material to the present case to determine when such division could or should be made by the executor, the son, Cassius, being still alive, and the youngest child of the testator's daughter not attaining his majority until September 17, 1894. While the will gives to the executor the amplest and most complete discretionary powers in the management and control of the estate, and invests him with full authority to rent, sell, or improve the whole or any part thereof, real or personal, and to invest, and from time to time reinvest, in such manner and in such property, either real or personal, as he may deem best to do, the same as the testator could do if living. Certain trusts are created and impressed upon the net annual income or incomes of the estate during the life of Cassius, or until the final distribution is made of the

principal, which confers rights and imposes duties not covered by or subject to the general powers conferred upon the executors in respect to the corpus of the estate. The testator clearly intended to separate the net income from the body of the estate, and to impress such income with a trust for the benefit of designated cestuis que trustent, and imposed upon the executor, as trustee, the duty of executing and carrying such trust into effect. Now, who are the beneficiaries of this income trust, and how far are the rights of such beneficiaries subject to the discretion of the trustee in respect to the application or disposition of the trust fund? It cannot be questioned that the three children of the testator's daughter Arrial take a vested equitable estate or interest in and to one half of said annual net income, which, under the directions of the will, the trustee was required to distribute, expend, or invest for their benefit equally. He was given the discretion to pay the whole or any part of each child's share of such income in cash, or if, in his judgment, such shares of the income could not all be properly and judiciously expended for or advanced to said beneficiaries, he was authorized and directed to invest such surplus as may remain, after what he deems a reasonable expenditure has been made, for the benefit of the child or grandchild who would be entitled to it (the surplus income) under the foregoing plan of distribution. In case any of said children should die without issue before the final division of the estate, the share of the income of such child or children so dying was to be divided between the other (surviving) children of Arrial; or if, in any event, any of such children should, before final distribution of the estate, die leaving issue, the share of such child so dying was to be paid to such issue. These limitations over in the event of the death of any of said children before the principal of the estate is divided clearly relate to their respective shares of the one half of the annual net income given to them as a class, and in no way affect the question under consideration, touching the existence and character of the trust intended to be impressed upon the income of the estate, and the duties and powers of the trustee in respect to such trusts. That it was the duty of the trustee, during the life of these grandchildren, until the final division of the principal of the estate, to pay over to, expend or invest for, them, their respective shares of said one half of the net annual income, is further shown by the ninth item of the will, which directs that the executor "shall continue to control and manage my estate, and distribute or distribute and invest the annual income of my estate, as hereinbefore provided, from year to year," until the final distribution of the estate is made. In making distribution, expenditures, or investments of said income for the benefit of the cestui que trust the testator desired the trustee to have in view the maintenance and education of his grandchildren "on a scale comporting with their condition and rank in life."

This expressed desire was manifestly not intended to cut down or restrict the trust in favor of the said grandchildren to one for maintenance and education, but was merely suggested as a consideration to be borne in mind by the trustee in making advancement

or expenditures for beneficiaries out of the trust fund, for it is followed by the imperative direction to invest such surplus of the income as may remain after all reasonable expenditures have been made for the benefit of the child or grandchild who would be entitled thereto under the testator's plan for the distribution of the income of his estate. There is no declaration, expressed or implied, that the one half of the net annual income impressed with the trust, or any part thereof, is in any event to go back to the corpus or body of the estate, and from a portion of the principal to be finally divided between the children of Cassius and Arrial after equalizing advancements previously made by the testator. It hardly admits of discussion that the children of Arrial could compel the trustee to execute this trust in their favor, and apply one half of the net annual income of the estate to their benefit. They could require him either to distribute, expend, or invest to or for them said income, according to their respective shares therein, subject to the contingent limitations over in the event of either dying before the final distribution of the estate. The neglect or refusal of the trustee either to distribute or invest the trust fund for their benefit would be a clear breach of trust. The trustee was undoubtedly invested with a discretion as to the amount in quantum of the income he would pay over in cash, or expend for the beneficiaries, and the discretion, so long as honestly and reasonably exercised, a court of equity could not or would not control; but the surplus or residue of income not so distributed was required to be invested for the benefit of the cestui que trust entitled thereto. There is nothing to indicate that it was the intention of the testator to limit and confine the application of the trust fund to the personal support of the designated beneficiaries; on the contrary, it clearly appears that the provision was for the general benefit. There is no direction or provision against anticipation or alienation by the cestui que trust of the benefit or interest given, nor is there any intention expressed or implied that the interest of the beneficiaries in the trust fund shall not be liable for or be subjected to the payment of their debts. Neither is there any limitation over in the event of bankruptcy, or upon the attempt of creditors to reach the share or interest of the cestui que trust in the funds. Under the circumstances, it is clear that the children of Arrial, when or as they come of age, could, in the absence of some prohibitory statute, have assigned or alienated their respective shares in the trust fund already accrued or which might thereafter accrue up to the final division of the principal of the estate. It is equally clear that their respective shares in the trust fund, in the absence of positive provision of law exempting such equitable interest and liability therefor, could be subjected in equity to the payment of their debts contracted after they may have attained their majority. Now, what has been said as to the one half of the net annual income bequeathed in trust for the children of the daughter of Arrial applies with equal, if not greater, force to the one half of the other half of said income given for the benefit of Cassius, or for Cassius and his family or children. The cestuis que trustent of each half of the net yearly income are placed upon sub-

stantially the same footing, with this exception: that there is no limitation over of this Cassius' half of the income in the event of his death, or of the death of either of his children, before the final division of the estate. The trustee is directed by the eighth item of the will to expend one half of said net annual income for the benefit of Cassius and his family, or, in case he should deem it best, to pay the whole or any part thereof over to Cassius in cash; and if, in his judgment, said half of the net income could not all be properly and judiciously expended or advanced to Cassius and his family, the trustee is directed to invest the surplus thereof "for the benefit of the child or grandchild who would be entitled to it [such surplus income] under the foregoing plan of distribution." The "foregoing plan of distribution" thus referred to related alone to the net yearly income impressed with the trusts in favor of the designated beneficiaries. By the second item of the codicil, which was intended to settle definitely and free from dispute that portion of item 8 of the will relating to the division and distribution of the annual net income of the estate, the testator declares it to be his wish and will, and he accordingly directs, "that the one half of said net yearly income which is to be expended for the benefit of my son, Cassius, and his family, is to be expended for his benefit only until the time arrives when the final distribution of my estate shall be made, and the provisions of said will, and to this extent the words in said will directing said portion of income to be expended for his benefit, 'so long as he, Cassius, shall live,' to be modified and controlled; also that the one half of said annual income which is to be expended for the benefit of Cassius, as aforesaid, shall, until expended or otherwise disposed of as provided in said item, be held and kept by my said executor in his possession, in trust, to the end that the same may be applied, as my said executor shall deem best, and not otherwise, for the benefit of my son, Cassius, and his family; also that any portion of said share of income which may be invested for the benefit of Cassius shall likewise be held and kept in his own possession, in trust, by my said executor, the same to be expended for Cassius' benefit, or paid to him at such time and in such amounts as he, my said executor, may deem best, and not otherwise." It appears that no portion of said share of income has been invested by the trustee for the benefit of Cassius, but that there is a portion thereof remaining unexpended and undisposed of, which the trustee holds for the objects of the trust.

The person or persons entitled to this unexpended and uninvested surplus of the accrued income, or to such income as may hereafter accrue, until the final division of the estate, presents a question of some difficulty. The complainant insists that Cassius is the sole beneficiary. The respondents contend that the "family" of Cassius share equally with him in the trust fund. If Hattie L. Hanna, the wife of Cassius, is entitled to a beneficial interest in said income trust, her share thereof would be equally liable with that of Cassius, she being equally bound by the judgment sought to be enforced. I am, however, of the opinion after careful consideration of the matter, that the wife of Cassius takes no beneficial interest or share

in the trust, and that Cassius himself is not the sole beneficiary thereof, but that the objects of the trusts to the one half of the net income involved are Cassius and his children, of whom there are two, one a minor, and the other now an adult. The word "family," employed in the will, admits of a great variety of applications. It may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children, excluding his wife; it is sometimes construed to mean his heirs at law. Its proper interpretation in each case must depend upon and be determined by the context of the will, the circumstances in which the testator is placed, and the character and situation of those who may be presumed to be the objects of his bounty. Story, Eq. Jur. §§ 1065b, 1071, and cases cited.

In *Pigg v. Clarke*, 3 Ch. Div. 672, it was said by the master of the rolls that "every word which has more than one meaning has a primary meaning; and if it has a primary meaning you want a context to find another. What, then, is the primary meaning of 'family?' It is 'children.' That is clear upon the authorities which have been cited, and, independently of them, I should have come to the same conclusion."

In the present case it may be assumed that Cassius and his children were, equally with the children of the deceased daughter Arrial, the objects of the testator's bounty. The provisions of the ninth item of the will and fifth item of the codicil indicate that the children of Cassius were the beneficiaries intended by the term "family," rather than the wife and children. They come within the expressed desire of the testator that the trustee, in the expenditure of the trust fund, should have in view the maintenance and education of the grandchildren on a scale comporting with their condition and rank in life. Cassius' children are so far implied, if not express, objects of the testator's bounty, that, if the entire trust fund were paid over or received by him, a court of equity would treat and consider him a subtrustee for their benefit to the extent of a fair proportion of the fund, under the principle laid down in *Chase v. Chase*, 2 Allen, 101; *Perry, Trusts*, §§ 117, 118, and cases cited. The children of Cassius being cobeneficiaries with him of the trust fund, it is claimed that there can be no apportionment thereof, so as to give him or his creditors any definite or separate portion thereof. It is, however, well settled that a court of equity can, and will in cases like the present, apportion the trust fund. *Perry, Trusts*, § 118; *Nichols v. Eaton*, 91 U. S. 723, and cases cited.

How the trust fund in question should be divided between Cassius and his children is a matter not free from doubt or difficulty, but, taking an equitable view of it, the apportionment should be made between them so as to assign or allot one half thereof to Cassius and one half to his children; thus making Cassius' share from the net yearly income of the estate one fourth of the whole.

It is further urged that the trust fund here under consideration is to go for the support of the designated beneficiaries, and that Cassius' interest therein cannot be subjected to the payment of his

debts. There is nothing on the face of the will to sustain the assumption that the income impressed with the trust was intended for support, rather than for the general benefit of the cestui que trust. But suppose it was bequeathed for that purpose, or for that object, would that defeat the right of the beneficiary to alienate his interest, or prevent his creditors from reaching it, in the absence of some positive provision of law exempting it from such liability, or of a clearly expressed intention on the part of the creator of the trust that the fund should not be assigned or be made liable for the debts of the cestui que trust? We think not. The general doctrine on the subject is thus stated by Perry, *Trusts*, § 386:

"Therefore, when an equitable interest is mentioned in the cestui que trust, he may dispose of it, or it may pass to his assignee by operation of law, if he become a bankrupt. Thus a trust for a person's support, or to pay the interest to a person for life, as the trustee may think proper, or when it shall become payable, or in such sums or portions, and at such times and in such manner as the trustee may think best, may be exercised according to the direction of the trustees, but the bankruptcy of the cestui que trusts puts an end to the discretion of the trustees, and vests the whole interest in the assignees; and this is so where the trustees were directed to pay as they should think proper, and at their will and pleasure, and not otherwise, so that the cestui que trust should have no right, claim, or demand other than the trustees should think proper."

The court thought in *Snowdon v. Dales*, 6 Sim. 524, that, taking the whole instrument together, the cestui que trust has a vested interest; that those directions applied only to the manner of enjoyment, and that the equitable interest vested in the assignee at his bankruptcy. The test is: Would executors of the cestui que trust have a right to call for any arrears? If so, the assignees would have the right to call for the future income or interest. This is directly applicable to the present case. There is a further consideration and distinction on this subject pointed out by the court in *Slattery v. Wason*, 151 Mass. 266, 23 N. E. Rep. 843, where it is said:

"When the whole income or a definite sum is given the beneficiary for his support, the whole belongs to him, and is to be applied by him at his discretion, and the expression of the purpose for which it is given is not deemed to be the expression of an intention that the right to secure it shall not be inalienable; but when the right given is for the support out of a fund which is given to another, the right is in its nature inalienable, and the intention of the donor that it shall not be alienable is presumed."

What is meant by this latter clause is that when a fund is given, not to a trustee, but to any person beneficially, and is charged with the support of another, the latter's interest is presumably inalienable. Thus in *Baker v. Brown*, 146 Mass. 369, 15 N. E. Rep. 783, the testatrix gave her estate to daughters, "subject to the condition that they should support their father during his lifetime." It was held that under the circumstances of that case the intention of the testatrix was that the daughters should furnish the father with a reasonable support in their own household or elsewhere, the mode of his support being in their discretion, and that the interest of the father was such that it could not be reached by his creditors

without imposing upon the daughters duties and obligations different from and greater than those imposed by the will.

The general doctrine laid down in *Perry*, Trusts, §§ 286, 286a, and in 2 Story, Eq. Jur. §§ 974, 974a, following the English rule announced in *Brandon v. Robinson*, 18 Ves. 429, that alienability and the consequent liability for debts is an inseparable incident attaching to any vested beneficial interest or trust estate in the absence of limitations over, or for other provisions for the lessor of such interest in such event, has no doubt been qualified or departed from by many courts in this country to the extent of holding that a party may settle property on another or for another's benefit in such a manner that it cannot be alienated or passed to assignees so as to be reached by creditors, even when there is no provision that the interest shall cease and determine upon the happening of such contingency, nor any limitation over. Thus it is said in *Sparhawk v. Cloon*, 125 Mass. 263, that—

"The rule in England, since the time of Lord Eldon, has provided that when income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to, the debts of the cestui que trust, and that this quality is so inseparable from the estate that no provision, however expressed, which does not operate as to lessor or limitation of the estate or interest itself, can protect it from his debts, [citing *Brandon v. Robinson*, 18 Ves. 429; *Bramhall v. Ferris*, 14 N. Y. 41-44; and *Nichols v. Levy*, 5 Wall. 433.] On the other hand, it has been maintained by the courts of recognized authority that the founder of a trust may secure the enjoyment of it to other persons, the object of his bounty, by providing that it shall not be alienable by them, or to subject it to be taken by this condition; and that his intention in this regard, when clearly expressed by him, must be carried out by the court, even though there is no cesser or limitation over."

In *Bank v. Adams*, 133 Mass. 170, it was held that a person having the entire right to dispose of property may settle it in trust in favor of another with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cesser or limitation over the fund or estate in such an event. In *Foster v. Foster*, 133 Mass. 179, 180, the will provided that "the trustees may, at their discretion, pay or apply the income of the fund to the personal benefit or comfort of the son, or such member or members of his immediate family as the trustees may think proper, and that such income shall not be subject to his [the son's] debts, or assignable by him by way of anticipation;" and it was held that the son had no such interest as could be reached by his creditors. That case is too clearly distinguishable from the present to require further notice. It certainly does not sustain the contention that the share of Cassius of the trust fund under consideration cannot be reached by complainant. *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. Rep. 376, more nearly approaches the present. There the testator gave to his wife, during her life, the income of all his estate, "to be for her comfort and support," and expressing the wish that she should provide for an unmarried daughter, and that a "home and grounds" be kept "as a home for them." After the death of the daughter, creditors of the beneficiary were allowed

to subject the income to the payment of their debts against her, the court saying:

"It is settled in this commonwealth that a testator who makes a gift of income to a beneficiary may provide that it shall not be alienable in advance by him, or be subject to be taken by his creditors. But, in order to give such a qualified estate, instead of an absolute one, the language of the testator must be such as clearly to import an intention to do so. In the case at bar the testator makes an absolute gift of the whole income of his estate to his widow for her life. The words, 'to be for her comfort and support,' at most express the motive and purpose of the gift, but cannot be held to make the gift conditional. They have little, if any, more significance than the words, 'to be for her benefit and enjoyment,' and are not to cut down the clearly expressed absolute gift to a qualified or conditional one."

The courts of Vermont, Connecticut, Pennsylvania, Maryland, Virginia, and of Missouri hold substantially the same doctrine as that announced in the above Massachusetts decision, and the supreme court, in *Nichols v. Eaton*, 91 U. S. 716-730, has indicated an inclination to adopt this modern view and departure from the English rule; but neither in that case nor in any other that has come to our attention has the supreme court actually done so. The positive authority of *Nichols v. Eaton* is coextensive only with the facts on which it was made. It has, however, been frequently misapplied, or pressed beyond what was actually decided. In that case the will contained the express provision that, if the beneficiary should alienate or dispose of the income to which he was entitled under the trusts of the will, or if by reason of bankruptcy or insolvency or any other means whatsoever said income could be no longer personally enjoyed by him, but the same would become vested in or payable to some other person, then the trust expressed in the will, concerning so much thereof as would so vest, should immediately cease and determine, and the trust fund was then to be paid to the wife and children, or wife and child, as the case might be, of the beneficiary, and, in default of any wife, child, or children, the income was to accumulate in augmentation of the principal fund; thus making a clear limitation over upon the happening of the designated contingencies which were to determine the beneficiary's interest.

It was further provided that, in case, after the cessation or determination of the beneficiary's interest in the income as directed, the trustees might, "in their discretion, but without its being obligatory upon them, pay to or apply for the use of" the beneficiary, or for the use of him and his wife and family, so much and such parts of the income to which the said beneficiary would have been entitled under the preceding trusts, in case the forfeiture provided for had not happened. The trust under the will terminated by bankruptcy of the beneficiary. The assignee thereafter claimed the fund, or a portion of it, under the discretionary power conferred upon the trustees to pay or to apply the income for the use of the cestui que trust, or for him and his wife and family, to the same extent the beneficiary would have been entitled if the forfeiture had not happened. It was conceded by the claimant, and so held by the court, that the beneficiary's interest given by the

will had ceased and determined on his bankruptcy, and it was further held by the court that it was thereafter purely discretionary with the trustees whether they would pay to or apply any parts of the forfeited income to the use of the beneficiary, or for him and his family, and that this discretionary power in the trustees could not be controlled by the court, or be called into exercise either for the former cestui que trust or his creditors. Whatever might come to the beneficiary from the voluntary exercise by the trustees of the discretion conferred upon them would neither constitute a portion of the trust bequest, nor be subject to the control or claims of the assignee. This case of *Nichols v. Eaton* closely resembles that of *Godden v. Crowhurst*, 10 Sim. 642-644, where the will directed that, in case the testator's son, for whom the trust was created, "should at any time or times make any assignment, mortgage, or charge of or upon, or in any manner dispose of by way of anticipation the said interest, dividends, or accumulations, or any part thereof, to which he was entitled for life, as aforesaid, or attempt or agree so to do, or commit any act whereby the same, or any part thereof, could or might, if the absolute property thereof were vested in him, be forfeited unto or become vested in any person or persons, then, and in any of said cases, his trustees shall henceforth pay and apply the said interest, dividends, and accumulations for the maintenance and support of his said son, and any wife, child, or children he might have, and for the education of such issue, or any of them, as his trustees for the time being should, in their discretion, think fit." There, as in *Nichols v. Eaton*, the beneficial interest given by the will terminates upon the happening of one of the contingencies expressly provided for; and thereafter the application of the fund rested in the discretion of the trustees. Neither of these decisions, cited and relied on by respondents, are in point here. The case under consideration is essentially different. Here there is no intention, expressed or implied, that the share of the trust fund given to Cassius was to terminate or be forfeited in any event, or for any cause. Nor was there any prohibition against alienation or anticipation, but his interest was to continue without restriction as to its use during his life, or until the final division of the corpus of the estate. Neither was it left to the discretion of the trustee to give or withhold this interest from the designated beneficiary; on the contrary, it was made his imperative duty to pay over or expend or invest that share of the fund for the benefit of the cestui que trust. Such discretion as was not conferred upon the trustee relates alone to the quantum of the fund he would pay in cash, or to the manner of its expenditure for the beneficiary, or to the investment of any surplus of the fund for the benefit of Cassius. The trust was an executed one, and such discretion as was given the trustee was subject to control, and neither prevented the interest intended for Cassius from vesting, nor in any way affected his beneficial ownership. If, therefore, the more modern rule adopted in some of the states in reference to trust interests or estates were applicable to the case at bar, it would not follow that the share of Cassius in

the trust fund here involved could not be reached by his judgment creditor. Some of the authorities relied on by respondents, such as *Leavitt v. Beirne*, 21 Conn. 1, were settlements for married women and for wives and children, which stand upon a different footing; the rule in respect to trusts for married women being that during coverture restrictions or provisions against alienation or anticipation are valid, but terminate or cease to be operative upon or after discovery. *Perry, Trusts*, §§ 387, 671. This class of cases has no application to trusts in favor of persons sui juris, like the present.

In some of the states, as in New York, Illinois, and Tennessee, there are statutory provisions preventing the alienation of trust estates, or exempting the interests of the beneficiaries therein from liability for the debts where the trust is created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by will duly recorded or deed duly registered. *Graff v. Bonnett*, 31 N. Y. 9; *Campbell v. Foster*, 35 N. Y. 361; *Williams v. Thorn*, 70 N. Y. 270; *Nichols v. Levy*, 5 Wall. 433; *Spindle v. Shreve*, 111 U. S. 542-548, 4 Sup. Ct. Rep. 522; and one branch of *Potter v. Couch*, 141 U. S. 319, 320, 11 Sup. Ct. Rep. 1005,—were cases where such statutory provisions were construed and applied. In *Spindle v. Shreve*, 111 U. S., at pages 547, 548, 4 Sup. Ct. Rep., at pages 524, 525, it is said by Mr. Justice Matthews, speaking for the court—

"That it cannot be doubted that it is competent for testators and grantors, by will or deed, to establish trusts, both of real and personal property, and of rents, issues, and profits, and produce of the same, by appropriation and limitation and power to trustees, which shall secure the application of such bounty to the personal and family uses during the life of the beneficiary, so that it shall not be subject to alienation, either by voluntary act on his part or in invitum by his creditors. The limits within which such provision may be made and administered of course must be found in the law of that jurisdiction which is the situs of the property in case of real estate, and in case of personalty where the trust was created, or is to be administered, according to circumstances; and in determining these limits that law declares how far and by what forms and modes the institution of property may be permitted to accommodate itself to the will and convenience of individuals, without prejudice to public interests and policy; by what limitations and instruments its usual incidents may be affected and altered, so as to effectuate the intention of parties; how far the dominion implied in the idea of property may be extended, so as to limit the future dominion of those who succeed to the beneficial enjoyment. It follows that the judgment in each case must be determined by the positive provision of the law of the localities which govern it, and the particular terms of the instrument by which the scheme is framed."

The result of the authorities most favorable to the contention of respondents is that, where the creator of the trust does not expressly or by clearly manifested intention restrict alienation or exclude the trust property or fund from liability for debts of the beneficiary, and there is no positive provision of law to the contrary, the cestui que trust may assign his equitable interest or estate, and the same may be reached and subjected to the payment of his debts by a court of equity, after his creditor has exhausted his remedy at law. "It is the settled rule of law," says Mr. Justice Swayne,

speaking for the court, in *Nichols v. Levy*, 5 Wall. 441, "that the beneficial interest of the cestui que trust, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristic right and enjoyment to the beneficiary and immunity from his creditors."

There is no statute of Ohio establishing a rule of property in respect to trust estates that exempts the interests of the beneficiary therein from liability for his debts; on the contrary, it is provided by section 5464, Rev. St. Ohio, that "when a judgment debtor has not personal or real property subject to levy or execution sufficient to satisfy the judgment, any equitable interest which he has in real estate, as mortgagor, mortgagee, or otherwise, or any interest he may have in any banking, turnpike, bridge, or other joint-stock company, or in any money contract, claim, or chose in action due or to become due to him, or in any judgment or order, or any money, goods, or effects which he has in the possession of any person or body politic or corporate, shall be subject to the payment of the judgment by action." It hardly admits of debate that the interest or share of Cassius in the trust fund held by and in the possession of the defendant Brooks, falls within the comprehensive provisions of this statute; and we have been cited to no decision or decisions of the supreme court of Ohio holding that such an interest as that given to and possessed by Cassius B. Hanna in the trust fund under consideration could not be reached by his creditors. Under the general rule stated by Mr. Justice Matthews in *Spindle v. Shreve*, 111 U. S. 547, 548, 4 Sup. Ct. Rep. 524, 525, quoted above, testators in Ohio cannot so execute wills or create trusts that a compliance therewith will result in a violation of law, or in overriding the provisions of the statute making the interest of the beneficiary in a trust fund liable for his debts, unless there is some forfeiture clause or limitation over which will operate to terminate the interest of the estate of the cestui que trust. It may well be doubted whether, under a statute like that of Ohio, an expressed intention or declaration of the testator that the share of Cassius in the trust fund should not be subjected to his debts, in the absence of any limitation over or termination of his interest, could have been sustained. It is not a sound proposition to say that the intention of the testator in such a case must be executed without regard to the existing law, or that his expressed wishes shall prevail against the positive provisions of the statute in respect to interests or estates given. In Kentucky there is a statute substantially like that of Ohio, and the decisions in that state fully sustain the views above expressed. Thus in *Marshall's Trustee v. Rash*, 87 Ky. 116, 7 S. W. Rep. 879, the interest of the cestui que trust was given to him absolutely, but with discretion in the trustees in whom the control or title was vested to pay to him such portions of the profits and in such manner as he might think best. It was held that this discretion the trustee was bound to exercise in good faith, and the reasonable exercise of which a court of equity would compel for the benefit of the beneficiaries, and that the interest of the cestui

que trust could be reached and subjected to the payment of his debts, and it was so subjected notwithstanding the discretion conferred upon the trustees. In *Bland's Adm'r v. Bland*, (Ky.) 14 S. W. Rep. 423, there was a trust fund created, the income of which the will directed to be paid annually to a certain person for life, and declared that such income should not be subject to the debts of the beneficiary, and that, if any attempt was made to subject it to such debts, it should be added to the principal, and the beneficiary should receive no part of it. These provisions of the will were held not to take such income out of the operation of a statute making trust estates subject to the debts of those for whose use they are held. In the more recent case of *Bull v. Bank*, Id. 425, the same general principle was announced and applied where the deviser of the rents and profits of an estate provided that the interest should not be subject to the claim of any creditor.

Without multiplying authorities on this subject, which is fully discussed in those already referred to, and in 2 Pom. Eq. Jur. § 536, the conclusion of the court is that Cassius B. Hanna's share of the net annual income of the estate, accrued and to hereafter accrue until the final distribution of the principal thereof, as provided by the will, can be reached and subjected in this proceeding to the payment of complainant's judgment. The question on which the court entertains the most doubt is whether said Cassius is not entitled to the entire one half of said net income, instead of the share as above indicated, and apportioned to him, but this doubt the court has resolved against the complainant and in favor of Cassius' children on the presumption that the latter were together, equally with the son, the objects of the testator's bounty.

In regard to what should be treated or regarded as the net yearly income of the estate, which is made the subject of the trust by the will, the chief, if not the only, question or matter of difference or dispute between the parties is whether certain funds or monthly payments received and to be received by the executor and trustee from the Hocking Coal & Iron Company, under a written contract made and entered into between him and said company on September 9, 1885, for the mining of coal on certain land of the testator located in Hocking county, Ohio, are to be considered income or part of the corpus of the estate. The master has reported that the money received under this contract (amounting, up to March 31, 1892, to the sum of \$30,000) was "income" of the estate, within the terms of the trust. To this the respondents have excepted, claiming that the fund is part of the "corpus" of the estate. The executor and trustee has so treated it, and made no distribution or investment thereof, for the beneficiaries entitled to the net income under the trust. Whether said fund is to be regarded as "income" or "corpus" of the estate depends mainly upon the question whether the contract under which it has been and is still being received is a lease of the coal mine or a sale of the coal as part of the realty. This must be determined by the proper construction of the instrument and the intention of the parties. By the terms of the contract called an "agreement" the executor "grants" to the Hocking

Coal & Iron Company "the exclusive right, license, and permission to enter upon the mine and remove the coal" from the premises. He also "grants" to said company "the right to occupy and make use of so much of the surface of said land as will enable the second party (said company) to efficiently and properly conduct said mining operations, also the right to make use of so much of the timber on the surface of said premises as may be necessary in mining on said premises; in consideration whereof the company agrees to mine the coal on said premises, and to take therefrom, or to pay royalty on, not less than 50,000 tons of coal in each and every 12-months period from and after the 1st day of September, 1885, and so continue to mine and pay royalty until all the coal that can be practically mined on said premises shall be so mined and paid for: provided, that, if the second party shall not find it practicable to remove more than 25,000 tons of coal during the first period of 12 months under this lease, the remaining 25,000 tons due for said period shall be mined or paid for in addition to the stipulated 50,000 tons in the year following." The company further agree to conduct such mining operation in a good and workmanlike manner, and especially in such manner that all the coal that can be practically mined on said premises shall be so mined and paid for. And the company also agrees, within three months, to furnish the executor a map and specifications of the plan on which it proposes to conduct the mining operations; also the size and location of pillars which it proposes to leave in order to keep said mine in a perfectly good condition until the coal, as aforesaid, shall be removed from the premises. Such plans and specifications were to be deemed part of the contract, and receive the approval of the executor before the contract was to have any force whatever. The second party further agrees to pay the executor, as royalty for the coal land to be mined and taken from the premises as aforesaid in each month, the sum of ten (10) cents per ton of two thousand pounds for lump coal, such as usually passes over an inch and a quarter screen. Said payment to be made on or before the 20th day of the month following the month in which such coal shall have been mined. It is the intention of the parties that said monthly payment under this contract, at least to the amount of \$416.17 each, shall be made regularly, whether the monthly proportion of coal on the basis of 50,000 tons per annum shall have been mined or not, and that any payment so made in advance of coal actually mined shall be applied as royalty on the coal which may be thereafter mined in excess of the minimum amount herein provided for; also, that said second party shall be deemed to have fulfilled its covenant in respect to payment of royalty during the first two years of this lease if it shall pay monthly on the basis of 25,000 tons per year for the first of said twelve-months period, and on the basis of 75,000 tons per year for the second of said twelve-months period."

At the time of making the monthly payments the company agreed to furnish a written report by its engineer or other proper officer, showing the number of tons of coal mined during the preceding

month, also the total number of tons mined to date of said report, also a description of the location in the mine from which the coal mined in the month preceding was taken, to the end that the executor might be fully advised as to "the amount of coal which may have been taken from said premises under this lease, the amount paid thereon, and the place from which the same shall have been taken." The right was reserved to the executor, either in person, or by his representative to enter upon the premises, or any part thereof, at reasonable hours, for the purpose of inspecting the work of mining the coal, etc., and verifying, by measurement or otherwise, the amount of coal that has been taken from the land. The right is also given the executor to inspect the books and papers of the company relating to its operations "under this lease" for the purpose of verifying the accuracy of said reports. The company was to pay taxes, fees, and expenses under state or national laws on the coal mine, while the executor was to pay taxes on the land and coal which was not mined. It was further provided that if the coal company should "fail, neglect, or refuse, for thirty days after the same became due, to make any monthly payments, this lease may, at the option of the first party, and not otherwise, be declared forfeited, and in the event of such forfeiture the first party may at once re-enter upon, and take and hold exclusive possession of, the demised premises, and every part thereof." The executor was also given the right to forfeit the contract for the company's failure or neglect to perform either or any of its covenants, and was given a lien, in case of any such default, upon all the improvements, tracks, and fixtures which the company may have constructed or placed upon or under the surface of the premises granted, as security for full performance of each and every covenant stipulated to be paid or performed. If the mining operations of the coal were interrupted by strikes, or through means or agencies beyond its control, the obligation to mine and pay said royalty should be suspended during the period of such interruption, but except during the period of such unavoidable interruption the company was to be liable for "the amount of royalty which would be due under the terms of this contract, in respect to coal mined each month, the same as if said coal had actually been mined." It was further agreed that the company should "make no sale, transfer, or assignment, in any form, of its rights under this agreement, nor sublet any portion of said premises hereby demised," without the written consent of the executors, "and any such sale, transfer, assignment, or subletting without the consent of the first party, in writing, shall be null and void." When the company has mined and paid for all the coal that could practically be mined, and fully performed all its covenants, it was permitted to remove from the premises all tracks, fixtures, and other properties which it may have placed thereon.

This contract or agreement is clearly, in its legal effect and meaning, a lease, and the monthly payment of \$416.67 whether coal is mined or not, although called "royalty," is the rental to be paid by the lessee for "the exclusive right, permission, and license to enter upon the mine, and remove the coal," together with "the right to oc-

copy and make use of so much of the surface of said land as will enable the second party to efficiently and properly conduct said mining operations, and to make use of so much of the timber on the surface of the premises as may be necessary in mining." That the executor "grant" these rights in no way changes the character of the agreement, which is five times referred to as a "lease." No technical words are necessary in a lease, and it is not material that the rental to be paid to the lessee is called "royalty," which is perhaps the most appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from the mine. The subject of the contract is frequently referred to in the instrument as the "demised premises." The stipulations against subletting without the written consent of the executor, and for forfeiture and a re-entry for the nonpayment of the monthly royalty or rent, or for nonperformance of either or all of the covenants on the part of the company, are more appropriate to a lease than to an absolute sale of the coal in place, or as mined. "The legal understanding of a lease for years is a contract for the possession and profits of land for a determinate period, with the recompense of rent." U. S. v. Gratiot, 14 Pet. 538. In that case the license for smelting ore was styled an "indenture," and the compensation to be paid was 6 pounds of every 100 pounds of lead smelted. It was held to be a lease. In the present case the term is sufficiently definite. Subject to its sooner termination under the forfeiture clauses of the contract, it is to continue so long as there is coal that can be "practically mined." This constitutes a "determinate period." The parties themselves contemplated a lease, and so regarded the contract. The resolution of the Hocking Coal & Iron Company's board of directors authorized and directed its president to execute, in the name and under the seal of the company, "an agreement of lease" between itself and the defendant Brooks, executor and trustee, of the coal in the described premises; and said Brooks, in his testimony attached to the amended and supplemental report, (page 15,) speaks of the contract as a lease. The contract in *Hyatt v. Bank*, 113 U. S. 408, 5 Sup. Ct. Rep. 573, was treated as a lease, although it purported to "convey" all the minerals, coal, iron ore, etc., upon and under the land, for which fixed royalties were to be paid for the articles mined and removed. The case of *Edwards v. McClurg*, 39 Ohio St. 41-48, cited and relied on by defendants, is clearly distinguishable from the present, and does not support their contention that the contract here involved is a sale of coal, rather than a lease of the mining rights. But, aside from all this, the money received under the contract, whether called "royalty" or "rent," is clearly "income or increase" of the estate collected by the executors. The company has not yet mined a ton of coal under this contract, but it has been making the stipulated monthly payment of the \$416.67 since September 1, 1885. Whether the company will ever exercise its right or license to mine coal rests upon its own volition. Should it fail or decline to mine coal, or for any cause forfeit the right to do so, the money received by the executor could not possibly be considered a part of the realty or "corpus" of the estate, rather than

"income." Again, the contract provides that the "company shall be deemed to have fulfilled its covenant in respect to the payment of royalty during the first two years of this lease if it shall pay monthly on the basis of 25,000 tons per year for the first of said twelve-months period, and on the basis of 75,000 tons per year for the second of said twelve-months period." But, subject to that exception or special provision for the first two years, the contract declares that "it is the intention of the parties that said monthly payments, at least to the amount of \$416.67 each, shall be made regularly, whether the monthly proportion of coal on the basis of 50,000 tons per annum shall have been mined or not, and that any payment so made in advance of coal actually mined shall be applied as royalty on the coal which may be thereafter mined, in excess of the minimum herein provided for." No coal having been mined, the company, in order to get any benefit of the payments already made, must in the future mine coal in excess of 50,000 tons per annum.

How can the right or license to mine coal in excess of the minimum of 50,000 tons per annum, taken in connection with the uncertainty whether it will ever be exercised or not, operate or have the effect to convert or change funds that are now clearly income into "corpus" of the estate? The intention of the testator was to give the designated beneficiaries of the trust the net "income or increase" of his estate that should be collected or received by the executor under powers of management and control as broad as those possessed by himself, if living. In *Eley's Appeal*, 103 Pa. St. 306, when the word "income" was used in a will creating a trust, the court said:

"In seeking for the testator's intention, we derive little or no assistance from that class of cases in which it has been properly held that a lease of the exclusive right to mine and remove coal or other mineral, without limitation as to the quantity or time, is practically a sale of coal or other mineral in place of the land itself. The word 'income' means the gain or profit which accrues from the property, labor, or business. In its ordinary and popular meaning, it is strictly applicable to the periodical payments in the nature of rent, which are usually made under coal and other mineral leases, and we have no doubt it was so used by the testator. In the absence of any provision, expressed or implied, that the payments in the nature of rents shall be accumulated for the ultimate benefit of those in remainder, it would be a strained and unnatural construction to hold that he intended to give appellants only the annual interest in the installments of rent."

The further contention urged by respondents, that, inasmuch as coal mines in question were not opened in the life of the testator, the executor had no authority to lease the same so as to make the rental therefor income, is not sound. In *Eley's Appeal*, *supra*, it is held that "by empowering his executors, with the written consent of six tenths of the owners, to lease the coal for mining purposes, the testator virtually gave appellants the same right they would have had if the mines had been open and operated in his lifetime." *Daly v. Beckett*, 24 Beav. 114-123, supports this proposition, and is an authority directly in point. In the present case the executor was invested with the same power of leasing as the testator himself possessed, and that, too, without the consent of any one interested, directly or remotely, in the estate under the will. This

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manifestly placed the executor's authority to make the contract in question upon the same footing as though the mines had been opened by the testator in his lifetime. It is settled law that the rents of an open mine are income, and go to the tenant for life; and in *Wentz's Appeal*, 106 Pa. St. 301, and *McClintock v. Dana*, 106 Pa. St. 386, it was decided that when land is chiefly valuable for coal-mining purposes, although the mines are unopened, the power to lease the real estate included the power to lease the coal lying under the surface. So in *Williard v. Williard*, 56 Pa. St. 119, it is held that a life tenant of land, whereof the timber is the chief or intended source of profit, may cut it for profit. In the present case it appears that the chief, if not the sole, value of the land, was for coal-mining purposes, and that the only profit to be derived therefrom was by sale or lease of the coal, either of which the executor, in his discretion, had the power to do. Having exercised the discretionary power of leasing, the rents or royalties in his hands, derived from the lease of the coal mines, are to be regarded as income, within the meaning of the testator's will. See *Bedford's Appeal*, (Pa.) 17 Atl. Rep. 538.

It follows that the exception taken by defendant or defendants to the report of the master as to the character of funds received by the executor under said contract of September 9, 1885, with the Hocking Coal & Iron Company, must be disallowed and overruled, and that the money already and yet to be received thereunder should be regarded as income, in which the defendant Cassius B. Hanna has a one-fourth share, which is subject to the payment of complainant's debts. The \$30,000 of rent or royalty received by the executor up to March 31, 1892, has been commingled with other funds, and invested by him, and he states that there has been no loss on said investments. The master reports (amended and supplemental report) that, exclusive of said royalties for lease of coal mines, the trustee has received between November 20, 1889, and March 31, 1892, net income to the amount of \$17,008.67. It is suggested by counsel for defendant that the master's addition is wrong, and that this should be only \$16,518.67. But the court finds no such error in the addition as claimed. The complainant is entitled to subject in the hands of the trustee one fourth of said sum of \$17,008.67 to the payment of his judgment against Cassius B. Hanna. The trustee will be allowed no credit for sums paid or advanced to Cassius B. Hanna and his wife, Hattie L. Hanna, from and after the 4th day of December, 1889, when said trustee was served with process in the cause, and had notice of complainant's claim, and all payments and advances made by the trustee after that date were made at his own risk and peril, including the \$1,876.50 paid Mrs. Ford on December 28, 1889, for account of Cassius B.

It is shown by the report that the income account of Cassius B. Hanna prior to November 20, 1889, had been overdrawn to the amount of \$690.95. This sum will be deducted from the above allowance made complainant, as against said Cassius and the said trustee. It is not material to determine and fix what is the exact

amount of the present net annual income of the estate, either including or excluding the rent or royalty upon coal mines. There will, however, be inserted a provision in the decree that one fourth of the net annual income of the estate, including the rent and royalty from the lease of coal land, and from all other sources, that may have been received since March 31, 1892, and that shall thereafter and hereafter be collected and received by the trustee, shall, as received and collected, be paid over to complainant or his attorney of record on and towards the satisfaction of the complainant's judgment, and interest thereon, until it is discharged, or until the final division of the estate among the testator's grandchildren, as provided by the will.

The foregoing conclusions render it unnecessary to consider and separately act upon the various exceptions to the master's report or reports, filed by the parties. Said exceptions so filed, so far as not disposed of above, are overruled. The costs of the cause, including a reasonable allowance to the special master, will be divided between the complainant and the defendant Brooks, each being taxed with one half thereof. Let a decree be entered accordingly.

COMSTOCK v. HERRON et al.

BARR v. SAME.

(Circuit Court of Appeals, Sixth Circuit. May 11, 1893.)

Nos. 74 and 75.

1. WILLS—CONSTRUCTION—LIFE ESTATES.

A will provided that specified sums should be invested, in the discretion of the trustees, and the income thereof paid to certain persons for life, and that until such investments were made the beneficiaries should be paid stated sums annually, which sums were about the equivalent of 6 per cent. upon the amounts directed to be invested. *Held*, that under the will the beneficiaries were entitled to these annuities until the investments were made, without any deduction for a deficiency in the general income of the estate.

2. SAME—ELECTION—ESTOPPEL—EVIDENCE.

The investments were not made by the trustees for several years, part of which time the annuities were paid in full, after which the trustees suggested to the beneficiaries a ratable abatement of the annuities, in order to keep within the income of the general estate. One of the beneficiaries received such ratable proportion, but declined to receipt for it except "on account." As to the other beneficiary, there was no satisfactory evidence to show that he had acquiesced in the partial payment. *Held*, that there was no election to take such partial payments as payments in full, so as to prevent a recovery of the deficiency.

3. JURISDICTION OF CIRCUIT COURT—ADMINISTRATION OF ESTATES.

The circuit court of the United States has jurisdiction, as between citizens of different states, of the administration of the assets of deceased persons, such assets being within their territorial jurisdiction; and, in a suit against a trustee under a will for an accounting and distribution, the court erred in remitting the case to the state probate court for the taking of accounts.

Appeals from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

In Equity. Bill by Nellie P. B. Comstock, a citizen of Indiana, and a beneficiary and residuary legatee under the will of Margaret R. Poor, deceased, against John W. Herron and William H. Fisher, citizens of Ohio, as trustees and executors under the will, to enforce the execution of the trusts in her favor. David McKnight Barr and Adele W. Lee, also beneficiaries and legatees, were made parties defendant; and subsequently Margaret E. Merrill, a citizen of Kentucky, William B. Finley, a citizen of Missouri, Ada D. Huston, a citizen of Kansas, and William A. Barr, a citizen of New York, also beneficiaries and residuary legatees, voluntarily entered their appearance, and were made parties. David McKnight Barr and Adele W. Lee filed crossbills, but by various stipulations and adjustments the case was finally tried on certain questions raised by the bill, with its amendments, the supplemental bill, the answer of the trustees and executors, replication thereto, and the cross bill of David McKnight Barr. For an opinion rendered on exceptions to the answer, see 45 Fed. Rep. 660. The decree of the court below denied the relief asked, and remitted complainants to the probate court of Hamilton county, Ohio, to obtain a proper accounting. From this decree, Nellie P. B. Comstock and David McKnight Barr appeal. Reversed.

Statement by SEVERENS, District Judge:

These suits, entitled as two, are in substance one case, upon the original and supplemental bills of Mrs. Comstock, the complainant in the principal suit, and the cross bill of David McKnight Barr, who was a defendant therein. The case comes here from the circuit court for the southern district of Ohio, upon the appeal of the complainants in the original and cross bills. These several bills were filed for the purpose of compelling the execution of certain trusts created in favor of the complainants, respectively, by the will of Margaret B. Poor; and the original bill of Mrs. Comstock also prayed for an accounting and distributing of the residuum of the estate, she being, not only a specific, but a residuary, legatee under the will.

Mrs. Poor died on the 18th day of August, 1882, and was at the time of her decease a resident of Hamilton county, in the state of Ohio. In her will, Mrs. Poor, after making certain specific bequests to various charities, therein mentioned, and giving to Nellie Preston Barr, now Mrs. Comstock, all her personal apparel and ornaments, her household furniture and ornaments, her household stores, and her horses and carriages, etc., by the third paragraph thereof devised and bequeathed all the residue of her estate, real, personal, and mixed, to John W. Herron and William H. Fisher, in fee simple, in trust, with full power to manage and dispose of the same as to them should seem best in the execution of the trusts created by the will.

By the fourth paragraph she directed the trustees to invest \$25,000 of her estate in productive real estate, or interest-bearing securities, as to them might seem best, with power to change the investments, in their discretion, and to pay the income from that sum so invested to her brother David McKnight Barr, during his life, and that until said sum was so invested they should pay to him from the day of her death, out of her estate, at the rate of \$1,500 per annum.

By the fifth paragraph she directed them to pay to Nellie Preston Barr, her niece, \$10,000 in money, and to invest the sum of \$56,667 in productive real estate or interest-bearing securities, at their discretion, with power to change the investments, and to pay the income therefrom statutely to her, and further directed that until the \$10,000 was paid, and the other sum invested for her benefit, the trustees should pay to her at the rate of \$4,000 per annum from the date of the decease of the testatrix. This paragraph also directed that the amount so invested should, upon the death of the ben-

eficiary, be paid to certain persons in a certain preferred order therein stated, or, in case none of the proposed subsequent beneficiaries should be living at the death of the said Nellie P. Barr, the whole invested sum should fall into the residuary fund, and be disposed of as directed by the fourteenth paragraph.

The testatrix, in several following paragraphs, directed the investment by her trustees of various sums for the benefit of other persons therein named, with similar provision for allowances in case the investments should be postponed, and to still others she directed the payment of certain definite sums, out and out. The particulars of the several bequests other than those in favor of the complainants, it is not necessary here to state, further than to say that some of the beneficiaries were persons who, with Nellie Preston Barr, were named as residuary legatees. By the fourteenth paragraph of the will, Mrs. Poor directed that all the rest and residue of her estate should be paid over to her six nephews and nieces, therein named; Nellie Preston Barr being, as above stated, among them. Other provisions, not material to any question arising on the record, followed, and Mr. Herron and Mr. Fisher were nominated as executors of the will, without bond. The will was duly probated in the probate court for Hamilton county. The executors therein named were confirmed, and they accepted the trusts imposed by the will, as executors and trustees.

The total value of the estate was about the sum of \$232,000, some four-fifths of which was productive. Some of the rest consisted of unproductive real estate. The sum of \$10,000 was duly paid by the trustees to the complainant Mrs. Comstock as directed by the fifth paragraph of the will, and no question arises upon that provision. It also appears that the several investments directed by the will have, since the commencement of this suit, been made, as of January 1, 1891, to the satisfaction of the parties, and by their consent those investments were confirmed by the decree in the court below.

In the course of the management and settlement of the estate, it was for some time found practicable by the trustees to meet the accruing charges upon it from funds coming to them as income from the productive portions, and from the disposition of portions which they could convert into money without prejudice to the estate. The investments for Mrs. Comstock, David McKnight Barr, and the others were not yet made; but the annuities due to them under the will were fully paid until January 1, 1887. Shortly before this time the trustees, finding that the income from the estate, and the proceeds of such portions as they had thought it judicious to sell, did not provide a sufficient fund for the purpose of meeting the charges against the estate, including the annuities above mentioned, addressed a communication, written by Mr. Herron, who seems to have had the principal active charge and management of the trust, to Mrs. Comstock, who had married, and was living out of the state of Ohio, being then at Detroit, in which Mr. Herron, after reciting the reasons for the shrinkage of income from the estate, stated that in consequence of this the amount of the income for the last two years would not pay the annuities, and that he saw no other way than to make a pro rata diminution in order to keep the estate together until certain unproductive property could be sold. He suggested to her that if the trustees made the investments the beneficiaries would not get more than five-sixths of what they had been receiving; that 5 per cent. was a fair rate of interest; and that he thought the whole property should be kept together, and the income divided; but, if "the heirs" thought better, he would divide it into shares. In reply to this, Mrs. Comstock said that she was greatly distressed at the condition reported by Mr. Herron, and, after making certain inquiries of him in regard to matters affecting the estate, said that, for one, she was in favor of keeping the estate together, and added that it seemed to her that, by the terms of the will, the first thing to be accomplished was the payment of the annuities. No answer appears to have been made to this letter, but about two months later Mr. Herron again wrote to Mrs. Comstock, stating that he desired to explain that the next year (1887) there must be a diminution of her income, but exactly how much he could not tell her; that there would be a deficiency of income for the then current year, which he had paid out of the principal;

but which he "must pay back;" and that the income would nearly, if not quite, pay the next year's annuity, (presumably, if none were taken to replace principal.) In January, 1887, Mr. Herron again wrote that for the present year he was unable "to pay more than 5 per cent. on the sums given to each heir by the will;" that this would reduce her allowance; but that he thought that after that year he could return to the old rate.

No further correspondence, directly bearing on this subject, appears, and there is no other evidence of a more specific nature. But it is shown that Mrs. Comstock was paid only \$2,833.35 per annum from January 1, 1887, to the date of the investment, which was January 1, 1891. A fact of much importance in the solution of the questions presented for decision is that Mr. Herron was himself a counselor at law, of large experience and high standing, and, no doubt deservedly, had the confidence, not only of the testatrix, but also of all who were interested in the estate. It was very probably because of these qualities that he was constituted a trustee, and afterwards accorded the management. Up to January 1, 1887, and perhaps for one or two months later, she receipted in full for her annuity, but after that she receipted for the sums paid her as "received on account of income." It appears that after the payment of the \$10,000, which was in 1882, Mrs. Comstock only received \$3,400 per annum; the parties seeming to have adopted the construction of the provision in the will to require that upon the payment of the \$10,000 the allowance should be reduced in the proportion of that sum to the whole amount of both provisions made for her, i. e. \$67,667,—a construction very equitable to the estate. She does not, in this suit, claim any more than at the rate of \$3,400 per annum; but she demands the difference between that sum and the \$2,833.35 which has been paid her, or \$566.65 for each of the four years during which she has received the diminished allowance.

As to David McKnight Barr, there is evidence in the record from which it appears that the trustees made a similar suggestion to him, when the estate became short of available funds, and that in fact his annuity was reduced during the same period from \$1,500 to \$1,200 per annum. Without going into a detail of the evidence on this point, it is sufficient to say that it presents the question whether he assented to the proposition of the trustees under circumstances which conclude him. By his cross bill the complainant therein sought to compel the trustees to pay him the deficiency of \$300 per annum for the four years during which it was withheld.

The defense to both the original and cross bills was the same, namely, that the complainants therein had assented to and acquiesced in a course of proceeding on the part of the trustees whereby they had forborne to make the investments for them under the will in consideration that they would take the diminished allowance during the time of such forbearance, and that they are thereby estopped from now demanding the deficiency.

The court below sustained this defense, and denied the relief sought in respect to the unpaid annuities, and also denied the accounting prayed for by the original complainant, Mrs. Comstock, whereon to obtain the distribution of the residuary estate. The parties were remitted by the decree to the probate court for Hamilton county to obtain the proper accounting, and it was ordered and adjudged that thereupon the trustees distribute the amount there ascertained in proportions fixed by the decree. Other ordering parts of the decree are not involved in this appeal. Both original and cross complainants appeal from so much of the decree as denies to them, upon the grounds of estoppel, the relief sought in respect to the unpaid portions of their annuities; and Mrs. Comstock appeals, also, from that part of the decree which denies her an accounting in that court, and remits her to the probate court for Hamilton county for that purpose.

Harlan Cleveland, (C. B. Matthews, of counsel,) for appellants.

John W. Herron, Lewis N. Gatch, and William C. Herron, for appellees.

Before JACKSON, Circuit Judge, and BARR and SEVERENS, District Judges.

SEVERENS, District Judge, (after stating the facts.) Upon the foregoing facts, as gathered by us from the pleadings and proofs, we think that there is error in the decree, in both particulars complained of. It is clear that, upon a proper construction of Mrs. Poor's will, the annuities which the trustees were required to pay to Mrs. Comstock and to David M. Barr until the permanent investments should be made for each of them were specific charges upon the estate itself, the whole fund, in the hands of the trustees. The beneficiaries were not restricted to the income of the estate as the source from which their annuities should be paid, as the trustees seem to have practically assumed in dealing with the beneficiaries in the execution of the trust. The annuities were in no sense dependent on income, and had no specific relation to it. It may be that the trustees, in providing for the satisfaction of the charges, might find it expedient to appropriate income for that purpose, but it was not the measure of the rights of the *cestuis que trust*.

It is sufficiently shown, as matter of fact, that at the beginning of the year 1887 the income realized by the trustees from the estate was insufficient to pay the accruing charges upon it, and that, finding the estate in that predicament, they suggested to the persons interested in the trust that, in order to keep the disbursements within the limits of the income, it would be necessary to diminish the current annuities, and that this diminution was continued for the period of four years from January 1st of that year, at the expiration of which time the permanent investments were made. It is now claimed that the diminution of the annuities and the postponement of the investments was with the assent of the annuitants, and that the circumstances were such as to preclude them from any right to assert a claim for the unpaid portion, upon the ground that they are estopped by their acquiescence and election. We have stated the defense in rather more specific terms than it is presented by the answer, and have given that defense the benefit of all the inferences which have been drawn from the allegations of the pleading on the argument.

Certain well-settled rules, recognized by courts of equity, are applicable to the solution of the question whether, in such circumstances as are exhibited by the record, such an estoppel has in fact been established.

One of those principles is that when it is sought to preclude a party from the assertion of what would otherwise be a clear legal right, upon the ground that he has elected an inconsistent right, there must have been some definite agreement, in the nature of an express contract, or some line of conduct, purposely taken, from which such definite agreement may be fairly and reasonably implied. The substantial elements of a legal contract must be found in the circumstances. *Jorden v. Money*, 5 H. L. Cas. 185. The question in that case was whether a party was concluded by the representation of her intention to relinquish a right, upon which representation others had so proceeded that their steps could not be retraced. It was held that there was no estoppel in such a case, for that, in order to be binding, the representation must amount

to a promise upon a consideration; that is to say, to a contract. Lord St. Leonards dissented from the majority, principally, as it would seem from an attentive reading of his opinion, upon his view of the facts, which he thought constituted a contract. In *Maddison v. Alderson*, L. R. 8 App. Cas. 473, Lord Chancellor Selborne said that he understood the law to have been so determined in *Jorden v. Money*.

That this is the basis of the estoppel in such cases is assumed in *Wheeler v. Smith*, 9 How. 55. In that case a testator had devised property to trustees upon a trust which the court held invalid. The heir at law, a young man, expressed to the trustees his conviction that the devise was void, and stated his determination to test its validity. He was dissuaded by the trustees, one of whom was a distinguished lawyer, and, in deference to their opinion that the devise was valid, consented to waive his right to the property, and take a sum of money instead. The court held that he was not bound by the compromise, and said:

"It appears to us that the agreement under such circumstances is void. It cannot be sustained on principles which lie at the foundation of a valid contract. The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely, and with a proper understanding of his rights."

Among the elements of a contract is the certainty of the thing agreed upon. It is proper to observe, in passing, that the present case is not strictly one of "election," as that term has been used in equity to define the choice of rights, one of which is already possessed, and another, inconsistent one is tendered by the donor; but the term is here employed in a wider sense, to indicate the choice of inconsistent rights or benefits, without regard to the peculiar manner of their origin. However, the rules applicable are analogous.

We are unable to find sufficient evidence in this case of any agreement, on the part of either Mrs. Comstock or Mr. Barr, having any defined scope and limits. In the first letter of Mr. Herron to Mrs. Comstock, in which he lays the foundation of the supposed election by her, he does not state the amount of the reduction he proposes. All that he says, bearing upon the subject, is that "five per cent. is regarded as a good rate to receive from property," and in a later letter he writes to her that he desires "to explain that next year (1887) there must be a diminution of your income, but exactly how much I cannot tell you." This, as he further explains, was because he had taken from the principal to pay the annuities for 1886, but which he "must pay back." Up to January 1, 1887, there had been nothing more definite than this in regard to the amount of the proposed reduction. Later on, in January of that year, he wrote her that he was "unable, for the present year, to pay more than five per cent. on the sums given to each heir by the will." There is no evidence, oral or written, tending to show Mrs. Comstock's assent to this as a full payment of the amount due her. On the 18th of March following, she wrote him in regard to a receipt to be signed by her for money which he had sent, and said:

"Your receipt reads \$236.11, being one month's payment due from the estate of said deceased; and, as I understand the will, we were entitled to six per cent. on the sum devised to us until a certain amount of property is set aside to each heir. Am I correct in this? Of course, I understand that you cannot pay 6 per cent. this year, but in case you should be taken away, and the trustees appointed by the court, I should not want them to find my receipt for \$236.11 as being one month's payment of the sum devised me."

The reasonable interpretation of this letter would seem to be that she did not wish to give receipts in full because she did not intend to take whatever sum the trustees could then conveniently pay as final satisfaction of her claim. It is difficult to see how, in the face of this letter, the trustees could have understood that anything in the nature of an agreement to take any definite sum had been intended by her.

The evidence is equally indefinite in regard to the time during which the proposed reduction was to continue. It would rather seem that it was expected to continue for one year only, but this is the only basis afforded by the evidence for an assumption that there was an election to take the reduced amount for four years. Upon the whole, without going into further particulars, the impression produced upon our minds by the testimony on that subject is that Mrs. Comstock did not assent to anything in the nature of a contract, nor take a course of conduct from which it could be reasonably implied that she was party to an agreement with the trustees, surrendering her right, nor intentionally lead them to do what they otherwise would not have done.

In regard to the case of David M. Barr, there is a similar indefiniteness in the terms of the supposed agreement. The evidence fails to satisfy us that he assented to any certain proposition. We rather infer from it that he took what the trustees felt that they were justified, by the condition of the estate, in paying him, simply because he could not get more without resorting to compulsory measures, and expected to be reimbursed when the estate should come into better condition for doing it. It is true, one of the trustees testifies, in a general way, that all the heirs, including David McKnight Barr, assented to him, in positive terms, to the arrangement proposed by his letter to Mrs. Comstock. It would have been more satisfactory if he had given the particulars of his communications, and the replies upon which his conclusions are founded. Mr. Barr goes more into detail, and denies that he at any time acquiesced in partial payment of his allowance. The burden of proof was upon the trustees to show some binding agreement, or a distinct acquiescence in a course of proceeding which would be equivalent thereto, and there would result an injury to others if the agreement or assent were revoked, and we do not think it is sustained.

From Mrs. Comstock's letter of January 18, 1887, it is seen that while she indicates her understanding that, until the investments were made, she was entitled to the full amount of the annuity, she appeals to the trustees to inform her about this. The trustees persistently went on, upon the theory that the annuities were payable out of income only, and were dependent thereon. Correct informa-

tion was due to her, and in order to preclude her by election it should appear that she acted upon knowledge of her rights. 1 Lead. Cas. Eq. (3d Amer. Ed.) p. 419, where it is said in the notes by Hare & Wallace that an election can only be determined "by plain and unequivocal acts, under a full knowledge of all the circumstances and of the parties' rights; and a bare acquiescence, without a deliberate and intelligent choice, will not be an election." Story, Eq. Jur. § 1097; Snell, Eq. (2d Eng. Ed.) 186; Wheeler v. Smith, 9 How. 55; Bennett v. Colley, 2 Mylne & K. 225; Macknet, v. Macknet, 29 N. J. Eq. 54, and cases cited; Davis v. Bagley, 40 Ga. 181.

If, therefore, we could see that she did in fact make an election, we would still be compelled to hold that she did so under moral pressure, and in deference to the superior judgment of the trustees as to what her rights were, and, further, that they were mistaken in that judgment.

The rule which requires clear proof to warrant the conclusion of a waiver of a substantial right is especially applicable to those holding fiduciary relations. When a trustee, holding a position of power and influence over the cestui que trust, sets up against that party, for the benefit of others, an estoppel precluding the assertion of a right created by the trust, and that estoppel is founded upon a transaction between the beneficiary and himself, he must be expected to produce quite satisfactory proof that the party proposed to be estopped came freely, and with full understanding of his rights, into some inconsistent arrangement, of tangible form and certainty. Nothing less than this should satisfy the court. Wheeler v. Smith, 9 How. 55; Lloyd v. Attwood, 3 De Gex & J. 614, (judgment of Lord Justice Turner;) Aspland v. Watte, 20 Beav. 474; Walker v. Symonds, 3 Swanst. 1. While the general rule is, undoubtedly, that mere mistake of law in regard to one's legal rights will not constitute ground for relief, yet the rule is otherwise if such mistake is the result of influence exercised by one occupying a fiduciary relation of superiority, no matter with what motives applied.

In the present case the defense is in the interest of the residuary legatees, whose fund will be increased at the expense of those having a paramount claim upon it. It is rightly said by the trustees, in their brief, that they have themselves no interest to subserve by it. But to sustain the defense the parties whom it would benefit must claim through the transaction of the trustees, and are affected by its qualities. There was no wrong actually intended by the trustees. But we think it is a mistake to suppose that what took place between them and the present complainants amounted to a surrender of the rights of the latter under the will, and an estoppel against their assertion in the present suit. The fund remains undistributed, and subject to the power of the court. Whether other considerations might have been potential if the fund had gone beyond reach, it is not necessary to inquire. The situation is such that equity can be done without injury to any one. Mills v.

Drewitt, 20 Beav. 632; *In re Ashwell's Will*, 1 Johns. Eng. Ch. 112; *Snow v. Booth*, 2 Kay & J. 132. We are fully persuaded that the trustees have not in fact pursued any substantially different course with regard to the estate from that which they would and should have taken if the transactions with the *cestuis que trust* which occurred had not taken place at all.

In respect to the other ground of appeal, we think the court below, having complete jurisdiction of the subject-matter and of the parties, should not have referred the parties to another tribunal, over which it had no control or supervisory power, for an accounting, but should have ordered this to proceed under its own authority. When the judicial powers of the circuit courts of the United States, in equity, were originally granted, their jurisdiction was extended over the general subjects of equity jurisprudence upon which the court of chancery in England was accustomed to exercise its powers. One of those subjects was the administration of the estates of deceased persons. Owing to the limited nature of the powers of the ecclesiastical courts, it was necessary, especially where property was charged and limited by trusts, to apply to the court of chancery, which, by the amplitude of its faculties for adjudication and relief, was competent to determine such matters, and afford the proper remedy. 1 Story Eq. Jur. § 532 et seq.

This jurisdiction of the circuit courts in equity remains unaltered, so far as the present subject is concerned. The states of the Union have, by their constitutions and statutes, distributed their own judicial power. But that distribution does not and cannot impair the general equity jurisdiction of the circuit courts of the United States to administer, as between citizens of different states, the assets of a deceased person, those assets being also within their territorial jurisdiction. *Green's Adm'x v. Creighton*, 23 How. 90; *Payne v. Hook*, 7 Wall. 425; *Lawrence v. Nelson*, 143 U. S. 215, 12 Sup. Ct. Rep. 440; *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. Rep. 503.

No doubt the probate court of Hamilton county has, as have the probate courts generally in the several states, much larger powers than the ecclesiastical courts of England had. It has the exclusive power of admitting wills to probate, and of appointing executors thereof, and of appointing administrators of intestate estates. In such proceedings the federal courts are without authority. *Fou-
vergne v. New Orleans*, 18 How. 470; *Broderick's Will*, 21 Wall. 503.

But in addition to this the probate court is intrusted with some—not all—of the general powers and duties of courts of equity. Whenever, in the exercise of this concurrent jurisdiction, the probate court has adjudicated upon a matter within the scope of its authority, such effect will be given in the courts of the United States to that judgment as by the law of the state it is entitled to. So far as validity and conclusiveness are given to it by state law, it will be recognized by the latter courts, and given effect, upon the same general principles as other judgments lawfully

rendered, and subject to the same limitations. *Caujolle v. Ferrie*, 13 Wall. 465; *Veach v. Rice*, 131 U. S. 293, 9 Sup. Ct. Rep. 730; *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. Rep. 369.

There is no actual possession of the fund by the probate court. That court has simply certain powers of adjudication which may affect it.

The complainant Mrs. Comstock is entitled to an accounting in the court below. Whatever is shown to be concluded by judgment in the probate court will be so treated, to the extent that such judgment is conclusive by the laws of Ohio. Subject to any such adjudication, the complainant is entitled to have the matters involved adjudicated by the court whose jurisdiction she has invoked. It is said in the brief for the trustees, and urged upon the argument, that there is really no controversy about the accounts, and that the taking them would involve useless expense. If this be so, the parties may, by stipulation in the circuit court, dispense with the reference, in whole or in part.

We think that an accounting should be ordered in the court below; that the trustees should be decreed to pay out of the trust funds to the complainants in the original and cross bills, respectively, the unpaid portions of the so-called annuities for the four years succeeding January 1, 1887, as claimed by them in the said original and cross bills; and that the residuary estate, when ascertained, should be distributed to those entitled.

The decree must be reversed, and the cause remanded, with directions to proceed therein in conformity with this opinion.

JACKSON, Circuit Judge, sat upon the hearing of this case, and participated in the conference thereon, and concurred in the propositions upon which the decision is rested, but was not a member of the court when its opinion was announced.

NATIONAL CORDAGE CO. v. PEARSON CORDAGE CO.

(Circuit Court of Appeals, First Circuit. February 28, 1893.)

No. 47.

1. CORPORATIONS—OFFICERS—AUTHORITY—CONTRACTS—EVIDENCE.

In an action on a contract for the sale of hemp executed on behalf of a cordage company by its treasurer, the company contended that he had no authority to make such contracts. There was put in evidence a by-law of the company to the effect that the treasurer "should discharge the duties usually and customarily pertaining to" such office; and a witness for plaintiff testified that he was familiar with the duties of treasurers of cordage and other manufacturing companies at the place where the contract was executed, and where the cordage company was located, and that they were accustomed to buy and sell merchandise, and to sign and accept contracts similar to the one in suit. *Held*, that the question of the treasurer's authority to bind his company by such a contract was for the jury.

2. SALE—CONTRACT—CONSTRUCTION.

A contract recited in its first paragraph that defendant had sold to plaintiff a certain number of bales of hemp for future delivery. The

second paragraph stated that "contracts for" a like number of bales bought by defendant "are to be given to" plaintiff "in place of this contract, which is to be surrendered." An addendum to this contract stated that "it is agreed that the acceptance of contracts by" the plaintiff, "if given, shall not in any way change the liability of either party hereto as regards terms of sale and price." *Held* that, construing the two papers together, the contract was not a mere sale of contracts for hemp, but that the vendor had the option to deliver the contracts, and, if it failed to exercise this option, the contract remained a sale of the actual bales of hemp.

3. SAME—BREACH—CONFIRMATION—CONDITIONS.

Defendant contended that this contract was made subject to an existing agreement that plaintiff should purchase hemp from defendant alone, and that, as plaintiff had thereafter made certain purchases in the open market, the contract of sale was abrogated. It appeared that defendant afterwards sent plaintiff an alleged confirmation of the original contract, reducing the quantity called for therein by that purchased by plaintiff in the open market; and the paper concluded: "This contract is further subject to the proper execution by the" plaintiff "of its general contract with the" defendant. *Held*, that this was not to be considered an amendment to the original contract so as to make the whole transaction subject to this condition, but the condition applied only to the so-called "confirmation," and, having never been performed, the confirmation never took effect.

4. SAME—MEASURE OF DAMAGES—EVIDENCE.

After being notified that defendant would not complete the sale, plaintiff bought a cargo of hemp of greater quantity than that contracted for from defendant; and defendant asked an instruction that if this hemp was bought as a substitute for that which defendant failed to deliver under its contract, then the measure of damages would be the difference between the price so paid and the contract price. *Held*, that the instruction was properly refused where there was no evidence that the plaintiff intended this purchase as a substitute for the hemp which defendant refused to deliver.

In Error to the Circuit Court of the United States for the District of Massachusetts.

At Law. Action by the Pearson Cordage Company against The National Cordage Company for alleged breach of contract. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

The contract originally entered into between the parties was as follows:

"New York, April 5, 1890.

"Sold by The National Cordage Company, of New York, to the Pearson Cordage Company, of Boston, eight thousand (8,000) bales Manilla hemp, about one-half Cebu and one-half current; Cebu at nine and one-quarter (9¼) cents per pound, current at nine (9) cents per pound; both less one and one-half per cent. for cash, delivered in Boston, shipment from Manilla during the months of April and May by sailing vessel, or equivalent delivery by steam. Contracts for the first and third four thousand bales of Manilla of these grades, which is bought by The National Cordage Company, their representatives or agents, (contracts running direct from the importer to the Pearson Cordage Company,) are to be given to the Pearson Cordage Company in place of this contract, which is to be surrendered.

"Accepted:

Pearson Cordage Company.

"B. Preston Clark, Asst. Treasurer.

"The National Cordage Company.

"E. M. Fulton, Treasurer."

To this contract there was afterwards added the following:

"New York, April 9, 1890.

"It is understood and agreed and made part of the within contract that at time of arrival of hemp buyers are to pay any increase in present duty of \$25 per ton, and to receive benefit of any reduction. And it is agreed that the acceptance of contracts by the Pearson Cordage Company, if given, shall not in any way change the liability of either party hereto as regards terms of sale and price.

"Accepted:

The National Cordage Co.

"E. M. Fulton, Treas.

"Accepted:

B. C. Clark,

"Pres. & Treas. of the Pearson Cordage Co."

It appeared that prior to the execution of these papers there had been negotiations between the parties looking to the appointment of The National Cordage Company as the sole agent of the plaintiff to buy all hemp required by it in its business, and a contract to that effect had been signed by plaintiff "subject to approval of counsel." Defendant contended that this contract for the sale of hemp was made with the understanding that it was to be subject to this general contract, and that, as plaintiff had violated the latter, the contract sued on was abrogated. The contention was based on evidence that about April 12th the plaintiff purchased certain other hemp; and the correspondence between the parties showed dissatisfaction on defendant's part with this purchase, and an intimation that the contracts of sale would not be performed by it. Thereafter the following paper was executed by defendant, and sent by mail to plaintiff:

"Contract for hemp under date April 5th, 1890, by which The National Cordage Co. sold the Pearson Cordage Co. eight thousand bales of Manilla hemp (4,000 bales current at 9 cents, less interest, and 4,000 bales Cebu at 9¼c., less interest) is hereby confirmed with the following restriction: The Pearson Cordage Co. having bought 2,764 bales per Nellie M. Slade and 440 bales by the Gen. Domville, their contract for the 8,000 bales is reduced correspondingly, both as regards quantity and quality. This contract is further subject to the proper execution by the Pearson Cordage Co. of their general contract with The National Cordage Co.

"The National Cordage Co.,

"J. M. Waterbury, President."

Defendant contended that this was an essential part of the original contract of April 5th-9th, and that, as the general contract herein referred to was never executed by plaintiff, this confirmation never took effect. There was a conflict of evidence as to whether this was accepted by the plaintiff. It was also shown that on the 5th of May plaintiff, after having been notified that defendant would not perform its contract, bought a cargo of hemp out of the ship Granite State, referred to in the opinion. The jury found a verdict for plaintiff for \$41,391, upon which judgment was entered for plaintiff, and defendant sued out a writ of error.

Richard Olney, Lewis S. Dabney, and Reginald Foster, for plaintiff in error.

Robert M. Morse and Horace G. Allen, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. The third and fourth requests for instructions to the jury made in the court below by The National Cordage Company, defendant in that court, and now plaintiff in error, were not carried into the bill of exceptions, and therefore are not before us for adjudication. The eighth and eleventh requests have been waived in this court, and also the questions raised at the trial touching the admissibility of certain testimony.

We will first consider the second request, which was, in effect, that the court instruct the jury that the treasurer of The National Cordage Company, who purported to have executed the alleged contract in suit, was not authorized to bind that corporation. This court has on two occasions reviewed the law touching the duty of courts to instruct juries to make findings for plaintiff or defendant, as the case may be, and has no occasion to reiterate what has been said, as the rule is clear and thoroughly settled. The proposition of the plaintiff in error is that there was not sufficient evidence to go to the jury; and, as no exceptions were taken to the specific instructions of the court on this point, the plaintiff in error is limited to that request. The by-law of The National Cordage Company was put in evidence, to the effect that the treasurer "should discharge the duties usually and customarily pertaining" to such office. Aside from other witnesses, Benjamin C. Clark, a witness for the plaintiff in the court below, first qualified himself by showing an apparently extensive experience, and, being asked what were the usual and customary duties of treasurers of cordage companies and manufacturing companies at New York, the habitat of The National Cordage Company, and the place of negotiation of the alleged contract in suit, testified that such treasurers buy and sell merchandise, sign contracts, and accept contracts, and enlarged upon this. That this condition of the proofs made an issue eminently proper for the jury this court cannot doubt.

The seventh and twelfth requests for instructions, and perhaps some other portions of the bill of exceptions, turn upon the claim of The National Cordage Company that the alleged contract in suit was not for the sale and delivery of hemp, but for the sale and delivery of certain contracts for hemp. The phraseology of the original paper of April 5, 1890, is not clear on this point; but doubt was removed by the additional paper of April 9, 1890, which contains the following: "And it is agreed that the acceptance of contracts by the Pearson Cordage Company, if given," and so on. This shows that the party vendor had an option of giving contracts, which, of course, is inconsistent with any pretense that both parties were bound to give and receive them. There is no evidence in the case that The National Cordage Company undertook to avail itself of the option, so that the contract stands as one for the purchase and sale of hemp.

The propositions made by the plaintiff in error touching some portions of the case which indicate that the Pearson Cordage Company preferred to acquire the original importer's contracts, also touching the circumstances of the parties, also touching the

claim that this addendum of April 9th was suggested by the Pearson Cordage Company, and assented to by the plaintiff in error solely for purposes aside from the point we are considering, are too remote to be applied by a court of common law in construing this or any other contract, whatever effect they might have in tribunals proceeding on broader or equitable principles. Also the suggestions that the first paragraph of the paper of April 5th is to be construed in connection with the closing one, and that the former is in the form of a bill of parcels, to which the merchants who drew the paper were accustomed, do not meet the case, because the true color of the transaction in this particular comes from the addendum of April 9th.

The tenth request for instructions made by the plaintiff in error relates to a cargo of hemp by the ship *Granite State*, purchased by the Pearson Cordage Company May 5, 1890; and certain instructions of the court to the jury, to which exceptions were taken by the plaintiff in error, relate to the same cargo. The request was, in substance, that if the Pearson Cordage Company, acting under the notice from The National Cordage Company that the contract would not be performed, bought this cargo as a substitute, the measure of damages would be the difference between the contract price and the price in fact paid for an equivalent proportion of the cargo; and the instructions on this topic excelled to were to the effect that purchases by the Pearson Cordage Company were immaterial, except so far as they might bear on questions of waiver, or upon the market value, and the court closed as follows: "You may consider the purchases by the Boston company [meaning the Pearson Cordage Company] upon the question of waiver, wherever you think they may bear, and upon the value of hemp, but not otherwise."

As the exceptions to these instructions were taken in general terms, it is impossible for us to perceive precisely the grounds on which they were intended to rest; but, as they were not expressed specifically with reference to any point of time at which the purchase was made, we are forced to conclude that they are limited, and were intended to be limited, to substantially the same issue as that raised by the tenth request for instructions, and the observations relating thereto in the brief for the plaintiff in error, including the cases there cited, lead to the same conclusion. We think, therefore, we dispose of both objections when we dispose of the tenth request. Without at all considering the proposition of law which this covers, or noting specifically its terms, it is sufficient to say that no evidence is shown us to which it is relevant, and therefore it would have been improper for the court to have complied with it. The only evidence to which we are referred by the plaintiff in error is that of Benjamin C. Clark, one of the officers of the Pearson Cordage Company, called out by the plaintiff in error on cross-examination. He expressly denied the proposition of fact which the request assumes as its basis. Whatever inferences might be derived from the circumstances of the case if the plaintiff in error had furnished any affirmative proofs, they have

no place where the plaintiff in error was contented to rest entirely on negations called out in cross-examination of the witness of the opposing party. The parts of the record to which our attention has been called did not furnish sufficient evidence to go to the jury as a basis for the requested instruction under consideration.

The remaining exceptions of the plaintiff in error group about the claim that, upon alleged undisputed facts, a paper, which was inclosed by The National Cordage Company to the Pearson Cordage Company in its letter of April 19, 1890, was retained by the Pearson Cordage Company without objection, and otherwise under such circumstances that the court was bound to instruct the jury that this paper superseded the alleged contract of April 5th, with the addendum of April 9th, or that by its retention The National Cordage Company was prevented from supplying itself with hemp, or making contracts for hemp, when the market was in condition for that purpose, and was thus prejudiced by the subsequent rise of prices; and that, therefore, the Pearson Cordage Company was estopped from maintaining this suit.

These two branches of this proposition resolve themselves into one, as it is impossible to conceive that the retention of the paper of April 19th could operate technically as an estoppel, or in any sense as such, unless its retention, and the circumstances under which it was retained, either as a matter of law or of fact, constituted an acceptance, so as to create a new contract which wholly or partially superseded the original one. The record does not appear to us to sustain the proposition of the plaintiff in error that the facts as claimed on this point by it were in any sense undisputed. On the other hand, this entire branch of the case seems to us to be involved in a cloud of disputed allegations and controverted proofs, eminently proper for the jury under suitable instructions from the court. But it is not necessary to consider this at length, because the terms of the paper inclosed in the letter of April 19th put it beyond doubt that none of the rulings or refusals to rule of which the plaintiff in error complains could have been prejudicial to it. It closes with the following words: "This contract is further subject to the proper execution by the Pearson Cordage Co. of their general contract with The National Cordage Co." This seems to us in the nature of a condition or provision precedent, and not of one subsequent; and it would be fairly understood to intend that the paper of April 19th was not to be held as executed until the general contract referred to was also executed. In other words, it seems to us to be the true construction of this closing paragraph that the two papers were to take effect simultaneously, or not at all. There is no claim in the case that the general contract referred to was ever executed. The record throughout shows that the parties never agreed upon its terms. Therefore the paper of April 19th never became effectual for any purpose. The court is unable to see any error in the record, and the judgment of the court below is affirmed.

After the foregoing decision, plaintiff in error filed a petition for a rehearing on the following grounds:

"That the true construction of said paper of April 19th is that it is to be treated as an amendment of the contract declared upon of April 5th-9th, and operates as if it had been added to or incorporated into that contract, so that the words, 'this contract is further subject to the proper execution by the Pearson Cordage Company of their general contract with The National Cordage Company' were not a condition precedent to the taking effect of said paper of April 19th, but became by the acceptance and adoption of that paper by the Pearson Cordage Company a condition of the performance of the whole contract; so that, unless such general contract were executed by the Pearson Cordage Company, neither could that company maintain an action against The National Cordage Company for nondelivery of hemp, nor could The National Cordage Company maintain an action against the Pearson Cordage Company for refusing to accept hemp. In other words, that the execution by the petitioner of said paper of April 19th, and its acceptance and adoption by the Pearson Cordage Company, incorporated it into the contract of sale, so that the contract between the parties then stood in brief as follows: (1) A sale by the petitioner to the Pearson Cordage Company of eight thousand bales of hemp. (2) A provision for the delivery of contracts for hemp instead of hemp. (3) An agreement that changes of duty either way were for the Pearson Cordage Company, and that delivery of contracts instead of hemp should not change terms of sale or price. (4) That, the Pearson Cordage Company having bought three thousand two hundred and four bales between April 9th and 19th, the amount to be sold and delivered is correspondingly reduced, and the whole contract of sale is subject to the proper execution by the Pearson Cordage Company of their general contract with The National Cordage Company."

The petition for rehearing was denied, April 13, 1893. No opinion was filed.

SHELDON et al. v. UNITED STATES. CASTRO v. SAME. SHELDON et al. v. SAME.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1893.)

CUSTOMS DUTIES—TOBACCO SCRAPS.

Leaf tobacco scraps, which are the remnants of tobacco, left after making cigars, and are used in the manufacture of snuff, cigarettes, and cheap cigars, are dutiable at 40 cents per pound, under paragraph 244 of the tariff act of 1890, as "tobacco, manufactured, not especially enumerated or provided for," and not as "waste," under paragraph 472, nor as "unenumerated, unmanufactured goods," under section 4.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Proceeding to appraise imports. The circuit court affirmed the decision of the board of general appraisers. The importers appeal. Affirmed.

P. L. Shuman, for appellants.

T. E. Milchrist, for the United States.

Before GRESHAM and WOODS, Circuit Judges, and BUNN, District Judge.

GRESHAM, Circuit Judge. These cases involved the question whether leaf tobacco scraps are dutiable at 40 cents per pound, under paragraph 244 of the tariff act of 1890, or at the rate of 10

per cent. ad valorem, under paragraph 472 of the same act, as "waste," or at the same rate of per cent., under section 4 of the act, as "unenumerated, unmanufactured" goods. The duty was assessed in each case under paragraph 244. The assessments were paid under protest. The board of general appraisers affirmed the collector's rulings. The importers appealed. The circuit court affirmed the decisions of the board, and the importers prosecuted these appeals. The board of general appraisers found that the merchandise was "leaf tobacco scrap," "tobacco cuttings," and "scraps and cuttings from Havana tobacco." In the manufacture of cigars, scraps are cut or broken from the wrappers and fillings, which are put aside, not as waste, but to be used in the manufacture of snuff, cigarettes, and cheaper cigars. This was the character of the merchandise in question. Paragraph 242 of the tobacco schedule provides that leaf tobacco suitable for cigar wrappers, if not stemmed, shall be subject to a duty of \$2 per pound, and, if stemmed, \$2.75 per pound; and paragraph 243 provides that all other tobacco in leaf, unmanufactured, and not stemmed, shall be subject to a duty of 35 cents per pound, and, if stemmed, 50 cents per pound. It will be observed that those two paragraphs embrace all leaf tobacco, both stemmed and unstemmed. Section 244 reads: "Tobacco, manufactured, of all descriptions, not specially enumerated or provided for in this act, forty cents per pound." Snuff, cigars, cigarettes, and cheroots are covered by other paragraphs. It appears to have been the intention of congress to cover by the tobacco schedule all kinds of tobacco,—manufactured and unmanufactured. The scrap tobacco in question is saved as valuable merchandise. It is a known article of commerce. Paragraph 244 was doubtless intended to embrace tobacco of all descriptions, not especially enumerated in the act. Scrap tobacco is tobacco which has been partially manufactured, and manufactured tobacco, of all descriptions, not elsewhere specially enumerated in the act, is covered by paragraph 244. The judgment of the circuit court is affirmed.

EMPIRE STATE NAIL CO. v. FAULKNER et al.

(Circuit Court, S. D. New York. May 13, 1893.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT—EVIDENCE—AGENCY.

In a suit for the infringement of a patent the defense was that the alleged infringer, the A. Company, was the equitable owner of the patent in suit. In support of this it showed an agreement between it and the son of the patentee, who claimed to be the patentee's agent, that he should disclose and transfer to the A. Company all the secrets and patent or other rights relating to the manufacture in question which were owned or controlled by him. There was nothing but the son's own declarations to show that he was such agent, and he was shown to be utterly untrustworthy; and the agreement made no express reference to either the patent in suit or the patentee. *Held*, that the A. Company acquired no title to the patent by virtue of this transaction.

2. SAME—BONA FIDE PURCHASERS—ESTOPPEL.

After this agreement, the son, by assignment, became owner of a half interest in the patent, and the A. Company claimed that under and by

virtue of the prior agreement it became the equitable owner of this interest. Complainant had by regular and duly-recorded assignments acquired title to the whole patent. *Held*, that the A. Company, having failed to notify complainant of the interest claimed by it, though it knew that he was negotiating for the patent, and had some communication with him in regard thereto, is estopped to set up such interest, more especially in view of the fact that during the time when, as it claims, it held such interest, it was contesting the very patent in interference proceedings in the patent office.

3. SAME—LICENSE.

The A. Company also claimed in defense an irrevocable license to manufacture the patented article by virtue of an alleged sale to it by the patentee of a machine invented by him for that purpose. But it was not shown that the articles alleged to be an infringement were made on such machine, and it did appear that the machine got broken, and could not now be found. *Held*, that on these facts no question of license could arise.

In Equity. Suit by the Empire State Nail Company against Edward H., Edward D., and Francis E. Faulkner, for infringement of a patent. Decree for complainant.

Witter & Kenyon, for complainant.

Geo. B. Ashley, for defendants.

TOWNSEND, District Judge. This is a complaint for infringement of letters patent No. 370,614, granted September 27, 1887, to Thomas F. N. Finch, for an improvement in furniture nails, with prayer for an injunction and accounting. It is conceded that the nails sold by defendants were manufactured by the American Solid Leather Button Company of Rhode Island, which I will hereafter call the American Company, and that they are the same as those made by complainant. The defendants claim—First, that the American Company is the equitable owner of the patent in suit; second, that, even if said company is not such equitable owner, yet that it has an irrevocable license to manufacture and sell the patented article.

The facts in the case are as follows: On April 25, 1881, Charles E. Bailey and William R. Talbot, who are now respectively president and treasurer of said American Company, applied for a patent for an invention substantially the same as that embraced in the patent in suit. A patent was granted to them October 18, 1881. When Thomas F. N. Finch made his application on November 2, 1881, it and said patent were put in interference, and a contest ensued, which lasted several years, and which was finally decided in favor of said Thomas Finch. During the hearing therein the American Company claimed that there had been a prior public use of said invention. This question also was finally decided in favor of Thomas Finch. As a result of these delays the letters patent were not granted until September 27, 1887. On February 21, 1882, said Thomas Finch made an assignment of his interest in said patent, and, after various assignments, the complainant acquired the legal title thereto on November 20, 1888.

The grounds on which defendants claim that the American Company is the equitable owner of said patent are as follows: It appears that in 1880 Latimer Finch, a son of the patentee, was in this

country, trying to establish the manufacture of solid leather buttons, such as his father was making in England. He met said Bailey and Talbot, and represented to them that he controlled all his father's interests in this invention. A contract was made on February 1, 1881, between Latimer Finch and said Bailey and Talbot and one Prentice, wherein said Latimer claimed "to own or control the business and certain knowledge, secrets, patent, registry, or other rights connected with the manufacture of solid leather buttons," and, in consideration of the formation of a company to carry on said manufacture, agreed "that the said party of the first part (Latimer Finch) will at once turn over to said parties of the third and fourth parts all the information, secrets, patent, registry, or other rights connected with said business or manufacture which he may now, or may at any time hereafter, own, control, or come into possession of, and that he will disclose to said parties of the third and fourth parts, and to them only, all of the processes connected with the said manufacture." Latimer Finch further agreed to supervise the business of the company. The American Company was thereupon formed, and Latimer stayed with it for about 30 days, when he left, and engaged in business with a competing firm. On January 26, 1881, Thomas Finch shipped to said Prentice, one of the parties to the above agreement, a press for making furniture nails, which was afterwards transferred to the American Company. The price of the press, \$19.36, was paid to Latimer Finch, and he, claiming to act on behalf of his father, gave a receipt therefor. In 1882, Latimer sold out all his interests to the American Company. In 1884 the American Company brought suit in the supreme court of Rhode Island, and obtained an injunction restraining Latimer from disclosing any information connected with the business of manufacturing solid leather nails, etc., mentioned in said agreement, and from violating any of the terms of said agreement. Among the intermediate assignments of the patent in suit was one whereby Latimer, in 1884, acquired an undivided half interest therein.

Defendants claim that, under the agreement of February, 1881, they acquired either an equitable title to the patent from Thomas Finch, through Latimer Finch, his agent, or to the interest therein, acquired by Latimer in 1884. The objection to the first claim is that there is no evidence to show that Latimer Finch was the agent of his father to transfer the title to the patent, other than the declarations of Latimer Finch, and the sale of the machine to Prentice. That Latimer Finch made representations to that effect, and that the parties made the agreement on the faith of such representations, is not denied; but he is shown to have been utterly untrustworthy, and guilty of bad faith, and gross breaches of contract. The agreement of February, 1881, does not mention or refer to Thomas Finch, and there is no evidence that he ever communicated with the parties thereto. The sale of the machine to Prentice was not a ratification of Latimer's agency in making the February contract, for it was prior to it. The only testimony of Thomas Finch

on this point is that he sent a press to the United States, which was prepared at his works, and was sent by another son to Latimer. In a deposition of Thomas Finch, in another suit against different parties, he says that he first introduced these nails into the United States in 1880; that his son Latimer took them and introduced them. This deposition was put in evidence against the objection of counsel for complainant. It does not seem to be admissible, inasmuch as the witness was examined in this cause. Even if it were admitted, the evidence would not be sufficient to show the authority of Latimer to bind Thomas Finch as to the disposition to be made of his inventions, or to dispose of a patent subsequently applied for by Thomas Finch. The act of Thomas Finch in so applying for a patent in November, 1881, his subsequent assignment of the patent, and his proceedings in the interference suits against Bailey and Talbot, lasting some five years, support the view that he neither authorized nor ratified the act of Latimer in attempting to dispose of his patent. It seems to me, therefore, that the evidence offered fails to connect Thomas Finch with Latimer as his agent to transfer title to this patent.

I am not satisfied that the subsequent assignment to Latimer of the undivided interest in the patent did not create an equitable interest in the defendants.

It is strenuously urged by complainant that certain agreements between Latimer and the American Company, and certain decrees obtained by it against him, show that the agreement of February 1st was merged therein, and that the part of the agreement relating to the assignment of patents to be thereafter owned by him was surrendered. There is considerable evidence to support this claim. But, for the purpose of determining the principal question in the case, I have assumed that the American Company did acquire Latimer's interest. This question is whether complainant, and each of the parties under whom it claims, had notice of the title of the American Company when they acquired title to the patent; and upon this question it seems to be settled that the burden of proof is on the defendants, and that, if they fail to show that each of said owners had, at the time of purchase, either record or actual notice of said claim, they cannot defeat the title of the complainant. *Rev. St. U. S. § 4898; Oakes v. Tonsmierre*, 49 Fed. Rep. 449; *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 20 Fed. Rep. 700; *Gibson v. Cook*, 2 Blatchf. 144; *Wright v. Randel*, 8 Fed. Rep. 599; *American Solid Leather Button Co. v. Empire State Nail Co.*, 47 Fed. Rep. 741; *Perry v. Corning*, 7 Blatchf. 195; *Secombe v. Campbell*, 2 Fed. Rep. 357; *Regan Vapor-Engine Co. v. Pacific Gas-Engine Co.*, 1 C. C. A. 172, 49 Fed. Rep. 68.

On July 16, 1886, Thomas Finch again obtained title to the patent under an assignment, expressed to be on consideration. There is no evidence, other than that heretofore referred to, as to his knowledge of the claims of the American Company, except certain newspaper and other notices to be hereafter considered. On December 21, 1886, Thomas Finch sold the patent, through

William M. Cavanaugh, to the Finch Manufacturing Company. Both of these assignments were recorded on October 3, 1887. After Cavanaugh had made the agreement to purchase the patent, and had caused the Finch Company to be incorporated, Latimer Finch being one of its incorporators, he received a letter from the American Company, calling his attention to papers inclosed therein "as somewhat indicating the character of the man we understand you to have connected yourself in the manufacture of goods infringing our legal rights and patents." They further notified him that if he persisted they would hold him accountable "for all violation of our patents, trade-mark, labels, and numbers," etc. Mr. Cavanaugh replied, saying:

"I have not the slightest wish to trespass on any rights that you may have, and, that I may not, I should be glad to have you inform me—1st. To what have you a patent? 2nd. Has your patent ever been litigated, and, if so, was the decision for or against you? Your answer to these two questions will enable me to act in reference to that part of your letter wherein you threaten to sue me for any infringement on your rights. If I am informed as to what your rights are, I probably can avoid interfering with them."

To this letter he received no reply. It does not definitely appear what circulars were inclosed. But an examination of all the circulars issued by the American Company up to this time shows, what seems to me should alone be fatal to defendants' claim, namely, that none of them referred to, or claimed title under, Thomas Finch, or under the patent in suit. They denounce Latimer Finch, and refer to the decrees of injunction restraining Latimer from disclosing secrets, or selling buttons, in violation of the agreement of February, 1881. In the Belden circular, which Mr. Cavanaugh swears he never saw prior to this suit, the American Company is referred to as manufacturers and patentees, but this would naturally refer to the Bailey and Talbot patent, granted in 1881, rather than to the Thomas Finch application, which was not granted until 1887. Furthermore, Mr. Cavanaugh denies that he ever received any notice of the claim of the American Company to the patent in suit.

If the American Company intended to make any such claim, it was clearly their duty then to say so, and to reply to Cavanaugh's letter. They knew Latimer's character, and that he would not tell Cavanaugh of such claim, for he was interested in trying to sell the patent. The patent office records would not show it, for it depended upon a contract with Latimer, which did not refer either to Thomas or his application. The American Company was bound to give specific notice of their claim in distinct and unequivocal language. *Fort v. Burch*, 6 Barb. 78; *Flagg v. Mann*, 2 Sum. 486; *Wilson v. Wall*, 6 Wall. 83; *Regan Vapor-Engine Co. v. Pacific Gas-Engine Co.*, 1 C. C. A. 173, 49 Fed. Rep. 68. Under the circumstances, having failed to give notice until after Cavanaugh had embarked in the enterprise, they could not affect his title by a subsequent notice; and, having suffered Cavanaugh to buy the patent in ignorance of their claim, and having failed to give notice of, and assert title, when it was their duty to do so, said company

is now estopped to assert it as against him or his assignees. These facts, together with much of the evidence as to the subsequent conduct of the American Company, show that they never claimed a right to the patent in suit until long after the assignors of the complainant had acquired title to the patent.

The following facts also tend to support this view: Messrs. Bailey and Talbot applied for and obtained a patent for practically the same invention as the patent in suit, after the execution of the agreement of February, 1881. They did not record said agreement until April 26, 1890. They contested the interference with the Thomas Finch application for several years,—a proceeding wholly unnecessary if they owned the Thomas Finch invention; and when they were beaten in this they caused proceedings to be taken in bar to the issuance of the Thomas Finch patent, on the ground of prior public use. They have always stamped on their circulars, letter heads, and boxes of nails, "Patented October 18th, 1881,"—the date of the patent issued to Messrs. Bailey and Talbot. The labels on the boxes of nails state that every box bears the date of patent. The American Company has never put the date of the patent in suit upon any of its goods. No satisfactory reason has been shown why no bill in equity has ever been brought for a conveyance of the equitable title. In view of these facts, it seems to me that the American Company has failed to show that Cavanaugh or the Finch Company had notice of their claim of title to the patent in suit at the time of purchase. The Finch Company, therefore, got a good title, and such title is good in the hands of subsequent assignees, irrespective of the notice which such assignees might have received.

Much of what has already been stated applies to the claim of notice to Johnson, the assignee of the Finch Company, and the assignor of complainant. The facts appear to be as follows: Before Johnson acquired title, the Finch Company had brought suit on the patent against I. B. Ryer & Co., which was pending at the time of his purchase. In that suit the agreement of February, 1881, was set forth, and the fact appeared that Latimer Finch thereafter acquired a record title to a part of said patent. It appears, however, that this suit had been practically abandoned. That Johnson had dealt with the American Company, and sold their buttons for years, was sufficient to put him upon inquiry. Such inquiry might have shown him the claim under the Bailey and Talbot patent. He might have found the agreement of 1881 by an examination of the interference proceedings. But there is no evidence that he knew of them, and, even if he did, he was not bound to examine them, as the object of interference proceedings is to determine priority, not title. *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602. Johnson caused a search to be made of the records of the patent office, and was assured by his attorneys that the title to the patent was clear before he bought it. Messrs. Bailey and Talbot had frequent conversations with Johnson. There is a sharp conflict of testimony as to whether, in these conversations, they notified him of

their claim to the Thomas Finch patent. But, judging from the tenor of their letters to him, the chief topic in conversations and correspondence was the unfair conduct of Latimer Finch. The claim of ownership of the Thomas Finch patent would appear not to have been asserted. I am not satisfied that Johnson had notice of the claims of the American Company prior to his purchase. But, even if he did have such notice, I do not see how it would affect the title of complainant, provided the Finch Company and Cavanaugh got a good title. I have stated the facts for the purpose of showing the course of conduct of the American Company.

In view of all the facts, I think the American Company has been guilty of such inexcusable laches in the assertion of its alleged rights that it is not entitled to relief. *Marsh v. Whitmore*, 21 Wall. 178; *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610.

Finally, the defendants claim that, even if the American Company is not equitably entitled to the patent, it has an irrevocable license to make and use the patented article under the agreement of February, 1881, and by reason of the sale of the press. The first claim would seem to be disposed of by the opinion of Judge Brown in *American Solid Leather Button Co. v. Empire State Nail Co.*, 47 Fed. Rep. 741. Besides, the agreement of February, 1881, did not refer to licenses, and, as is forcibly urged by counsel for complainant, if the effect to be given to this agreement is that it is to be treated as a license, then an agreement to assign has greater effect than an assignment; and while the latter, if unrecorded, is void, and of no effect, the former, if unrecorded, is valid, and of some effect, namely, to operate as a license. *Gibson v. Cook*, 2 Batchf. 151. Whatever effect the fact that Thomas Finch sold a button machine, which was afterwards transferred to the representatives of the American Company, might have upon the question of the license to use that machine as against said company, it has no relevancy to this case. It is not claimed that the buttons sold by defendants were made on said machine. In fact the evidence shows that it got broken, and cannot now be found.

Let there be a decree for an injunction and an accounting.

GOEBEL v. AMERICAN RAILWAY SUPPLY CO. et al.

SAME v. GOLDMANN.

(Circuit Court, S. D. New York. May 13, 1893.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DEMURRER.

While the objection of want of patentable novelty may be raised by demurrer to a bill for infringement of a patent, the question must be determined in favor of the patent, unless the court can see from an examination of the patent itself, and the consideration of those facts alone of which it will take judicial notice, that it does not involve invention.

2. SAME—VALIDITY—HATS AND CAPS.

The claim of letters patent No. 345,965, issued to John C. Goebel, July 20, 1886, for improvements in hats or caps, was for, "in a hat or cap

having a flexible tip, the body or skeleton of the side crown, formed of wire cloth, the ends of which are connected by angular seams." It is also stated that the essential feature of the device "is not only the use of wire cloth," hair cloth having been theretofore used for the purpose, "but also the peculiar cutting of the wire cloth to have its wires in a diagonal line to the edges of the cloth, as else the desired elastic expansion and contraction of the side crown for stretching the tip will not be obtained, and that otherwise the shape of such wire-cloth body cannot be made conical." *Held*, that the patent cannot be held void on demurrer to a bill for its infringement.

3. SAME—INFRINGEMENT—PLEADING—DEMURRER.

The omission, from a bill for infringing a patent, of the averment that the invention had not been patented or described in any printed publication before the date of said invention, is a defect in form which is demurrable.

4. SAME—PRAYER FOR PROCESS.

The omission from the prayer for process of subpoena of the names of some of the defendants named in the introductory part of the bill is a violation of equity rule 23, and is a fatal defect.

In Equity. Suits by John C. Goebel against the American Railway Supply Company and others, and against Philipp Goldmann, for the infringement of complainant's patent. On demurrers to bill. Demurrers sustained in part, and overruled in part.

Thos. F. Byrne, for plaintiff.

Wm. C. Hauff, for defendants.

TOWNSEND, District Judge. These are bills in equity for the alleged infringement of letters patent No. 345,965, issued to complainant July 20, 1886, for improvements in hats and caps. The defendants demur to both bills. The demurrers are the same in each case, with a single exception, which will be separately considered.

The first four grounds of demurrer assigned are that the patent is void on its face for want of patentable novelty, and because the claim does not comprise a combination. That this objection may properly be raised by demurrer is well settled. *Brown v. Piper*, 91 U. S. 43; *Blessing v. Copper Works*, 34 Fed. Rep. 753; *Fougeres v. Murbarger*, 44 Fed. Rep. 292; *Bottle Seal Co. v. De La Vergne Bottle & Seal Co.*, 47 Fed. Rep. 61.

The claim of the patent in suit is as follows:

"In a cap or hat having a flexible tip, the body or skeleton of the side crown formed of wire cloth, the ends of which are connected by angular seams, as set forth."

The defendants urge that the specification and claim show the patent to be for a mere substitution of one well-known material for another, and a connection such as would be made by any skilled operator. The question of patentable novelty, when raised by demurrer, must be determined in favor of the patent, unless the court can see from an examination of the patent itself, and a consideration of those facts alone of which the court will take judicial notice, that the patent does not describe such an advance in the art to which it relates as to constitute invention. *Bottle Seal Co. v. De La Vergne Bottle & Seal Co.*, supra; *Engraving Co. v. Hoke*, 30

Fed. Rep. 444; *Dick v. Supply Co.*, 25 Fed. Rep. 105. In the present case, the patentee does not claim merely the substitution of one material for another. He admits that hair cloth has been used for the crown lining in hats and caps. But he says, further:

"The essential feature of my device, therefore, is not only the use of wire cloth, but also the peculiar cutting of the wire cloth, to have its wires on a diagonal line to the edges of the cloth, as else the desired elastic expansion and contraction of the side crown for stretching the tip will not be obtained, and that otherwise the shape of such wire-cloth body cannot be made conical."

The patentee claims that by the substitution of the new material, so cut that the woven wires are on diagonal lines relative to the band and tip, and are connected by angular seams, certain new and useful results are produced. He further claims that these results are produced by the combination of coacting and co-operating elements.

An examination of the patent, and a consideration of the alleged invention, seem to show that the presumption of patentable novelty arising from the grant of the patent has not been rebutted. The patentee is entitled to the benefit of any doubt which may exist in the mind of the court. Whether, in view of the state of the art, there was any invention, whether the alleged invention consists merely in the substitution of one material for another, and whether, as is strenuously maintained by complainant, its practical utility can be shown by the fact that it has displaced other modes of manufacture, are questions of fact which cannot be disposed of upon this hearing. The first, second, third, fourth, and sixth grounds of demurrer are overruled.

The fifth ground of demurrer assigned is that the complaint does not aver that the invention had not been patented or described in any printed publication before the date of said invention. The omission of this averment is a defect in form which is demurrable. *Coop v. Institute*, 47 Fed. Rep. 899; *Overman Wheel Co. v. Elliott Hickory Cycle Co.*, 49 Fed. Rep. 859.

The seventh ground of demurrer assigned in the case of *Goebel v. American Railway Supply Co. et al.* is that the prayer for process of subpoena does not contain the names of all the defendants named in the introductory part of the bill. This omission is in violation of rule 23, U. S. Eq. Prac., and is a fatal defect. *City of Carlsbad v. Tibbetts*, 51 Fed. Rep. 852.

The fifth ground of demurrer in each case, and the seventh ground of demurrer in *Goebel v. American Railway Supply Co.*, are sustained, with leave to amend in 15 days in both cases, upon payment of costs in *Goebel v. American Railway Supply Co.*

GOEBEL v. AMERICAN RAILWAY SUPPLY CO. et al.

SAME v. GOLDMANN.

(Circuit Court, S. D. New York. May 13, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Letters patent No. 345,965, issued to John C. Goebel July 20, 1886, for an improvement in hats or caps, claimed "in a hat or cap having a flexible tip, the body or skeleton of the side crown, formed of wire cloth, the ends of which are connected by an angular seam." In a suit for infringing this patent defendants produced affidavits that this mode of making hats and caps had been known and used during several years before the date of the patent; and a British patent, granted in 1864, showed metal threads or wires cut obliquely into strips similar to those claimed in the patent. *Held*, that a preliminary injunction would not be granted.

In Equity. On motion for preliminary injunction. Demurrers to the bills were heretofore passed upon. See 55 Fed. Rep. 825.

Thos. F. Byrne, for plaintiff.

Wm. C. Hauff, for defendants.

TOWNSEND, District Judge. These are applications for preliminary injunctions to restrain the alleged infringement of letters patent No. 345,965, granted to complainant July 20, 1886, for an improvement in hats or caps. The defendants have already demurred to the complaints on the ground that the patent in suit is void on its face for want of patentable novelty, and because it does not claim a combination, and said demurrers have been overruled. The claim of said patent is as follows:

"In a cap or hat having a flexible tip, the body or skeleton of the side crown, formed of wire cloth, the ends of which are connected by angular seam, A, as set forth."

The patents and affidavits introduced by defendants as to the state of the art show that complainant's patent is not for a primary or important invention. It is claimed in the affidavits that this mode of making caps was publicly known and used by various persons during several years prior to the date of said patent. The British patent No. 309, of the year 1864, granted to R. A. Brooman, for bonnets and caps, shows metal threads or wires cut obliquely into strips, similar to those claimed in the patent in suit. It does not seem necessary to discuss the various defenses presented on the preliminary hearing, further than to say that they have raised such a doubt in my mind as to the validity of the patent that I think a preliminary injunction should not be granted. The applications are denied.

THE VIOLA.

MURRAY v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. May 17, 1893.)

No. 8.

1. SALVAGE—EXTRAORDINARY TOWAGE—EVIDENCE.

A light-ship was broken from her moorings off the coast of Delaware, and driven before the wind 130 miles southward. She was a new vessel, schooner-rigged, well-provisioned, fully equipped and officered, and had a crew of six men. She displayed no signals of distress, and refused assistance from passing vessels, but afterwards signaled for a tow. She was taken in tow during mild weather by the sugar-laden steamer V., bound from Matanzas to New York, who carried her inside of Cape Henry, neither vessel sustaining injuries of any consequence, and the V. incurring no risks to property or lives, and but trifling expense. There was evidence to show that the light-ship was at no time in serious danger. *Held*, that the V. was not entitled to salvage. 52 Fed. Rep. 172, affirmed.

2. EXTRAORDINARY TOWAGE.

In such case the V. was entitled only to extraordinary towage, and, as she was detained two days, and her value was \$250,000, while the value of the light-ship was \$50,000, the sum of \$2,500 was a sufficient allowance for her services. 52 Fed. Rep. 172, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Admiralty. Libel by Lawrence Murray, master of the steamship Viola, against the United States, for salvage. The court below held that the service rendered was not a salvage service, but gave libellant a decree for \$2,500 as for towage. 52 Fed. Rep. 172. Libellant appeals. Affirmed.

John F. Lewis and Curtis Tilton, for appellant.

Robert Ralston and Ellery P. Ingham, for the United States.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

WALES, District Judge. This is an appeal from a decree of the United States circuit court for the eastern district of Pennsylvania, refusing the libellant's claim for salvage, and allowing inadequate compensation for towage services. Eight assignments of error have been filed, but all of them may be included in the second and third, which are as follows:

"(2) In holding that the services rendered by the Viola to the light-ship were extraordinary towage services, and in not holding that said services were salvage services, and so compensating them. (3) In not awarding adequate compensation for said services, and in not awarding interest upon the sum allowed from the date of said services."

The history of the case is this: At 5 o'clock on Sunday morning, April 7, 1889, during the height of a northeast storm, the winter quarter light-ship, No. 45, broke loose from her moorings, off the coast of Delaware, about 26 miles from Chincoteague, and was driven before the gale 130 miles southward from her station.

She was a new vessel, schooner-rigged, well-provisioned, and fully equipped with sails, boats, and anchors, and was in charge of an assistant keeper, an assistant engineer, and a crew of six men, including the cook. The first keeper and the chief engineer were ashore on leave. Immediately on breaking loose, the chains were hauled in, the jib and foresail were put up, the vessel was hove to, and a color set, showing that she was adrift. It was not long before the steamer Richmond, of the Old Dominion Line, passed No. 45 within short hailing distance, but no signal of distress or for assistance was made by the latter, and the Richmond saluted and went on. The expectation was that the Richmond would, on reaching port, report the position of No. 45. On Monday night, the 8th, between 8 and 9 o'clock, the steamer Chatahoochee, of the Ocean Steamship Company of Savannah, came in sight, and, in answer to a flashlight on board of No. 45, circled round the latter, to ascertain what was wanted, and, on finding that a tow was required, Capt. Daggett replied that he had not sufficient coal for the purpose, but would lay by until daylight to take off the officers and crew, if necessary. The officer in charge of No. 45 replied: "No, I don't want to be taken off. Go on." At 6:30 A. M. on Tuesday, the 9th, the large freight steamer Viola, sugar laden, bound from Matanzas to New York, came up, and, in response to a signal from No. 45, "Will you take me in tow?" the steamship signaled, "Wait till the weather moderates." Later in the day the Viola made an offer of provisions, which was declined. In the mean time the Viola kept No. 45 in sight, and at 5 o'clock A. M. on Wednesday, the 10th, the sea having fallen considerably, the Viola got out a boat, passed a small line to No. 45, and by that means hauled a seven-inch hawser on board. The Viola next sent her hawser and made fast to No. 45, and at 8 A. M. "let away with full speed, towing with two hawsers." At 6 A. M. on Thursday, the 11th, No. 45 was brought into Cape Henry, and left in charge of a tug, the Viola proceeding on her voyage to New York. The log of the Viola contains this entry for Wednesday: "Noon. Latitude 36 deg. north; longitude 74 deg. 27 min. west; distance twenty-eight; steering northwest by west; speed about seven knots; weather fine. 4 P. M. Light northwest wind and fine clear weather." This was the day on which the towing began. The storm which drove No. 45 from its station had set in on Saturday night previous, and continued with great violence during the two following days. On Tuesday it had spent its force, the wind backing to the north-northwest, and the sea having fallen. During this time No. 45 rode out the gale without loss or damage, save such as were repaired at the small cost of \$41.50. Neither did the Viola suffer any injury, save a chafed hawser, which was afterwards condemned, and possibly a leak in the lazaretto, near the rudder post, which was not at all serious, and was not repaired until after she had returned to the West Indies; and no witness was able to tell whether the leak was developed before

or after the Viola fell in with No. 45. The chief engineer of the steamship could perceive no strain on her engines after the towing began; and as to the alleged risk to the lives of the men who passed in the small boat between the two vessels in carrying out the lines attached to the hawsers the evidence conclusively shows that it was nothing more than the usual risk which always attends such work in mid-ocean, and is not accounted dangerous by experienced and active sailors.

The claim for salvage was urged on the ground that No. 45 was in charge of incompetent officers, with an inexperienced crew on board, was unmanageable, and at the mercy of the winds and waves. It is true that the vessel had no skilled navigator, but her officers and men were practical seamen, and there is ample testimony to prove that she was ably handled throughout the prevalence of the storm; and the indisputable fact that no signal of distress was made, and the refusal of the officers to accept an offer of rescue from the Chattahoochee, confirm the belief that those in charge of her did not consider themselves or the vessel to be in imminent peril. The entry in the log of the Viola for Tuesday, the 9th, is: "This day begins with strong north-northwest gale and clear weather; sea moderating; steering north by east; speed about two knots an hour. At 4 A. M. wind and sea moderating. 6:30 A. M. Sighted winter quarter light-vessel under small sail, hove to."

The main sail of No. 45 was not bent, and it was attempted to be shown that she could not be hove to without it, but this is disproved by the extract from the Viola's log, and by the statement of Capt. Daggett, of the Chattahoochee, who says that the light-ship was ably handled, reversing his courses while the captain was steaming round him, hauling his head up to the sea, and laying in a very comfortable and easy position. By that time (Monday night) the height of the gale, according to Capt. Daggett, had passed, and was moderating very fast, but there was still a very heavy sea. Mouat, chief officer of the Viola, admitted that if he had been on No. 45, with plenty of food and water, he would have considered himself safe, but would have kept along the land, so that some one might pick him up. He qualifies this admission, however, by saying that if he was not a practical seaman, and no practical seaman was on board, he would think his time had come. Nelson, the second officer of the Viola, also admits the possibility of No. 45 pulling through the gale, provisioned and manned as she was, and he could not say that she was not carefully managed. Capt. Murray thinks that No. 45 could have sailed with a fair wind, and that on the night before the towing began there was nothing dangerous in her position. Commander Read, of the United States navy, who was the inspector of the fourth lighthouse district in 1889, and investigated the facts connected with the accident to No. 45, immediately after its occurrence, found that everything had been done to his satisfaction by the officers and crew as far as handling

the ship was concerned. It was the object of her officers to head the vessel to the eastward, and keep her away from the land. It was also his opinion that they could have sailed up to or near their position, off Chincoteague, if they had not been taken in tow. He further testified to his belief in the competency of her officers and men.

A careful review of the evidence has convinced us that the services performed by the *Viola* do not support a claim for salvage. The ingredients of a salvage service are: First, enterprise in the salvors in assisting a vessel in distress, risking their own lives and property to save the lives and property of others; second, the degree of danger and distress from which the property is rescued,—whether it was in imminent peril, and almost certainly lost if not at the time rescued and preserved; third, the degree of labor and skill which the salvors incur and display, and the time occupied. Where all these circumstances concur, a large and liberal reward should be given; but where none, or scarcely any, take place, the compensation can hardly be denominated a salvage compensation; it is a little more than a mere remuneration *pro opere et labore*. The *Clifton*, 3 Hagg. Adm. 121; *Tyson v. Prior*, 1 Gall. 133. The towing of No. 45 into Cape Henry, a distance of 120 miles, was unattended by any unusual peril or risk; nor was any danger incurred by the *Viola* in laying by No. 45 from Tuesday morning to Wednesday morning. There is also some force in the argument that the light-ship signaled for a tow, and at no time hoisted any signals of distress; and that, the request for a tow having been accepted by the *Viola*, it constituted an implied contract for towage, to be paid for as such; and that no claim for salvage could arise unless the tow was in imminent peril at the time, or became disabled and in distress from causes occurring after the towage had begun. The *Kingloch*, 26 Eng. Law & Eq. 596.

The value of the *Viola* and her cargo was \$257,000; the value of No. 45 was \$50,000. The *Viola's* service was highly meritorious, and may be classed under the head of extraordinary towage, but it did not reach the grade of a salvage service. Her deviation from her regular course was not great, and at Cape Henry she was nearer to New York than when the towing began. She assumed a possible risk of endangering her insurance, but with this exception she incurred no greater risk than she would have incurred had she kept on her direct course, save the danger of ordinary towage. The only question in Capt. Murray's mind in considering the request for towage was whether he had enough coal to carry him through, and, on being satisfied that the supply was sufficient, he decided to take the light-ship in tow. The circuit court allowed \$2,500 for this service, and we think that amount was sufficient to cover all the items for detention, extra consumption of coal, the extraordinary towage service rendered, and interest.

The decree of the circuit court is therefore affirmed.

AUSTIN v. RILEY et al.

(Circuit Court, S. D. Iowa, W. D. May 10, 1893.)

1. OPENING DECREE—PRACTICE OF STATE COURT—EQUITY CAUSES.

The practice of a state court in opening judgments or decrees by default after the term at which they became absolute will not be observed in a suit in equity in a federal court, under Rev. St. § 914, which requires the practice of the federal courts to conform to that of the state courts only in "civil cases other than equity causes."

2. SAME—JURISDICTION—SUBSEQUENT TERM.

The federal circuit court has no jurisdiction of a motion to set aside a final decree upon a bill taken for confessed, made after the expiration of the term at which such decree became absolute; and it is immaterial that a different decree would have been entered if the facts had been presented by a timely defense, or that extreme hardship would result, or that the failure to defend was occasioned by want of skill or diligence on the part of counsel.

3. SAME—PROCEEDINGS IN ANOTHER COURT.

And where the decree is one which gives plaintiff's mortgage priority over that of defendant, it is immaterial that before the filing of the bill defendant had procured a decree of foreclosure in a state court, plaintiff not being a party to the suit therein.

4. SAME—MOTION FOR FINAL DECREE—NOTICE.

Where an order has been entered that the bill be taken for confessed, defendant, even if he has entered an appearance, is not entitled to notice of subsequent application for final decree, when such application is made in open court.

In Equity. Suit by Julia A. Austin against James F. Riley, Katherine M. Riley, and Benjamin Winchester. Heard on motion to set aside default and vacate the decree. Motion denied.

Statement by WOOLSON, District Judge:

On March 14, 1892, complainant filed in the clerk's office in said western division her bill herein, seeking correction and foreclosure of mortgage given by respondents Riley, and praying that respondent Winchester be decreed to have no lien on or interest in the mortgaged premises, or, if it be found that he has a lien thereon, that it be decreed to be junior to complainant's said lien. On the same day subpoena was duly issued, returnable at the April rule day, and the return of service shows personal service on Winchester. On March 16, 1892. Upon the May rule day, on demand of complainant, by praecipe duly filed, default for want of appearance was entered against said Winchester. Upon October 3, 1892, the same being in the second week of the regular term of this court, complainant moved for decree, and the same was duly entered pro confesso upon the default of said Winchester, (as well as of the other respondents,) correcting said mortgage as prayed, adjudging the amount due on said bond thereby secured, and ordering sale of mortgaged premises, etc. Upon October 14, 1892, praecipe for execution was filed, and execution issued on said decree. On the day following, notice of time and place of sale was served personally upon the tenant in possession of the mortgaged premises. On November 12, 1892, the mortgaged premises were duly sold by the master appointed in said decree, and due report thereof has been made to and confirmed by this court. Upon November 11, 1892, respondent Winchester filed in the office of said clerk a motion asking (1) that the default heretofore entered against him be set aside; (2) that the decree above described be vacated; or, (3) if such decree cannot be vacated, that it be so modified as to decree the priority of lien held by said respondent over the lien of complainant's mortgage. Attached to said motion, to support same, are the affidavits of respondent and G. A. Holmes, of counsel for respondent. These affidavits state that prior to the April rule day, at which respondent was summoned to appear, respondent and his said counsel went to the office of

said clerk, examined the file of papers in this case, and said counsel duly signed and delivered to said clerk the written appearance of respondent, and requested said clerk to file same in this cause, and said clerk stated that he would do so; but they are surprised to find that the same has not been filed, and that no appearance has been entered herein for respondent; that counsel for respondent had no notice of the application for decree herein, nor was said decree submitted to him, nor had he any knowledge or information of the entry of said decree, until after the adjournment of the term at which said decree has been entered. The affidavits also state that the priority of respondent's lien arises from its being a mortgage for the deferred purchase money of said mortgaged premises, and that same was executed and duly recorded some two years before complainant's mortgage was executed, and that at the time of filing of complainant's bill herein respondent had secured a decree of foreclosure of his said mortgage in the (Iowa) state courts and said premises had been duly sold thereunder. Conversations are also detailed with complainant's counsel, wherein it is claimed that said counsel recognized the said priority of respondent's said lien. Said affidavits also charge said counsel with having committed fraud on respondent's counsel and on the court in obtaining the decree entered herein, giving complainant priority of lien. It may be properly stated here that complainant's counsel filed affidavits denying such conversations and recognition of such priority of lien, and denying all fraudulent, etc., action as charged.

Burke & Cassidy and G. A. Holmes, for the motion.
Saunders, McFarland & Dickey, opposed.

WOOLSON, District Judge, (after stating the facts.) While counsel for complainant have made a showing seeking to disprove the allegations of the motion and accompanying affidavits, (which impute improper, deceitful, or fraudulent conduct on their part,) they directly deny the power of the court to vacate or modify the decree as attempted. And to the latter question we will first address our attention, since, if this power does not exist, the questions of fact beyond will not demand investigation. The point presented may be thus stated: That the motion having been filed herein after the term of court had ended during which the decree was entered, this court has no power to set aside the default, or modify the decree on motion, as herein attempted. The question presented is not a new question in the United States courts, and its extended examination is not required. The following facts are not disputed: Upon bill regularly filed, respondent was personally served with summons to appear, answer, etc. No appearance is filed in the cause. At the rule day next following the rule day named in the summons, default was entered against respondent. During the term of court next following, on application of counsel for complainant, decree pro confesso was entered, and decree recorded. After close of that term counsel for respondent filed a motion to set aside default and vacate decree. This motion was presented and submitted at the next term following its filing.

First, let it be noticed that this cause is not on the law docket of the court. The argument of counsel for respondent has largely proceeded on the theory that the procedure as to his said motion, and the action the court is to take, will be governed by what he claims to be the practice of the state courts in like matters, and this claim is evidently based on section 914, Rev. St. But counsel will

notice that the section referred to does not include equity causes. "The practice, pleadings, and forms and modes of proceeding in civil cases, other than equity causes," shall conform to the practice and modes of proceeding existing in the courts of the state. So that by the very terms of the section its provisions do not apply to this cause. Lest I may be misunderstood as intending to hold that judgment at law may, in the federal courts, be set aside on motion after term at which they were rendered, I will here quote from *Bronson v. Schulten*, 104 U. S. 410, a portion of the clear and vigorous statement of Justice Miller. In speaking of a motion filed in that case to open up a judgment at law, he says:

"The question relates to the power of the courts, and not the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state, or the practice of its courts."

At another point in the opinion Justice Miller voices the views of the unanimous court as follows:

"It is a general rule of law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that, after the term is ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them, and if errors exist they can only be corrected by such proceeding, by writ of error or appeal, as may be allowed in the court which by law can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered; and this is placed upon the ground that the case has passed beyond the control of the court."

Congress having conferred upon the supreme court of the United States the authority to prescribe rules regulating "the whole practice to be used in suits in equity" by the courts of the United States, (section 917, Rev. St.,) that court has prescribed as the nineteenth rule of practice for the courts of equity:

Rule 19: "When the bill is taken *pro confesso*, the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer upon cause shown, upon motion and affidavit of defendant."

Respondent Winchester did not avail himself of the provisions of this rule. Had this motion been made during the term at which the decree was rendered, and been accompanied with his affidavit, making a satisfactory showing of merits, this court could then have determined the same, and, if found equitable, have set aside the default and decree, and permitted him to plead, or could have arrested the record and operation of the decree until such motion was decided.

Foster, in his second edition of Federal Practice, (section 350,) says: "When a party to a suit in equity, or his representatives, feels himself aggrieved by a final decree of the court, there are eight ways in which he can apply to have such decree reversed, set aside, and varied;" and he then names these eight ways as either petition for rehearing, bill or supplemental bill, or by appeal, but he does not include any way of so applying by motion. In *Sibbald v. U. S.*, 12 Pet. 488, where a motion was made in a case in equity, the court says:

"No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decree or judgment for errors of fact or law after the term at which they are rendered, unless for clerical mistakes, * * * or to reinstate a cause dismissed by mistake; * * * from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing."

The fact that at the time when this action was commenced respondent Winchester had obtained a decree of foreclosure of his mortgage in the state court in no manner varies the application of the doctrines above stated. He did not choose to make complainant, Austin, a party to his action, so that she is in no wise bound or affected thereby. He was personally notified to appear in this action, and the bill herein advised him of the decree sought.

This court cannot assist him on the ground, as argued by his counsel, that the facts sworn to in his affidavit show that he was entitled to have his lien declared by the decree herein to have priority, should he have appeared and answered and submitted his proofs thereof. As was well said by Judge Blodgett, in *Dunlevy v. Dunlevy*, 38 Fed. Rep. 466, in considering the failure of a complaint to answer and defend against a cross bill:

"It is true the grounds taken by the cross bill might not have been sustained had the case been resolutely contested, and the complainant's rights under the proof fully discussed and presented to the court by counsel. But, instead of doing this, the defendants in the cross bill allowed it to be taken as confessed against them, thereby, in effect, admitting all the allegations contained in the cross bill."

In *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. Rep. 788, will be found a clear and thorough consideration of the practice and effect of taking bills pro confesso:

"The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty. But in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the courts require an examination of detail, the obligation to furnish proof rests on the complainant. We may properly say, therefore, that to take a bill pro confesso is to order it to stand as if its statements were confessed to be true, and that a decree pro confesso is a decree based on such statements assumed to be true, and such decree is as binding and conclusive as any decree rendered in the most solemn manner. It cannot be impeached collaterally, but only upon a bill of review or a bill to set it aside for fraud."

Counsel for respondent forcibly argues that the appearance of respondent Winchester was actually entered in the case, and presents affidavits to that effect, and thereupon they contend that the decree should have been submitted to counsel for respondent

before the same was handed up to the court, or at least that such counsel should have had notice of the application for final decree; citing *Bennett v. Hoefner*, 17 Blatchf. 341. *Thomson v. Wooster*, *supra*, contains the following, which is pertinent to this point:

"As we have seen, by the eighteenth rule in equity it is provided that, if the defendant make default in not filing his plea, demurrer, or answer in proper time, the plaintiff may as one alternative enter an order as of course that the bill shall be taken pro confesso, 'and thereupon the cause shall be proceeded in ex parte.' The old rules adopted in 1822 did not contain this ex parte clause. They simply declared that, if the defendant failed to appear and file his answer within three months after appearance day, the plaintiff might take the bill for confessed, and that the matter thereof should be decreed accordingly; the decree to be absolute, unless cause should be shown at next term. * * * Under these rules the English practice was left to govern the subsequent course of the proceeding by which, as we have seen, the defendant might have an order to permit him to appear before the master, and be entitled to notice. Whether, under the present rules, a different practice was intended to be introduced, is a question which it is not necessary to decide in this case."

If the phraseology of the present rule is to govern, the complainant in the ex parte proceedings would not be required, however much it might be thought the more desirable plan, to give notice to the party in default of the application for final decree. But if such notice were necessary, the motion for final decree, when made in open court, is of itself notice as to a case then pending in such court.

Suggestions are strongly pressed in argument that a denial of this motion will disastrously affect the respondent in his old age, etc., and counsel for complainant reply with an argument from the standpoint of financial injury to complainant if the motion be sustained. These considerations cannot change the law applicable to this case. Judge Wilkins in his clear and very satisfactory decision in *The Illinois*, 1 Brown, 13, 20 Myer, Fed. Dec. 430, had occasion to speak upon this very question. That decision was upon motion to open a decree. Having learnedly reviewed the authorities, and denied the motion, he adds:

"Again, Judge Story, speaking of the constitutional powers of the government, says, (1 Const. § 426:) 'On the other hand, a rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the people may remedy it. If they do not do so, the presumption is that the mischief done by a restriction of power is less than would arise by its extension. It is a choice between two evils, choosing the least.' And the same remark will apply to grants of judicial power,—the grant is not to be extended by construction beyond its fair terms. If mischief ensues in individual cases, it is better to bear that than the greater evil of extending the power."

And again, Judge Wilkins says:

"It may at first view seem harsh, and in some cases it may operate hardly, yet it is the only safe rule that can be followed. Any other practice would destroy the sanctity and conclusiveness of records, open the door to endless litigation, unsettle rights of property and person, cause delay, expenses, and ruin. 'Interest reipublica ut sit finis litium.' It would accumulate and clog the business of courts, and render it impossible to get through it. As the

rule now is, parties understand their rights and duties, and it becomes them to be vigilant and prompt, and not to sleep upon them."

But there has not been in this case, on the part of the respondent, that diligence which favorably affects a court of equity. The affidavits presented state that before the April rule day counsel for respondent delivered to the clerk the written appearance of respondent. Default was not moved until the May rule day. And the decree herein was not entered until the October following, and then on motion in open court. There is no suggestion that until in November following any attempt has been made on the part of respondent, with regard to pleading herein, nor any cause shown why, during the months intervening between the attempted appearance and entry of decree, a pleading was not presented, setting up what is now claimed to be the prior lien of respondent, and offering proofs thereunder.

In *Ruggles v. Eddy*, 11 Blatchf. 524, Judge Woodruff, in overruling a motion to open an interlocutory decree, and permit evidence upon a point not theretofore presented, says:

"I am constrained to hold the defendants concluded. Their case, as made by themselves, rests either on their own want of due diligence or the want of due diligence on the part of their counsel. By this the complainant ought not to be so far prejudiced as, after decree, reference, and report of the master, to be compelled to go again through the litigation on a point distinctly presented and proper to be met at the outset. Their case, as presented by the counsel whom they have employed for the purposes of this motion, and who regards it as clear that, as to most of the stoves they had made, they had avoided the operation of the patent, seems, at first view, one of hardship; but, if that is so, the defendants have brought it upon themselves by their own negligence or by relying on a degree of vigilance, study, and accuracy on the part of their several counsel which they now think was inadequate for their protection. No case has been referred to which in any degree tends to sanction the latitude of indulgence which the defendants here seek."

Cases are numerous in the other direction, and Mr. Justice Blatchford, now of the supreme court, and the circuit judge, in overruling a motion after interlocutory decree to permit counsel, then just employed in the case, to introduce evidence on material points not presented on the hearing of the case, says, in *De Florez v. Reynolds*, 16 Blatchf. 397:

"If such grounds were to be permitted as reasons for opening cases, there would never be an end to a suit, so long as new counsel could be employed who could allege and show that prior counsel had not been sufficiently diligent or experienced or learned."

These are cases of much greater force in the application of the matter of personal hardship than is the case at bar. I cite them as illustrations of how this question of practice is applied, but without intending to apply to counsel herein any of the terms of censure which appear to attach to counsel in the cases cited. Judge Wheeler, (*Witters v. Sowles*, 31 Fed. Rep. 11,) in referring to the cases just cited, and others, says:

"These cases abundantly show that no mistake of judgment or want of attention of counsel, if there are any such, which is not intended to be affirmed or implied, affords any just or proper grounds for granting this motion and opening the case. The judgments and decrees of courts should rest upon

such solid bases of fact as may be had by the usual modes of procedure and the rules of evidence established by law and usage. At first sight, it might appear that the retaking of evidence or the taking of new evidence could justly wrong no one, for the making of truth to appear would afford greater opportunity for just judgment. But affording chances for retaking testimony after judgment might not always, and probably would not often, tend to the elucidation of truth. Temptations would be furnished which it is the policy of the law to avoid."

Mr. Justice Harlan, in *Morgan's Co. v. Railway Co.*, 32 Fed. Rep. 530, concisely sums up the rule which must govern the case at bar as to the motion under consideration when he says:

"It is an established principle that, except upon bills of review in cases in equity, upon writs of error, *coram nobis*, in cases at law, or upon motions which in practice have been submitted for the latter remedy, no court can reverse or annul its own final decision or judgment for errors of law or fact after the term at which they have been rendered, unless for clerical mistakes, from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing."

Since this court is powerless to open up the decree herein on motion as attempted, it becomes unnecessary to investigate the issues of fact tendered in the affidavits submitted with the motion. The motion of respondent Winchester to set aside default and to vacate or modify decree must, therefore, be overruled, and at his costs. The clerk will make due entries accordingly.

BRUNDAGE et al. v. DEARDORF et al.

(Circuit Court, N. D. Ohio, W. D. May 12, 1893.)

No. 1,051.

1. EQUITY JURISDICTION—TITLE TO CHURCH PROPERTY—REMEDY AT LAW.

Complainants, praying an injunction, alleged that they were duly elected trustees to hold certain church property, and that defendants, claiming the same property as trustees, were illegally and unlawfully elected such by a seceding faction of the church, and were holding such property in perversion of the lawful trust. *Held*, that a demurrer for want of equitable jurisdiction must be overruled, the remedy by injunction being peculiarly adapted, and that by ejectment inadequate, to the necessities of the case.

2. RELIGIOUS ASSOCIATIONS — SUPREME JUDICATORY — CONCLUSIVENESS OF DECISIONS.

The decisions of the supreme judicatory of a religious denomination of the associated class, having a constitution and governed by local, district, state, and national bodies, are not conclusive upon the courts, when they are in open and avowed defiance, and in express violation, of the constitution of such body. *Watson v. Jones*, 13 Wall. 679, distinguished.

3. SAME—POWERS OF SUPREME JUDICATORY—CHANGE OF CONSTITUTION.

Where the constitution of a church of the associated class provides that no amendment shall be made thereto except on request of two-thirds of the whole society, and that the confession of faith shall not be done away with or amended, a decision by the general conference of such society that such provisions are so far-reaching as to render them "extraordinary and impracticable," is nugatory and void. *Watson v. Jones*, 13 Wall. 679, distinguished.

4. SAME—POWER TO APPOINT COMMITTEE TO PREPARE CHANGES.

The general conference, being vested by the constitution with power to pass ordinances, had the right to appoint a commission to prepare a revised and amended constitution, and fix a time at which the vote of the church could be taken thereon.

5. SAME—ELECTION—WANT OF NOTICE.

The bill averred that defendants' title to the property in controversy rested upon amendments of the constitution made in pursuance of an enabling vote, for the taking of which no general day was fixed, no provision made for notice of the time and place of the election, and no such notice in fact given, in consequence of which less than one-fourth of the membership voted. *Held*, that under these averments the amendments in question were unauthorized and void, and defendants, holding thereunder, had no rights in the property in question.

In Equity. Bill by Homer H. Brundage and others against David Deardorf and others to determine adverse claims to church property, and for an injunction. Heard on demurrer to the bill. Demurrer overruled.

Young & Young and Doyle, Scott & Lewis, for complainants.

Gunckle & Rowe, J. A. McMahon, and Bowersox & Starr, for respondents.

TAFT, Circuit Judge. The complainants claim to be trustees lawfully elected by a quarterly conference of the Church of the United Brethren in Christ to hold the title to the property of said church, located in Hicksville township, in Defiance county, Ohio, for the use of the local unincorporated society known as the "Fairview Church." The complainants are all residents and citizens of Indiana. The defendants are residents and citizens of Ohio, in possession of Fairview church, and claim to be the lawfully-elected trustees thereof, except J. W. Lilly, who is acting as, and claims to be, the lawfully-elected pastor of the church.

The Church of the United Brethren in Christ belongs to what is known as the "Associated Class of Churches," and is governed, subject to the provisions and requirements of a constitution, by official boards, quarterly conferences, annual conferences, and a general conference, which are subordinate to each other, in ascending progression, in the order named. Under the constitution of the church, all right and title to its property in meetinghouses, real estate, etc., obtained by purchase or otherwise, for the use of the church, is recognized to be the property of the church; and under its rules the title to the property intended for the use of the members of the local society is required to be held by the trustees, not less than three in number, and by their successors in office. These trustees are elected by the quarterly conference to which the local society belongs, and hold their office during the pleasure of such quarterly conference. The Church of the United Brethren in Christ, down to the year 1889, numbered about 200,000 communicants, and had 3,000 local church societies. At that time a difference arose, resulting in schism, and the establishment of two general conferences. The schism extended down to the annual and quarterly conferences, and to the official boards,

so that the controversy has appeared in many of the local societies. The complainants belong to what is known as the "Conservative Party," and they claim to be the representatives of the true and original organization. The defendants, who are in possession of the church, are the trustees in subordination to that party in the general conference, where the schism occurred, which is known as the "Liberal Party" in the church.

This bill is filed to obtain a declaration from the court that the trustees appointed under Conservative auspices are, for the purposes of succession to property rights, the representatives of the true church, and that the defendants are the representatives of the seceding portion of the church, which no longer is entitled to claim the benefit of the original organization. The schism arose over the adoption of a new constitution and new confession of faith. The Conservative party maintains that the so-called adoption of the new constitution and confession of faith was, on the part of the members of the conference who carried it out, in bad faith, and in open and avowed violation of the constitutional limitations imposed on that general conference, and that thereby the members thus unlawfully acting seceded, and withdrew from the organization of the church, which is entitled to hold its property and use and enjoy the same; that by the continued possession of this usurping and seceding party the trust to which the property was originally devoted is perverted; and that the complainants, as representing the cestuis que trustent, may apply to a court of equity to prevent the continued perversion of the trust, and to restore the trust property to the uses to which it was originally devoted.

The land upon which stands Fairview church, which is the subject-matter of this controversy, and which is alleged to be of the value of more than \$2,000, was conveyed in 1874, in consideration of \$74, to Amo Furlow, John B. Johnson, and Benjamin F. Willits, trustees of the Church of the United Brethren in Christ. The bill avers that at the time the property was received by the said trustees the Church of the United Brethren in Christ, including the local society located at Hicksville, was identified and characterized among the evangelical denominations of the United States by its adherence to a fundamental constitution adopted in 1841, and to a confession of faith as it stood at the adoption of said constitution, and the members of said church, including those of the local society, were then expected to, and did, believe in the doctrines contained in said confession of faith. The averments of the bill are that the new constitution and the new confession of faith are in material respects departures from the old constitution and the old confession of faith, and that the use of property by an organization under the new constitution and the new confession of faith is a perversion of the trust to which it was originally devoted. The circumstances of the adoption of the new constitution and the new confession of faith are fully set out in the bill, and they will be considered later.

The first contention in support of the demurrer is that a court of equity has not jurisdiction to consider the bill, because its averments show that the complainants have a plain and adequate remedy at law, in ejectment. I do not think that this contention can be sustained. It is quite true that the complainants aver that they have a legal title to the property in controversy, but it appears from the bill that they hold it in trust for the use of the members of the local society whom they represent. It is also apparent that the controversy is with another set of trustees, who claim legal title for the purpose of maintaining the property for different uses under the same deed of trust. In other words, the question of title is to be determined by the character of the trust to which the property is to be devoted, and the action is to restrain the use of the property in perversion of the lawful trust. The property is, in a sense, brought into a court of equity, for the court to decide what use shall be made of it, and, by its equitable power of injunction, to enforce the proper use. The fact that in doing so it also has to determine the legal title will not oust the jurisdiction of a court of equity. The peculiar character of the possession by the church trustees, and of the use by the pastor and congregation, makes it clear that a mere action in ejectment would be quite inadequate as a remedy to secure the complainant trustees, and those whom they represent, the same peculiar possession and use for them. The writ of injunction is well adapted to prevent an unlawful intrusion in the pulpit by the pastor, and an unlawful use by the congregation, against all of whom it would be obviously impracticable to institute proceedings in ejectment. In the enforcement of a trust, where the circumstances are such that the remedy is not as complete at law as in equity, a trustee may appeal to a court of equity to assist him. See *Harrison v. Rowan*, 4 Wash. C. C. 202. There are, perhaps, other grounds upon which the jurisdiction here could rest, but the one stated is sufficient. Cases of this kind have frequently been considered by courts of equity, as in *Watson v. Jones*, 13 Wall. 679. It is true that the action there was by one of the *cestuis que trustent*, and not by one of the trustees, in whom was the legal title; but I think that the jurisdiction was asserted because of the character of the controversy, involving, as it did, the disposition and use of trust property. In Pennsylvania, in a number of cases, the inadequacy of a legal remedy, and the necessity for an equitable remedy, in cases of exactly this character, have been frequently recognized. See *Kerr v. Trego*, 47 Pa. St. 292; *Ferraria v. Vasconcelles*, 23 Ill. 456; *Gibson v. Armstrong*, 7 B. Mon. 481; *Trustees v. Hoessli*, 13 Wis. 348.

We now come to the merits of the controversy, as stated in the bill. The constitution of 1841, then adopted by a general conference of the society, and which remained in force at least until 1889, is as follows:

"We, the members of the Church of the United Brethren in Christ, in the name of God, do, for the perfection of the saints, for the work of the min-

istry, for the edifying of the body of Christ, as well as to produce and secure a uniform mode of action in faith and practice, also to define the powers and business of a quarterly, annual, and general conferences, as recognized by this church, ordain the following articles of constitution:

"Article 1. Section 1. All ecclesiastical power herein granted, to make or repeal any rule of discipline, is vested in a general conference, which shall consist of elders elected by the members in every conference district throughout the society: provided, however, such elders have stood in that capacity three years in the conference district to which they belong. Sec. 2. General conference is to be held every four years; the bishops to be considered members and presiding officers. Sec. 3. Each annual conference shall place before the society names of the elders eligible for membership in the general conference.

"Article 2. Section 1. The general conference shall define the boundaries of the annual conferences. Sec. 2. The general conference shall at every session elect bishops from among the elders throughout the church, who have stood six years in that capacity. Sec. 3. The business of each annual conference shall be done strictly according to discipline; and any annual conference acting contrary thereto shall, by impeachment, be tried by the general conference. Sec. 4. No rule or ordinance shall at any time be passed to change or do away the confession of faith, as it now stands, or to destroy the itinerant plan. Sec. 5. There shall be no rule adopted that will infringe upon the rights of any, as relates to the mode of baptism, the sacrament of the Lord's supper, or the washing of the feet. Sec. 6. There shall be no rule made that will deprive local preachers of their vote in the annual conference to which they severally belong. Sec. 7. There shall be no connection with secret combinations, nor shall involuntary servitude be tolerated in any way. Sec. 8. The right of appeal shall be inviolate.

"Article 3. The right, title, interest, and claim of all property, whether consisting in lots of ground, meetinghouses, legacies, or donation of any kind, obtained by purchase or otherwise, by any person or persons, for the use, benefit, or behoof of the Church of the United Brethren in Christ, is hereby fully recognized and held to be the property of the church aforesaid.

"Article 4. There shall be no alteration of the foregoing constitution, unless by the request of two-thirds of the whole society."

The bill avers that some time previous to the year 1885 a faction arose in the Church of the United Brethren in Christ, hostile to the lifelong principles of the church, on the subject of secret combinations, and to the requirements of its constitutional provisions relating thereto, and that they carried their opposition to such an extent as to openly recommend and advocate, in order to accomplish their purposes, a violation and nullification of said fundamental constitution, and of the provisions contained therein, and that, conspiring and combining together to accomplish this end, they called and held conventions, and passed resolutions declaring their intention to disregard and nullify the constitution and the laws of the church forbidding secret combinations, and, in violation thereof, to receive as members of said church persons connected with such combinations, and recommending the same course and policy to others; that subsequently this faction secured control of the general conference which met at Fostoria, Ohio, in the year 1885; that for the purpose of accomplishing and carrying out the unlawful purpose aforesaid a question was raised by them as to the binding force and validity of the constitution, which had always theretofore, and ever since its adoption, in 1841, been acquiesced in by the entire membership of said church as the fundamental organic law of the church,

unchangeable except in the mode therein provided; that at this conference the subject of secret combinations, together with the constitution and confession of faith, were referred to a committee known as "Committee No. 6," which made a report conceding the validity of the constitution, and admitting the amendment article, and the article forbidding the change in the confession of faith, to have the meaning and effect arising from the natural scope and import of their language, but that, for the purpose of accomplishing their unlawful ends, and with a view to carrying out the conspiracy above stated, the committee, and the faction in control of the conference, characterized these articles as so far-reaching as to render them extraordinary and impracticable as articles of constitutional law, and that for these reasons the conference had a right to devise and plan for a new form of belief, and amended fundamental rules for the government of the church, whenever it was believed that a majority of the people favored a change thereof,—thereby expressly declaring that in the plan devised and adopted by them for this purpose it was not intended to conform, in good faith, to any construction of said constitutional provision, but, on the other hand, to nullify and override the same, and to openly set the same at defiance, and to effect a change therein by methods of their own devising, not claimed to conform to the requirements of the constitution, but avowedly unconstitutional and revolutionary in their character; that pursuant to this declared intention the conference proceeded to take measures for the amendment of the constitution, and for the adopting of a new form of belief, by a plan of their own devising, which was not put forth as conforming to the provisions of the said constitution, or to any construction placed thereon by said conference, and having no other foundation or authority than that which the conference claimed as resulting from the extraordinary and far-reaching character of the constitutional articles on these subjects, which provisions it thereby disregarded and nullified; that thereupon a church commission was appointed by the conference to prepare a form of belief, and amended fundamental rules for the government of the church, for a submission of these to a vote of the church membership according to a plan to be adopted by the commission, with a provision that, if a result of the vote showed that two-thirds of the vote cast approved the proposed confession of faith and constitution, it would be the duty of the bishops to publish and declare the result in the official papers of the church, and that when so proclaimed they should become the fundamental belief and organic law of the church; that at the time of the passage of this resolution, in 1885, a number of the members of the conference—in all, 34—presented a protest against said election as being illegal, and such protest was placed on the journal of the conference; that the commission met in Dayton in 1885, and prepared a revised confession of faith, and amended constitution, which were in November, 1888, submitted to the membership of the church, in accordance with a plan devised and adopted by said commission; that no general

day was fixed for the taking of said vote, and that no provision was made for giving notice to all the members of said church of the particular day and place of election, and that no general notice was in fact given; that at the time of taking said vote the church contained 204,000 members, but that only 41,070—less than one-fourth of the membership—voted in favor of such changes; that in May, 1889, before the general conference of that year, five of the six bishops of the church issued a proclamation in the official church papers declaring the result of the vote, and stating that two-thirds of the vote cast had been cast in favor of the new instruments; that at the meeting of the general conference in 1889 at York, Pa., a member of the church commission appointed by the conference of 1885 reported the proceedings of that commission, although the commission itself had not been directed to make such a report, and had not in fact directed the reporting member to do so; that it was not understood by any persons called upon to vote for the adoption of the new constitution and confession of faith that such vote was to be used as a request for an amendment of the constitution to be presented to the conference of 1889, and yet the reporting member used it as such, and the conference treated it as such, approved the acts of the commission, and directed the new constitution and new confession of faith to be proclaimed as the organic law and faith of the church, and passed a resolution that thenceforth they were acting under the amended forms thus adopted.

The charge is that all these acts were in bad faith towards those still adhering to the old constitution and confession of faith, and with the intention of overriding the original compact upon which the society was organized and conducted for 40 years; that the new constitution is materially different from the old one, in that it provides for a lay delegation in the general conference, makes possible future alterations in the confession of faith, and lays down a different rule on the subject of secret combinations, and a wholly different amendment, so that it embodies a different form of church government from that existing under the constitution of 1841; that there have been material changes, omissions, and additions to the confession of faith; that the defendants, claiming to be the trustees of the Liberal party, have excluded, and still do exclude, the complainants from the management and control of the church edifice, and have prevented, and still prevent, those adhering to the constitution of 1841, and said confession of faith of 1815, and who still continue to be members of said true Church of the United Brethren in Christ, from assembling and worshipping therein. It is further averred that when the proclamation at the conference at York was made, that they had passed from under the old constitution, and would legislate under the new, delegates to said general conference to the number of 15, together with others, lawfully admitted as alternates, refused to recognize the constitutionality of the proceedings, and the methods by which it had been attempted to put the same in force, and under the chairmanship of Bishop Wright, a regular bishop of said

church, continued and completed the regular session of the quadrennial general conference under the old and lawful constitution, and since that time have continued and do still maintain the church organization of the true church, have organized and held regular conferences, annual and quarterly, throughout the territory covered by said religious organization,—among others, the quarterly conference at which complainants were appointed trustees as aforesaid, in the manner required by the constitution of 1841, and the laws, rules, customs, and usages of said church thereunder.

The question raised by the demurrer is whether the facts recited show that the 15 members of the general conference, and the 15 alternates with them, who have refused to recognize the adoption of the new constitution and new confession of faith, and the annual and quarterly conferences which have since organized in subordination to them as a general conference, are the organization of the true Church of the United Brethren in Christ, and whether, by the course which the majority of the general conference of 1889 took in pursuance of the conspiracy charged as begun in the conference of 1885, they thereby ceased to be the general conference of the true church, and became seceders, and withdrew from the organization entitled to control and use the property devoted to the Church of the United Brethren in Christ.

The question is one of identity, and that identity is to be determined by a reference to the fundamental law of the church, which was the original contract or compact under which its organization was effected, and in pursuance of which, and subject to which, all the property acquired for its use became vested in the church. An open, flagrant, avowed violation of that original compact, by any persons theretofore members of the church, was necessarily a withdrawal from the lawful organization of the church, and the forfeiture of any rights to continued membership therein, and to the control and enjoyment of the property conferred on such organization. The chief contention by counsel on behalf of the defendants is that the supreme court of the United States, in the case of *Watson v. Jones*, supra, decided that in this class of churches known as the "Associated Class," governed by local, district, state, and national conferences, vested with legislative powers, the decision of the ultimate body, known in ecclesiastical language as the "Supreme Judicatory," is conclusive upon matters of ecclesiastical law, the rules, customs, and discipline of the church, and that its action cannot be inquired into by the civil courts, but must be taken as final by the civil courts, in determining property rights dependent thereon. The question in *Watson v. Jones* was whether the action of the general assembly of the Presbyterian Church was final, in excising from its organization the synod of Kentucky, and the local presbytery of Louisville, on the ground that those bodies were disloyal to the government of the United States, and asserted the doctrine of the divine character of the institution of slavery. The action of the general assembly was disciplinary, but

in its action was involved the decision that it had jurisdiction to determine that disloyalty, and belief in slavery, were of such a character as to be offenses against the moral law of the church. The supreme court (Mr. Justice Miller delivering the opinion) held that the decision of the general assembly that it had jurisdiction was as conclusive as its decision, if within its jurisdiction, upon the merits was conceded to be; and that the court could not interfere, even in a case involving property rights, with the succession to, or change in the control of, property, which the decision of the assembly made necessary.

I do not think that the case of *Watson v. Jones* controls the case presented in this bill. In *Watson v. Jones* the question was one of discipline. The general assembly which acted was admitted to be the supreme judicatory of the church, and there was no other general assembly disputing its power to act as such. In the present case, while the conference which met in 1889, at the time of meeting, was the acknowledged conference of the church, there was a division between the members when the new constitution was said to have been adopted, and two general conferences were then established. The question now to be decided is which of those two general conferences is entitled to be recognized, under the averments of the bill, as the proper governing body of the church. *Schweiker v. Husser*, decided by the supreme court of Illinois, March 31, 1893.¹

More than this, the averments of the bill here charge a conspiracy on the part of a majority of the members who met in conference to override and disregard the original compact. The charge is that this was the avowed intention of the conspiring faction, and this charge is supported by the report of the committee No. 6, adopted in the conference of 1885, in which it is stated that the provision of the old constitution of 1841, that no amendment can be made to the constitution except on request of two-thirds of the whole society, and the provision that the confession of faith shall not be done away with or amended, as it now stands, were so far-reaching as to render them extraordinary and impracticable as articles of constitutional law. Even if the supreme judicatory has the right to construe the limitations of its own power, and the civil courts may not interfere with such a construction, and must take it as conclusive, we do not understand the supreme court, in *Watson v. Jones*, to hold that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judicatory which is binding on the civil courts. Certainly, the effect of *Watson v. Jones* cannot be extended beyond the principle that a bona fide decision of the fundamental law of the church must be recognized as conclusive by civil courts. Clearly, it was not the intention of the court to recognize as legitimate the revolutionary action of a majority of a supreme judicatory, in fraud of the rights of a minority seeking to maintain the

¹Opinion held pending rehearing.

integrity of the original compact. This is the case stated by the bill, as I understand it, and such a case the language of Mr. Justice Miller in *Watson v. Jones* does not cover. No other case than *Watson v. Jones* need be considered, because in no case has the doctrine of the conclusive effect of the judgment of the supreme judicatory of the church been so strongly stated. If that does not control this case, no other authority brought to my attention does.

The next question is whether the acts of the majority in the conference of 1885 and in the conference of 1889 were violations of the original compact or constitution of 1841. As averred in the bill, I am clear that they were. The constitution, in terms, is a limitation upon the powers and business of the quarterly, annual, and general conferences. By the first article, all ecclesiastical power there granted to make or repeal any rule of discipline is vested in the general conference, as therein constituted. It is given power to define the boundaries of the annual conferences. It is given power to elect bishops. Section 4 of article 2 is: "No rule or ordinance shall at any time be passed to change or do away the confession of faith, as it now stands, or to destroy the itinerant plan." This section is necessarily a limitation upon the power of general conferences, because it alone is vested with power to pass rules and ordinances. Section 5 is a further restriction as to the rules to be adopted. Section 6 is a similar restriction. Section 7 is a limitation upon the membership of the body. Section 8 is a limitation upon the general conference and annual conferences, forbidding them to deny the right of appeal. Article 4 is a limitation both upon the general conference, and upon the right of the majority of the members to change the original compact. Though it is not expressly stated, the only meaning that can be given to the constitution is that the amendment of the constitution is to be made by the general conference. And this power is limited by requiring the request or approval of two-thirds of the entire society to give the amendment validity. I do not attach any particular importance to the word "request," as indicating that it is a condition precedent to the action of the general conference. It would seem that all that was intended was that no amendment of the constitution should go into effect until two-thirds of the whole society should agree thereto. The constitution is inartificially drawn, and the expression "request" should not have a narrow meaning. Nor do I think there is anything in the article or in the constitution which prevents the general conference from lawfully taking steps looking to the amendment of the constitution in accordance with its terms. It would seem to be a legitimate exercise of the supreme legislative power of the general conference to enact an ordinance that upon a certain day the expression of the society should be taken by vote upon the question whether the constitution should be amended in a certain way. While the constitution was adopted at a time when the church was smaller than it is now, the hope of the founders, doubtless, was that it would extend the country over.

It is not to be presumed that they inserted in the constitution a provision which, while it professed to give the power of amendment, imposed such limitations as to make it practicably impossible. Therefore, I am of the opinion that the general conference of 1885 had the right to appoint a commission to prepare a revised and amended constitution, and fix a time at which the vote of the church should be taken to signify the desire of the church that the amended constitution should be adopted. It may be conceded, though it is not decided, that it was also within the legitimate powers of the general conference to provide that, if two-thirds of those voting at the time upon the amendment should be in favor of the new constitution, it should be held to be two-thirds of the entire society, on the ground that, if notice was given to the entire society of such a rule, then a failure to vote would be an acquiescence in the vote of those who did vote. But, to make such a provision lawful, full and ample notice of this requirement, and of the day of the election, should be given to each member of the church. The averment of the bill is that no such notice was provided for, or given to the members of the church. If so, then the election was a mere nullity. An election not fully and lawfully proclaimed has no force or validity. A fortiori, it has no force when, in order to make the result lawful, those who do not vote must be counted as acquiescing in the vote of those who do.

Without, therefore, considering any of the other questions raised, it is sufficient to say that the vote of 50,000 in a membership of 200,000, without notice full and ample to the entire membership of the entire church, could not constitute a request of two-thirds of the whole society, within the meaning of the constitution, and would render the adoption of the new and amended constitution wholly invalid. As the new and amended constitution changed materially the form of the church government, those who, in defiance of their plain obligation, refused to abide by the original compact, and asserted the continuance of their body under the new constitution, must be held to have withdrawn from the organization of the true church, and to have lost their right of membership therein. It follows that the majority of the conference of 1889 has ceased to be and represent the true church, and that those who adhere to the old constitution, among whom are the complainants, remain the only representatives of the Church of the United Brethren in Christ, which this court can recognize as entitled to assert its property rights.

For this reason the demurrer to the bill will be overruled. It should be distinctly understood that this ruling is upon the averments of the bill, exactly as they are. The opinions which have been cited from Oregon, Indiana, and local courts in Pennsylvania, Ohio, and other states, were not upon demurrers to the bills, but were upon issues of fact raised upon bill and answer; and the questions therein presented are, or may be, quite different from those here considered.

FOURTH-STREET NAT. BANK v. YARDLEY.

(Circuit Court, E. D. Pennsylvania. May 23, 1893.)

No. 7.

BANKS AND BANKING—DRAFTS—NOT AN EQUITABLE ASSIGNMENT.

A draft given on a bank in the ordinary course of business does not constitute an equitable assignment of the fund; nor is it sufficient to constitute such an assignment that the draft is drawn by a bank against its reserve fund in another city, and is given in exchange for clearing-house certificates, upon the president's representation that it owes a heavy debt at the clearing house, while it is unable to meet, and his statement showing the amount of the reserve fund against which the draft is drawn.

In Equity. Suit by the Fourth-Street National Bank of the city of Philadelphia against Robert M. Yardley, receiver of the Keystone National Bank, to charge him as trustee of a fund. Bill dismissed.

Richard C. Dale, for complainant.

Read & Pettit, for respondent.

DALLAS, Circuit Judge. It is authoritatively settled for this court that a check or draft drawn upon a fund in the hands of a banker in the ordinary course of business is not an equitable assignment of such fund, or of any part of it. *Bank v. Millard*, 10 Wall. 152; *Bank v. Schuler*, 120 U. S. 511, 7 Sup. Ct. Rep. 644. The learned counsel for the complainant, while frankly admitting this to be the rule, insists that the giving of a check may, "in connection with other circumstances, be evidence of such equitable assignment." Conceding this, the question is as to the sufficiency of the circumstances relied on in this case; and these, according to the statement thereof in the complainant's brief, are as follows: On March 19, 1891, G. W. Marsh, the president of the Keystone National Bank, called at the Fourth-Street National Bank, and stated to the cashier that he had a heavy debt in the clearing house against his (Marsh's) bank, and that all its funds, or the greater part of them, were in New York,—so much so that it could not meet its debt in the clearing house,—and asked if the Fourth-Street National Bank would accept its (the Keystone's) draft against its reserve account in the New York bank for this sum of money, and give him clearing-house gold certificates. Mr. Marsh supported this statement by showing a memorandum giving the exact balance which the Keystone Bank had with the Tradesmen's National Bank of New York city,—a sum between \$26,000 and \$27,000. Upon this statement the Fourth-Street Bank gave to the Keystone Bank clearing-house certificates for \$25,000, and accepted a draft for the same amount drawn by the Keystone Bank on the Tradesmen's Bank of New York. The general ledger sheet of the Keystone Bank showed a balance to its credit with the Tradesmen's Bank at the close of business of March 19, 1891, after deducting this draft for \$25,000, of \$1,757.32.

Accepting for the present purpose this presentation of the facts, we have an express statement by the president of the Keystone Bank that a fund was provided for payment of the draft; but between a draft taken in reliance upon such a statement and an assignment of the particular fund, the distinction is obvious, and of the latter, or of any intent that the transaction should be in effect anything different from what it was in form, I perceive no indication whatever. It seems, too, that Marsh's statement that the Keystone Bank had between \$26,000 and \$27,000 with the Tradesmen's Bank was not true, and that the general ledger sheet of the Keystone Bank, to which reference has been made, was not correct; but inasmuch as, irrespective of these matters, the fundamental proposition upon which the case of the complainant rests cannot be sustained, no other question need be discussed.

The bill is dismissed, with costs.

DUEBER WATCH CASE MANUF'G CO. v. E. HOWARD WATCH &
CLOCK CO. et al.

(Circuit Court, S. D. New York. May 22, 1893.)

1. COMBINATIONS IN RESTRAINT OF TRADE—ACTION FOR DAMAGES—PLEADING.

An action to recover damages alleged to have been caused by acts done in violation of the statute prohibiting monopolies and combinations in restraint of trade (26 Stat. 209) cannot be maintained when the complaint fails to show that plaintiff is engaged in interstate commerce, and no such showing is made by an averment that plaintiff is engaged in "manufacturing watch cases throughout all the states of the United States and in foreign countries."

2. SAME—CONSTRUCTION OF STATUTE.

An agreement by a number of manufacturers and dealers in watch cases to fix an arbitrary price on their goods, and not to sell the same to any persons buying watch cases of plaintiff, is not in violation of the statute; and a complaint which, on the last analysis, avers only these facts, without averring the absorption or the intention to absorb or control the entire market, or a large part thereof, states no cause of action.

At Law. Action by the Dueber Watch Case Manufacturing Company against the E. Howard Watch & Clock Company and others to recover damages alleged to result from an illegal conspiracy to destroy plaintiff's trade. Defendants demur to the complaint. Demurrer sustained.

Statement by COXE, District Judge:

The complaint alleges that prior to November 16, 1887, the plaintiff was engaged in manufacturing watch cases throughout all the states of the United States and in foreign countries, employing a large number of skilled artisans who were and are able to produce 25,000 watch cases per month. That prior to said date the plaintiff had a ready market for its goods throughout the United States and Canada, and realized a profit of, at least, \$175,000 per annum. That on November 16, 1887, the defendants, who were and are engaged in selling watches and watch cases, mutually agreed, and notified the watch dealers throughout the United States and Canada, including some of the plaintiff's customers, "that they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever who thereafter should buy or sell any goods manufactured by

this plaintiff." That upon being informed of said agreement a large number of dealers who had previously purchased plaintiff's goods withdrew their patronage and ceased to deal in plaintiff's goods. That the defendants refused to sell their goods to plaintiff's customers, giving as a reason that the said customers dealt in plaintiff's goods and defendants declined to have any business relations with them unless they would agree not to deal in the plaintiff's goods. That prior to November 16, 1887, the defendants agreed among themselves that they would maintain an arbitrary fixed price for their goods, and pursuant thereto they have fixed and maintained an arbitrary price which the public must pay for their goods. That said agreement of November 16, 1887, was for the sole purpose of compelling plaintiff to join with the defendants in their previous agreement to fix and maintain arbitrary prices for watch cases. That all of said acts of the defendants were for the purpose of establishing a monopoly in watch cases, their object being to crush competition and drive the plaintiff from the business, unless he joined the conspiracy. That the defendants by their agreements intended to injure and impoverish the plaintiff and deprive it of all profits and break up its business. That the defendants have used the extended influence acquired by reason of the combination formed between them to prevent persons who naturally would purchase plaintiff's watch cases from dealing with the plaintiff and have threatened said persons that if they bought plaintiff's goods they would sell them no goods and give them no credit. That such conduct and threats effected a complete boycott and resulted in the ostracism of plaintiff from the trade, preventing the lawful and ordinary competition in business which plaintiff had a right to enjoy. That after the passage of the act of July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," the plaintiff would have regained its customers and re-established its business had not the defendants since that date ratified, confirmed, renewed and continued in force the said contracts, agreements and combinations and served notice thereof upon all the dealers in plaintiff's goods. That by reason of said renewals and continued threats said dealers have been compelled to refuse to purchase plaintiff's goods to its damage in the sum of \$150,000. Judgment is demanded for three times this sum, pursuant to section 7 of said act.

The defendant above named demurs on the ground that the court has no jurisdiction of the defendant or the subject-matter of the action, and, on the further ground, that the complaint does not state facts sufficient to constitute a cause of action. The sections of the act of July 2, 1890, which are drawn in question, so far as it is necessary to quote them, are as follows: "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc. "Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Wilber & Oldham and Robert Sewell, for plaintiff.

Sullivan & Cromwell, W. J. Curtis, and Edward B. Hill, for defendants.

COXE, District Judge, (after stating the facts as above.) An examination of the complaint, in the light of the provisions of the act of July 2, 1890, and the decisions construing that act, leads to the conclusion that the complaint, in its present form at least, cannot be sustained. The statute makes it illegal to enter into

a contract or conspiracy in restraint of interstate trade and also to monopolize, or attempt to monopolize, or combine or conspire with others to monopolize, such trade. There is no allegation in the complaint that the plaintiff is engaged, or has at any time, since the passage of the act, been engaged in interstate trade and commerce. There is an allegation that the plaintiff is engaged in the business of manufacturing watch cases throughout all the states of the United States and in foreign countries. This allegation is probably a mistake of the pleader, but if it were true it would not be a compliance with the requisites of the law. A corporation may have an operating manufactory in every state of the Union and yet not be engaged in interstate commerce. There is no allegation that the defendants are, or that any of them is, or was, engaged in interstate trade, or that the articles made by them are used in such trade, or that the rights of the general public have been invaded, or interstate commerce injuriously affected by any of the acts of the defendants as described in the complaint. There is no allegation that the defendants absorbed or intended to absorb the entire trade in watch cases, or that they controlled the market, or any considerable part thereof, or that they were even a majority of the watch manufacturers of the United States, or that the prices fixed by them were more than the goods were worth or in any respect unfair. There is no statement that the goods made by the defendants were made by them exclusively, or that such goods were indispensable to plaintiff's customers; non constat, such goods could have been furnished by the plaintiff or dealers other than the defendants.

What, then, is the accusation? When analyzed it will be found that the illegal acts charged against the defendants are, first, that they agreed to maintain an arbitrary fixed price for their goods; second, that they agreed not to sell their goods to plaintiff's customers; and, third, that they notified plaintiff's customers of their determination. It is only necessary to examine the first and second of these allegations, for it is manifest that if the agreements made by the defendants were lawful it could not be unlawful to notify the world of their existence. Both of the alleged agreements were made before July 2, 1890, the result being that the plaintiff, before the passage of that act, lost its customers. The only acts of the defendants which by any possibility can be construed as a violation of the statute were the ratification and renewal of these agreements after its passage. The complaint alleges that but for such renewal the plaintiff would have regained all its old customers.

The first question then is, does it constitute a violation of the statute for two or more dealers to fix an arbitrary price for their goods? No authority has gone to the extent of holding that such a transaction, in the absence of other facts, is illegal.

The second question is: Is it an illegal act, within the provisions of the law in question, for two or more traders to agree among themselves that they will not deal with those who prefer

to purchase the goods of another designated trader in the same business? Many perfectly legitimate reasons might be suggested for such an agreement. It is not a combination to monopolize; at least there is no statement of facts tending to show that it produced a monopoly in the present case. Indeed, it would seem that it must have had a contrary effect. There was surely nothing to prevent the plaintiff from supplying its customers with those things which the defendants declined to sell them, and thus enlarge its trade and stimulate competition. The plaintiff was perfectly free to engage in every branch of the watchmaking business. So were all others. The plaintiff's customers were free to purchase of the plaintiff, of the defendants, or of any other manufacturer. The contract of 1887 was not one in restraint of trade within any of the definitions or authorities which have been examined, and it is thought that the defendants' acts are not reached by any section of the law in question. The construction contended for by the plaintiff would render each of the defendants liable to an indictment not only, but would make unlawful almost every combination by which trade and commerce seek to extend their influence and enlarge their profits. It would extend to every agreement where A. and B. agree that they will not sell goods to those who buy of C. It would strike at all agreements by which honest enterprise attempts to protect itself against ruinous and dishonest competition.

It is thought that these views are in conformity with the decisions of the courts construing the act of 1890. *In re Greene*, 52 Fed. Rep. 104; *U. S. v. Nelson*, Id. 646; *U. S. v. Trans-Missouri Freight Ass'n*, 53 Fed. Rep. 440; *In re Corning*, 51 Fed. Rep. 205; *In re Terrell*, Id. 213. The demurrer is sustained.

PAINÉ LUMBER CO., Limited, v. UNITED STATES.

(Circuit Court, E. D. Wisconsin. January 9, 1893.)

1. EMINENT DOMAIN—RIGHT TO RECOVER DAMAGES SUSTAINED BY GRANTOR.

A proceeding was begun against the United States to ascertain the damages caused to a sawmill, etc., by the flooding thereof through the raising of a dam for the purpose of improving the navigation of a river. The plaintiff corporation was organized in May, 1883, succeeding to a firm which had owned the premises from about 1855. Plaintiff offered to show damages to both real and personal property accruing between 1874 and May, 1883. *Held* that, as plaintiff had not owned the premises prior to its incorporation, it could not recover damages which had happened to its predecessor. *Sweeney v. U. S.*, 22 N. W. Rep. 609, 62 Wis. 306, disapproved.

2. UNITED STATES—CONSENT TO BE SUED—REPEAL OF STATUTE.

If the national government authorizes the commencement of suit against it to recover damages caused by its acts, and subsequently, but after suit brought, repeals the statute authorizing suit against it, the recovery in such suit is limited to the time during which the consent to sue existed, and cannot include damages sustained after the enactment of the repealing statute.

8. EMINENT DOMAIN—FLOODING LANDS—STRUCTURES WITHIN BANKS OF NAVIGABLE RIVER—PROVINCE OF JURY.

In a proceeding to ascertain the compensation payable by the national government for flooding lands by the construction and maintenance of a dam to improve the navigation of a river, the question whether the lands, docks, wharves, piers, and structures affected by a rise of water lie within the banks of the river is a question of fact to be determined by the jury, as is also the further question whether any part within the banks of the river is an obstruction to navigation.

4. NAVIGABLE WATERS—"BED OF RIVER" DEFINED.

The bed of a river is a definite, and commonly a permanent, channel, and is the characteristic which distinguishes the water of the river from mere surface drainage, flowing without definite course or certain limits, and from water percolating through the strata of the earth, both of which are not subject to riparian rights, but form part of the realty, and belong exclusively to the owner of the realty. The banks and the soil which is permanently submerged form the bed of the river.

5. SAME—"BANK" DEFINED.

The bank of a river is that elevation of land which confines the waters of the river in their natural channel when they rise to their highest, but do not overflow the banks.

6. SAME—SWAMP AND MARSH LANDS.

While the banks are a part of the river, the river does not include lands beyond the banks, which are covered in times of freshet or extreme floods, or swamps or low grounds which are liable to overflow, but are reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture.

7. SAME—"LOW AND HIGH WATER MARK" DEFINED.

Low-water mark is the point to which the river recedes at its lowest stage. High-water mark is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation, and to destroy its value for agriculture.

8. SAME—RIGHTS OF RIPARIAN OWNERS—DOCKS AND WHARVES.

The owner of premises bounded by a navigable stream has, as a riparian proprietor, the right of access to the navigable part of the river in front of his premises, and the right to make a landing, dock, wharf, or pier for his own use, or the use of the public; but such structure must not encroach upon navigable waters and vessels, and the commerce navigating the stream must not be impeded in their passage, or precluded from the use of all parts of the stream which are navigable in fact. These rights are property, and the riparian owner is entitled to compensation for their destruction or impairment.

9. SAME—OBSTRUCTION—DOCK—WISCONSIN STATUTE.

The construction of a dock extending through shoal water only so far as is necessary to reach the navigable part of a river is not within the prohibition of the Wisconsin statute prohibiting the obstruction of navigable rivers without authority from the legislature.

10. SAME—DOCK PRIVILEGES—RIGHT TO COMPENSATION—EMINENT DOMAIN.

If a dock constructed on the bank of a navigable river does not extend into waters which are navigable in fact so as to obstruct navigation, the owner is entitled to compensation for damage sustained to his dock by the raising of a dam to improve the navigation; but if the dock so encroaches on that part of the river which is navigable in fact as to obstruct navigation, and impede commerce, he cannot recover damages for injury to the portion of the dock which so encroaches.

11. EMINENT DOMAIN—FLOODING LANDS—COST OF FILLING.

In a proceeding by a lumber company against the United States to recover damages caused by flooding lands forming part of its lumber yard, the company made a claim for filling, which was alleged to have been rendered necessary by the raising of a dam. The land was originally low and marshy, and subject to overflow by freshet, and to render

it fit for use, in connection with the sawmill, it was necessary that it should be filled. The filling used was sawdust, slab, and other material, and it was claimed that the effect of the water set back thereon was to disintegrate and rot it, and that by the action of the water, and the weight of the lumber, the filling was constantly settling, necessitating refilling. *Held*, that in determining the amount of damage the jury must consider the original character of the land, and the consequent disintegration and rotting of the filling, and that the recovery must be limited to such filling as was rendered necessary by the raising of the dam, and the disintegration and rotting resulting therefrom, and not from natural causes.

12. DAMAGES—MEASURE—VALUE OF ARTICLE FOR SPECIFIC PURPOSE.

Evidence was given concerning the value of sawdust, from which it appeared that at one time there was a certain demand in Oshkosh for sawdust, and that the value of it at a particular mill depended upon the nearness of the mill to the locality where it was needed, or the facility with which it could be shipped. *Held* that, in determining the value of the sawdust used for filling, the jury must consider whether the demand included all the sawdust made in Oshkosh, and the location of the plaintiff's mill, its nearness to the market, and the value of the sawdust there.

At Law. Proceeding by the Paine Lumber Company, Limited, against the United States to ascertain the damage caused to the plaintiff's premises by the raising of a dam at Menasha for the purpose of improving the navigation of the Fox and Wisconsin rivers. Verdict for plaintiff.

In the year 1872 the United States purchased of the Green Bay & Mississippi Canal Company the line of improvement of the Fox and Wisconsin rivers, including all locks, dams, canals, and franchises, excepting the water powers created by the dams, and by the use of the surplus waters not needed for the purposes of navigation, took possession of the same, and since that time have controlled and carried on the works of such improvement. By an act of congress approved March 3, 1875, it was, among other things, provided: "In case any lands or other property is now, or shall be, flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed, for which compensation is now, or shall become, legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in the mode provided for by the laws of the state wherein such property lies." The plaintiff being the owner of a sawmill, sash, door, and blind factory, warehouses, and piling grounds situate in the city of Oshkosh, on the east side of the river, containing 22 and a fraction acres of land, and also the owner of a sawmill, yards, and piling grounds on the west side of the river, containing 5 and a fraction acres of ground, which it claimed were damaged by flowage caused by the dam at Menasha, at the outlet of Lake Winnebago, on the 1st day of February, 1887, filed its petition in accordance with the laws of the state of Wisconsin, as applicable in case of lands taken by a railroad company, for the purpose of having the damages claimed to the real estate and personal property thereon appraised and paid. Commissioners were appointed, and in 1889 an award was made by them, whereby there was awarded to the plaintiff the sum of \$65,561 as damages. From this award the United States appealed to the circuit court of Winnebago county, and the cause was afterwards, under the provisions of the act of congress, approved September 30, 1890, removed into the circuit court of the United States for the eastern district of Wisconsin. Such cause was tried before the Honorable James G. Jenkins, J., and a jury.

Evidence was produced tending to show that in 1874 the dam at Menasha, which was so purchased by the United States, was raised by private parties, claiming to be the owners of the water power created by the dam, by placing 15 inches of movable flushboards upon the crest; that in 1881 a large amount

of stone was placed upon the dam by the mill owners, which raised it from 18 to 20 inches above the height of such flushboards, and resulted, in connection with severe and unusual rains, in a disastrous flood upon the country above. In the winter of 1882 these stones were removed, or leveled back, and in the summer of that year the government took exclusive control of the dam. At this time it was found that in some way, and at some time subsequent to 1874, the dam had been made solid to the same height as the flushboards placed thereon in 1874. For the purpose of reducing the waters of Lake Winnebago the United States lowered the crest of the dam, as it was found in 1882, 18 inches, or to a point 3 inches below the crest of the dam in 1874, and placed thereon 18 inches of movable flushboards, which restored the dam, with the flushboards, to the same height that it was in 1874 with the flushboards on. In 1886 the old dam was entirely removed, and a new one built, by the United States, to the same height as the dam of 1874, with its flushboards, and to the same height as the dam of 1882, with its flushboards.

The plaintiff corporation was organized in May, 1883, succeeding the firm of C. N. Paine & Co., which had owned the premises claimed to be damaged from about the year 1855. The statute which authorized these proceedings was repealed February 1, 1888. The plaintiff offered to show damages accruing between 1874 and May, 1883, both to the real and personal property. Such evidence was excluded by the court on the ground that the plaintiff had no ownership prior to its incorporation, and could not recover for any damages which had happened to the firm of C. N. Paine & Co., its predecessor; the court declining to follow the rule laid down in *Sweeney v. U. S.*, 62 Wis. 396, 22 N. W. Rep. 609. The plaintiff also offered to show damages which had accrued subsequent to February, 1888, but the court excluded the evidence on the ground that no damage could be recovered after the repeal of the statute. Evidence was received as to damages between May, 1883, and February, 1888. The plaintiff claimed to have proven damages during such time as follows:

To manufactured lumber	\$ 9,300 00
Glass	1,000 00
Loss of use of mill	5,100 00
Expense of raising mill and machinery	5,656 45
Cost of filling 28 acres to a height claimed to be necessary to bring the premises above high-water mark, including the cost of filling made necessary by waste caused by high water.	60,486 00

The jury returned into court January 10, 1893, with a verdict for the plaintiff for \$5,588.34. Such other facts as are necessary to understand the charge are fully stated by the learned judge therein.

Charles W. Felker and Moses Hooper, for plaintiff.

A. E. Thompson and Elihu Colman, for defendant.

JENKINS, District Judge, (charging jury.) The trial in which we have been engaged has taken considerable of your time, and of the time of the court, and is an important one, both to the public and the private parties here litigant; and if, with the assistance of counsel and of the court, you can arrive at a just conclusion upon the merits of this controversy, the time expended in the trial will have been well employed. A large mass of testimony has been taken, to which you have given careful and intelligent attention. Notwithstanding that large mass of evidence, the propositions of law involved are not many, and are not, as the court views them, extremely difficult of solution. And if you will carefully listen to such charge as the court thinks it its duty to address to you, and will endeavor to apply the law as the court shall give it to you, to the facts as you may ascertain them to be, I think you

will have no great difficulty in arriving at a correct solution of the rights of this case.

In 1849 a dam was constructed across the "Menasha channel," as it is called, or the outlet of Winnebago lake. That dam was constructed by private parties under authority of the legislature of the state. It remained substantially as it was constructed, with reference to its effect upon the waters of Lake Winnebago, down to 1866, or say the 1st of January, 1867. This proceeding by the plaintiff here having been commenced in the year 1887, the owners of that dam, whether the private owners or their successors, (finally the United States of America,) had acquired by prescription the right to maintain that dam, and to set back the waters of Lake Winnebago to the height that that dam would set them back, and no one had a right to dispute the right of the owner of the dam to so set back those waters. They had been set back, if at all, by that dam, for a period of 20 years, from 1849; and, if the waters of Lake Winnebago or of Fox river have not been set back by any improvements or additions to the dam to a greater height than they were set back in 1866 by the dam of 1849, there can be no recovery here by the plaintiff, because the right so to set them back had become fixed by prescription,—by the fact that they had been so set back for a period of 20 years.

In 1872 this dam was purchased by the government of the United States of America, and it had the right to set back the waters of Lake Winnebago and of the Fox river as they were set back by the dam it then purchased at that time. The United States of America, being sovereign, cannot be sued with respect to anything that it does, except by its own consent; and on the 3d day of March, 1875, by an act of the congress of the United States, approved by the president of the United States on that day, the government provided that whenever, in the prosecution and maintenance of the improvement of the Fox and Wisconsin rivers, it became necessary or proper, in the judgment of the secretary of war, to take possession of land, or right of way over lands for canals and cut-offs, or to use any earth, quarries, or other material lying adjacent to the line of the improvement, and needful for its prosecution or maintenance, possession might be taken by the officers of the United States, and they might use the same, after first paying, or securing to be paid, to the owner, the value thereof, to be ascertained in the mode pointed out by the laws of the state of Wisconsin. And it was further provided that "in case any land or other property is now, or shall be, flooded or injured by means of any part of the works of said improvement heretofore or hereafter constructed, for which compensation is now, or shall become, legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in like manner." Under that provision of law the plaintiff has taken the necessary steps to have its claim that its lands are flowed, by reason of this improvement, over and above what they were flowed in 1866 by the dam of 1849, determined in this proceeding, and the sovereign, having assented, by

this act, to be brought into a court of justice, is here to meet that claim; and the question for your determination is, under the charge of the court, whether, and to what extent, that claim is justified by the law and the facts.

The plaintiff acquired title to the premises in question in the spring of 1883,—to the part on the east bank of the river, in May; and the part on the west bank of the river, in June. The discrepancy in the time of acquiring the title does not cut much, if any, figure in this case, and we may take it as the spring of 1883. The court has ruled during the trial that the plaintiff, if entitled to any damages at all, is limited to those damages which accrued between the time that it took title to the property, in the spring of 1883, and the time when this act was repealed by the congress of the United States,—February 1, 1888; and it so charges you now, that the claim of the plaintiff, if valid in the law or in fact, must be limited to the years 1883, 1884, 1885, 1886, and 1887, because the sovereign power, having withdrawn its consent to be sued, and to be held responsible for these damages, cannot be compelled to respond in a court of justice beyond the time when it has withdrawn its consent. But, as to any injury inflicted during the time that that consent was effectual, it can be held responsible.

The first question for you to consider is whether the Menasha dam, during the period between 1883 and 1888, raised the waters at the Paine mill to a greater height than that water was maintained in 1866 by the dam of 1849. If it did not, then your verdict should be for the defendant, and you need inquire no further with respect to the other questions in the case. This question, gentlemen, depends upon several considerations. The court does not propose to enter elaborately into any discussion of the facts of the case, because it has observed that you have given to them an intelligent attention, and have taken great interest in the facts as they have been disclosed to you, and they have been ably argued to you by counsel on both sides, but I shall content myself with calling your attention to certain facts which may aid you in arriving at a determination of that question; and I desire to say here that, in whatever the court may say upon the facts of the case, it does not wish you to understand that it expresses any opinion as to how the fact should be determined as to whether or not the waters were raised by the dam in question. That is a question of fact for you to determine upon the evidence, as it shall convince your judgment.

In 1875, after the United States government had become the owner of this dam, proprietors of mills interested in maintaining this dam performed certain work upon it, presumably without the knowledge of the officials of the United States. But if the government of the United States maintained that dam thereafter, with such additions, alterations, and elevations as private parties had made to it, the United States is responsible for the consequences, and, if there have been any injury, is responsible to the parties injured. The dam of 1875, as so constructed and altered by private parties, was, with the movable flushboards put upon it,

some 15 inches higher than the dam of 1849. Some time between 1875 and 1882—just when is left, I believe, uncertain—those flushboards were permanently attached to that dam. So that the dam, as it was in 1882,—the commencement of the year,—was 15 inches higher than the dam of 1849.

Now, certain work was done upon that dam in 1882. Mr. Herman, the engineer then actively in charge of the work, states that the flushboards were removed that had been permanently affixed,—those 15-inch flushboards; that the crest of the dam was cut down 3 inches, and movable flushboards supplied, of 18 inches in height. So that, if these flushboards were maintained on the dam permanently thereafter, that dam would be 15 inches higher than the dam of 1849. Between these dates—1875 and 1881—these mill proprietors, or certain of them, had placed some 82 or 83 cords of stone upon the work, which, it is claimed, raised that dam higher than its crest. These stone, or some of them, were removed in 1882. It will be for you to say, gentlemen, as a question of fact, whether these stone were all removed, or whether those that remained, if all were not removed, raised that dam above the 15 inches that it was higher than the dam of 1849. That is a question of fact, which I need not take time to elaborate to you. It is claimed on the part of the defendant that these stone were substantially all removed, or, if not all removed, that the true height of the dam was shown by the levels taken at that time to be 15 inches higher than the dam of 1849, and no more. It is claimed on the part of the plaintiff that these stone were not all removed, and that those that were left raised, and presented an obstruction to the flowage of water,—that obstruction being higher than that 15 inches above the dam of 1849. This dam so remained until 1886, when it was in fact raised to an elevation equal to the height of those flushboards, and that elevation made permanent, and sluice gates put at the bottom of the dam to let out the water in times of freshet and of high water. This last change would, of course, make that permanent dam higher, but for the fact that the effective result of it would depend upon the use made of those sluice gates to let out the water in time of freshet, of flood, or high water. That work was substantially done in 1886, so that only comprehends one year of the time. Some time between 1875 and 1881,—it may have been in 1867; there has been some dispute as to the time; but at some time before 1881, and after 1866,—you will remember that that dam, to one-half of its width across the river, had been converted into a permanent embankment, the height being equal to the other part of the dam with the flushboards upon it. That you will take into consideration in determining the question of whether, after 1866, or after this right of prescription accrued to the owners of the dam, a change had been made which tended to set back the waters of the lake, and of the Fox and Wisconsin rivers. The "spill," as it is termed, over the dam, had been shortened by about one-half of its width.

Then comes the question whether that dam of 1882 caused the waters of the lake and of the Fox river to be set back. If the height to which it was raised by means of those flushboards was permanent, it would not necessarily follow that the structure itself set back the waters to the extent of its height. That would depend upon the quantity of water that was flowing towards that dam, and the height of the water, and not altogether upon the height of the dam. Now, in ascertaining the fact, you must have regard to all the evidence that has been given in the case. You must regard the evidence on the part of the plaintiff carefully, and analyze that, as well as all the evidence on the part of the defense. The plaintiff has given evidence tending to show that the waters of the Fox river have raised, and have remained for a longer period of time upon the lands. You will consider the means of observation of the parties so testifying,—whether it is guesswork upon their part, or a statement of a fact which they have observed, and their means of knowledge; whether or not they had the means of measurement, and the accuracy of those measurements, if they had. You have also testimony upon the part of the defendant which, it is claimed, tends to show that these waters have not been raised by the dam. They have given in evidence readings taken from this “Deuchman gauge,” as it is termed, which has a tendency to show, as it is claimed, that as a matter of fact the waters have not been so high, or have been no higher since the dam of 1882 than they were prior to that time,—than they were during the existence of the dam of 1849. And in considering the value of that testimony, and its reliability, you are also to consider the question of the reliability of this Deuchman gauge. This gauge has been described to you. It was kept by the owner of the mill. It has been the standard adopted by the government since it came into possession of these improvements, upon which the government has acted. The reliability of that gauge—as to whether it has been changed with respect to its location, as to its accuracy—is a question for you to determine. It has been attacked by the plaintiff’s counsel as unreliable, and as one manipulated by the mill owners—not by the government of the United States, but by mill owners—at the time it was maintained before the government came there, in anticipation of suits and claims for damages, and that it was read at that time with respect to, and in anticipation of, these claims. It is for you to say, gentlemen, whether the evidence in this case proves or sustains that claim; whether the facts, as disclosed, as to the condition of the water in the Fox river, prove, or do not prove, that that gauge is unreliable. If it is a standard that has been so manipulated in the interest of the mill owners, then the readings of that gauge before the time when the government took possession of these works, and had charge of them,—acquired the title to them,—must be considered in the light of such fact and evidence. If it is contrary to actual fact with respect to the height of water at the Paine mill, as you may de-

termine it to be, it would have a tendency to show that the gauge was unreliable. But if the testimony does not satisfy you that that gauge has been manipulated,—does not satisfy you that it has been kept otherwise than as an honest gauge of the height of the water,—then you must consider it as reliable evidence with respect to the various heights of water during the time that these readings speak. The question of the reliability of the gauge, and the credit to be given to it, is one of fact, for you to determine, and rests solely with you. If, following the readings of that gauge, you shall come to the conclusion that the water has not been raised by that dam of 1882, and has not been raised by the dam of 1886, then, equally, the plaintiff is not entitled to recover, however its injury, if it has sustained any, may have been occasioned.

And in this connection the court will advert for a moment to the order of Col. Marshall, concerning which much has been said, although, being made in October, 1886, it can have reference to but one year,—the year 1887. Col. Marshall says in his order that the sluiceways in the dam are placed by the government to prevent damage by floods in Lake Winnebago. "The term 'flood' is to be considered to refer to all stages of water above an ordinary high-water stage. The ordinary high-water stage will be taken as the mean high-water stage for the past 28 years, as shown by the readings of Deuchman's gauge at the foot of Lake Winnebago; rejecting 1860, when the water was abnormally low, and 1881, when the water was excessively high. This mean annual high water for 28 years is +42 inches on Deuchman's gauge, or +3' 6" above zero. You will, therefore," says Col. Marshall, "begin to open the sluiceways in the Menasha dam when the water approaches within two inches of this height, or at 3' 4" on Deuchman's gauge, and as far as the capacity of the Fox river below Menasha, and the security of the government works, will allow. You will maintain the level of Lake Winnebago at or below the ordinary high water level of 3' 6" on the Deuchman's gauge by opening or closing the sluiceways in the Menasha dam." That order does not require the officers to maintain it at 3' 6", but at or below 3' 6", depending upon the necessities of the works below the Menasha dam. The object of the order, as you will observe, is that the water of Lake Winnebago and of the Fox river, at mean ordinary high-water mark, shall not be above the mean annual high water for the 28 years preceding.

Now, what did that dam of 1882 do with respect to the raising of the waters in Fox river? That depended, not wholly, as the court has observed, upon the height of the flushboards, for the flushboards may or may not have been on there at times of high water. Whether that dam would be effective to raise the water at the dam, and hold it there at the height of 15 inches above the dam of 1849, would depend in part upon whether the flushboards were on. I say in part, because, you will remember, up to 1886, one-half in the width of this dam was a per-

manent embankment to the height of 15 inches above the dam of 1849. You will, in determining this question of fact, consider first to what height, if the water was maintained at the height of the flushboards on the dam, and the flushboards were on, it would be effective to set back the water at the Paine mill, and to what height it would be effective if the flushboards were off,—taking into consideration the fact that one-half in width of this dam had become a permanent elevation of 15 inches above the dam of 1849, and also taking into consideration other circumstances, as to the rainfall, as to the melting of snow, which have been detailed by the witnesses. Tables have been given you of the rainfalls during the period. You will also consider the fact—historical fact—that the country north of this, and to the west of it, the waters of which are contributory to this Fox river, had been developed. Timber had been cut down, the land had been improved, and you will determine the fact—which seems to be disputed here—whether the felling of the timber, and cultivation of the ground, does or does not tend to release the water which has been held in the ground when the land was in a state of nature, and whether that cultivation does or does not release the water so that a larger quantity of water is coming down than formerly came when the land was in a state of nature. You will also consider and determine the question whether the fact, if it be a fact, that parties along the river have built docks out, and have narrowed the channel of the river, has caused the waters to be held back and dammed up, in a measure, so that the flow of water has been retarded, and has spread over upon the lands of the plaintiff. You will also consider whether or not there were obstructions in the river at or above the plaintiff's premises, in the way of piles, or other obstructions put in there, not by the United States government, but by others, which had a tendency to hold back the water, and spread it over the premises of the plaintiff. You will see, therefore, gentlemen, that there are many circumstances which you should consider in arriving at a just conclusion as to whether this dam of 1882 did or did not set back the waters of Lake Winnebago upon the premises of the plaintiff.

With respect to the dam of 1886, in this connection, you will remember that the object of these sluiceways was to lower the water in time of freshets, and prevent floods; and you will also say, as to the year 1887, whether or not that dam of 1886 has set back the water, either by reason of the dam itself, or the management of it with respect to the sluiceways, over and above the height to which water was set back in 1886. If you shall come to the conclusion that during those five years, from 1883 to 1888, this dam, as it was maintained from 1882 to 1888, did not set back the waters upon the premises of the plaintiff more than they were set back in 1866; if you shall find that the water was higher on the plaintiff's premises during those years than it was in 1866,—yet if that was caused, not by the dam, but from other causes which the court has mentioned, and the evidence of which is before you, then it will be your duty to find for the defendant, because the act of the

government in such case would not have caused any injury to the plaintiff. But if, on the other hand, you shall find that in fact this dam of 1882 and 1886 did cause the waters of the Fox river to rise higher upon the land of the plaintiff than it was wont in time of freshet, and it was caused by the dam, and has been retained there by the dam longer than it was usually retained, and longer than it was retained by the dam of 1849, and in 1866, then it will be your duty to proceed further, and ascertain whether, upon the other questions in the case, the plaintiff is entitled to damages, and to what damages.

It is insisted on behalf of the government that the plaintiff cannot recover here for any such damages, if any were occasioned, because it is claimed that the premises which were affected by that rise of water, if it was raised by the dam, lie within the banks of the river, and that, therefore, the government of the United States, having the right to improve the navigation of the river, had a right to do what was necessary to be done in that regard, and that no one had a right to any part of the soil within the banks of the river, and that no docks, wharves, piers, or structure erected within the banks of the river, and injured by this improvement of the navigation of the river, can sustain injury by reason of that improvement for which the government can be called to account. This proposition involves an interesting and important principle of law, which, as the court considers and determines it, leaves it in part a question of fact for the jury to determine upon the evidence in this case,—whether this property claimed by the plaintiff is within the banks of the river, and, if any part of it is within the banks of the river, whether that part is or is not an obstruction to the navigation of the river.

A river consists of the bed, the water, and the bank. The bed, which is a definite, and commonly a permanent, channel, is the characteristic which distinguishes the water of a river from mere surface drainage flowing without definite course or certain limits, and from water percolating through the strata of the earth, both of which are not subject to riparian rights, but form part of the realty, and belong exclusively to the owner of the realty. The bank of a river is that elevation of land which confines the waters of the river in their natural channel when they rise the highest, and do not overflow the banks. And, in that condition of the water, the banks, and the soil which is permanently submerged, form the bed of the river. The banks are a part of the river bed; but the river does not include lands beyond the banks which are covered in times of freshet or extreme floods, or swamps or low grounds which are liable to overflow, but are reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. Fresh-water rivers, like the Fox river, may rise and fall periodically at certain seasons, and these have defined high and low water marks. "Low-water mark" is the point to which the river recedes at its lowest stage. "High-water

mark" is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation, and to destroy its value for agriculture.

Now, apply these principles, gentlemen, to the facts in this case. It is claimed on the one side that the bank of this river on the east was about the line of the present Lake Shore & Western Road. It is claimed upon the other side that that was not the bank of the river; that that was high ground, but that between that line and the true bank of the river was low ground, covered in times of freshet with water, but which gradually and naturally drained off, leaving the property fit for pasture; that it grew grass; and that that land was real estate, and not the bed of the river. You are to look at the character of the vegetation which was upon that bottom land, as the court may term it, to settle in your minds whether that was really part of the bed of the river, or whether it was simply low ground, which in times of freshet or of floods was overflowed, and afterwards drained. In other words, to again recur to the definition of "high-water line," did the water so act upon the soil by covering it for such sufficient periods as to deprive it of vegetation, and destroy its value for agriculture? The soil which is so impressed is the soil between low-water mark and high-water mark. So you are to determine from the evidence in this case whether high-water mark was at the elevation which the plaintiff claims was the bank, or that higher elevation by the railroad, which the defendant claims was the bank. You are to take these premises as they existed, and as they are shown to you by the evidence to have existed, to determine whether the water—the ordinary mean high water of that river—remained there, and remained there so long as to unfit that land for pasturage or agriculture, and to change entirely the soil. Was it that character of land which by action of the water so permanently remaining upon it, when it reaches its high-water mark, would be deprived of its usefulness as land, and become simply what we all know to be the bed of a river? If it was not so impressed by the water; if it was merely covered by freshets or by floods, which receded at once, or remained there but temporarily, and, after the water receded, grass grew upon it,—cattle pastured upon it,—then that land did not constitute the bed of the river, but was simply low, marshy land, title to which is in the owners of the property, and was part of the realty, which the owner of that realty had a right to improve. Can it be said truthfully that low lands which we find along the rivers of the west, which are flooded in times of freshet, and then comparatively dry for the remainder of the year, are part of the river bed? Is it not true that such lands can be cultivated, and belong to the owner, who owns at least to the water's edge? And if you find that these premises of the plaintiff were such lands, were low lands, lying beyond the bank of the river, and not within the banks of the river, lying beyond the point of high water when the river does not overflow its banks,—for rivers frequently overflow their banks,—then it was real estate; then it was the property of the plaintiff, which it had a right to improve; and if it has

been damaged the government of the United States must make just compensation for the injury it has occasioned, if it has occasioned any.

And again, gentlemen, it is claimed on the part of the United States that even assuming the bank of the river to be as claimed by the plaintiff, if the plaintiff has docked out beyond that bank, beyond high-water mark, that, as the government had a right to improve this river for the purposes of navigation, the plaintiff cannot recover for any injury to structures, docks, or to filling that have been extended beyond the bank of the river. And that brings us to the consideration of the question of riparian rights. It is not essential for the purposes of this case to determine or to declare whether or not the plaintiff owned the soil under the water to the thread of the channel; for, by reason of its ownership of the premises bounded by a navigable stream, the plaintiff possesses the rights of a riparian proprietor, among which are the right of access to the navigable part of the river from the front of its premises, and the right to make a landing, a dock, a wharf, or a pier for its own use, or for the use of the public, subject, however, to such restrictions as may, by law, be imposed for the protection of the rights of the public. But in so doing the plaintiff must take care that it does not encroach upon navigable waters, and that vessels, and the commerce employed in navigating the stream, are not impeded in their passage, nor precluded from the use of all parts of the stream which are navigable in fact. This right, as Mr. Chief Justice Ryan, of the supreme court of Wisconsin, aptly defined it, "necessarily implies some intrusion into navigable water at peril of obstructing navigation. This intrusion is expressly permitted to aid navigation, and expressly prohibited to obstruct navigation. It is impossible," he says, "to give a general rule limiting its extent. That will always depend upon the condition under which the right is exercised; the extent and uses of the navigable water; the nature, extent, and object of the structure itself. A structure in aid of navigation which would be a reasonable intrusion into the waters of Lake Michigan would probably be an obstruction of navigation in any navigable river within the state. A logging boom which would be a reasonable intrusion into the waters of the Mississippi river would probably be an obstruction of navigation in most or all the logging streams within the state. The width of a river may justify a liberal exercise of the right of intrusion, or may exclude it altogether. Its extent is purely a relative question." The construction of a dock extending through shoal water only so far as was necessary to reach the navigable part of the river is not within the protection of the state statute to which the court has been referred, forbidding the obstruction of navigable rivers without authority from the legislature.

You will therefore consider if there has been any intrusion into this river by the plaintiff's premises, beyond this high-water line, as you may determine it. You will consider the object, the nature, and the extent of that intrusion, and whether it obstructs the navigation of that river; whether it goes so far, and includes that part

of the river which is navigable in fact,—navigable for crafts usually plying its waters. If this structure, this dock, has been extended beyond the line of navigable water so that it becomes an intrusion to navigation, an obstruction to the commerce, taking into consideration the locality, the commerce that plies there, the width of the river,—if it has extended into waters navigable in fact,—then, so far as it extended, the plaintiff cannot claim damages for injuries to that property by act of the government in improving the navigation of that river. But if it has not extended into navigable water,—waters navigable in fact,—if it is not an obstruction to navigation, then that property cannot be injured without compensation being made for the injury. This riparian right is property, as has been determined by the supreme court of the United States, and is valuable, and, although it must be enjoyed in due subjection to the rights of the public, it is a right of which, when once vested, the owner can only be deprived in accordance with established law; and if that right has here been injured by means of any part of the improvement constructed or maintained by the United States under the act of March 3, 1875, the defendant must respond for any such injury occasioned between the spring of 1883 and the repeal of the act, on the 1st of February, 1888. The right of the government to improve the navigation of a navigable river is paramount, and, as against the exercise of that right, the plaintiff had no right to obstruct navigation by encroaching upon the navigable part of the river; that is, that part of the river within its bank that was navigable in fact. And if the plaintiff's dock so encroaches, in whole or in part, the plaintiff cannot recover for any injury to the structure, or that part of it so encroaching, caused by the act of the United States in the improvement of the navigation of the river. But the plaintiff had the right to construct or maintain its dock in the river so far as to reach that point which was navigable in fact. So that you see the question comes down, as a question of fact for you to determine, as to the extent to which the dock has encroached upon that part of the river which in fact was navigable; how far it has extended beyond the bank which held the water, without the bank being overflowed in time of ordinary high water. Upon this question of fact, as to whether this dock has encroached into water navigable in fact, you will bring to bear your common sense, and your best judgment. You have been there. You have seen these premises. You have heard evidence of the depth of the water at the dock. It is for you to say, as you may determine these facts, whether that dock has or has not encroached upon that part of the river which was navigable in fact. If it has not, then, if, under the consideration of the other branches of the case, you find it has been injured by act of the United States, and by the maintenance of this dam, then, so far as it has been injured by that act, the plaintiff would be entitled to recover.

I now come, gentlemen, to the consideration of the question of the damages which the plaintiff is entitled to recover, if at all.

A large part of the plaintiff's claim is made up of filling; and the court will make a few observations to you, and give you a few instructions, upon that subject, which you may apply to the facts as you may find them. You will remember that, if the plaintiff is entitled to recover at all for any filling upon these premises, it is only entitled to such filling as it has done to make these premises as much higher as the water has been raised by reason of the dam in question over the height to which it was raised at and prior to 1866; the filling done by the plaintiff during the years 1883 to 1888; the filling rendered necessary by reason of the elevation of the water on that land by the dam in question, if it was so raised by the dam. You will consider the question first, if you shall determine that the water was raised and kept there by the dam in question to the extent of a foot or to whatever extent you may find it to have been raised, if it was raised; then, if it was necessary, by reason of the rise of the water a foot, that it should be filled a foot, to the extent that it was necessary, and to the extent the plaintiff did the filling, it would be entitled to recover what that filling was reasonably worth. You must consider, gentlemen, in this connection, the original character of this land, if you should find that it was land. It was low, marshy, swampy land. To be rendered fit for use in connection with a lumber mill, it was essential that that land should be filled. You will remember, also, that they were premises that were annually overflowed by freshet. You will remember that it is claimed that the effect of water upon such filling was to disintegrate the filling, and to rot it, and that that kind of filling was constantly and yearly settling by reason of the action of the water upon it, and the pressure of the lumber from above, so that it, either annually or at stated periods, required refilling. Now, because the government of the United States has raised the water upon these premises, and retained water upon these premises longer than it was wont to be retained, if it has so done, is no reason why the government should pay for the filling that was originally done, or refilling that was rendered necessary by the disintegration of this filling, and the rotting of the filling. That was a natural imperfection in the nature of the ground, and the nature of the material with which it was filled. It is only such filling as was rendered necessary because of the increased height of the water which was put there, and the increased damage, if any, caused to the filling by the increased height of the water. You must be very careful, gentlemen, in the consideration of this question, if you should come to it, to understand, and have in your minds, thoroughly, the facts with respect to these premises,—the necessity which constantly existed of refilling them, for the reasons that have been stated,—and limit the recovery of the plaintiff, if it is entitled to recover at all, to just such filling as it did, as was rendered necessary to protect itself against the rise of the water which was caused by this dam, if it was caused at all. If there were other matters which caused the rise of this water, and the dam did not, and therefore the filling was rendered necessary, the government of the United

States ought not to pay for it. But if it caused a rise of water which rendered imperative a certain amount of filling, and the plaintiff has done it, the plaintiff is entitled to recover for what it so did.

The court will also say to you, with respect to another large claim of the plaintiff,—the waste of filling from other than natural causes, two inches a year,—it must be very difficult for any one to estimate that the waste of filling actually put on these premises during those years was so many inches a year, attributable solely to the rise of the water, and the retention of the water upon these premises for a longer period. You must bear in mind that the whole foundation of these premises was wet; that there was constant disintegration going on, irrespective of the question of the raising of the water by this dam; and you must determine, if you can, from the testimony, according to your best judgment, whether or not there has been waste of that filling which was put there, by reason of the increased height of water, over and above the waste which would have been created there by the action of the water which would have come upon these premises without this dam raising it above the dam as it was in 1866. It will be a very difficult question for you to arrive at the proper and just and accurate conclusion upon. You are not to guess at it. You are not bound by estimates of the parties upon it. You must, by the evidence, ascertain in some way, if you can, if there has been such waste by such increase of water, and the extent of it, and allow for it. You must also regard the character of the filling. A great deal of it was sawdust. It is said there was some slab and other material. Was the filling put there by the plaintiff necessary to protect itself from the increased height to which this dam raised this water, or was it put there in the natural filling up of such premises, for the use of the mill? Was it necessitated by this rise, and was it so done by the plaintiff for the purpose of protecting itself against that rise of the water? Then as to the value of this material. Evidence has been given touching the value of sawdust. It seems that at a certain time there grew up a certain demand in Oshkosh for sawdust, and the value of it at a particular mill would seem to have depended upon the nearness of the mill to the locality where it was needed, or the facility with which it could be shipped. How great that demand was—whether it was general, so as to comprehend all the sawdust that was made in Oshkosh, or whether it was limited in extent—will be for you to say. You will consider the location of the Paine mill, its nearness to the market, and the value of that sawdust as it was there; whether it was of the value stated, or not. And in this connection you will also consider the evidence which Mr. Paine gave here upon the stand, and compare that evidence with the evidence which he gave before the commissioners, which has been presented here. Consider the circumstances under which the evidence was given in both instances; and if there is any discrepancy, or wide discrepancy, in his statements, either as to the quantity of filling, or time of filling, or as to the value of the filling, you will consider that circumstance in determining how much credibility is to be

given to the statement by him with respect to the value of that filling, or the amount of filling that was done. And, while these commissioners before whom that testimony was taken were officers appointed by the court to ascertain damages, they were officers, it is proper for me to say to you, who were authorized to take testimony under oath; and one who undertakes, in a court of justice, or before commissioners appointed by a court, to state his claim, and the facts of his claim, under oath, ought to know what he is testifying to, and to testify to it deliberately; and the statement he makes of facts ought, in the main, to correspond with the facts that he states under oath with respect to that claim in any other court, or before any other tribunal. Mistakes may be made. The human mind is not perfect, and we must allow somewhat for error of judgment; but if there be any wide discrepancy, either as to the amount of filling, or as to the cost of filling, it will be for you to say, gentlemen, on a comparison of that evidence, to which statement you will give credit; all the while considering that you are to take all the testimony in the case into consideration in determining and arriving at the fair and proper price to be given for that filling.

There is an item here charging for raising the mill in the winter of 1886. You will determine whether the raising of that mill was rendered necessary by the increased high water upon this land caused by the Menasha dam, if it was so caused. Was that mill raised for that purpose? Was it raised to protect it against the increased high water? And in considering that you will consider what the stage of water was at that time; whether it was necessary, for that purpose, that it should be raised. You will consider the time when it was raised, and all the circumstances surrounding that act, and determine whether the plaintiff raised that mill because of the increased raise, if any, occasioned by the dam of 1882.

Then there is an item of repairing and raising tramways in 1886. These tramways were put down in 1871. You know what they were. You have seen them. You know the uses to which they were applied. You must consider their age. Consider the uses to which they have been put. You must consider the necessities of the plaintiff with respect to the means by which lumber was to be handled, and you are to determine whether those tramways were laid down because they were injured by this increased rise of water, or whether it was done because they had become worn, and the mill required better facilities for its business. The government of the United States, while it must respond for damages actually imposed upon this property, if you shall find it liable under the facts and the law, is not required to pay for better facilities for doing business, nor for any other injury than that it has actually occasioned. And with respect to the cost of the new tramways, which has been testified to here, the remarks which the court made to you with respect to the testimony of Mr. Paine before the commissioners equally applies.

With respect to this damage to lumber in 1886. In that connection you will consider from the readings, and from the evidence

in this case, and determine how high the water came in that year, compared with previous years, and whether that damage was or was not occasioned by this rise of water, if any, caused by this dam. If it was so occasioned, then for the damage actually resulting the government ought to render compensation; but if the water was not higher in 1886 than in 1885, 1884, 1883,—for which years no damage is claimed,—then you will determine what caused that damage; whether it was this increase of water, or whether it was rains, and the staining of this lumber by reason of murky, hot weather coming on afterwards. In other words, was this injury to the lumber occasioned by other causes than the mere additional elevation of water upon the land? The same remarks will apply, and is all the court need say to you, in regard to the damage to shingles and glass.

There is only one observation with respect to the west side that is peculiar to that side; that is, loss of time occasioned by mill lying idle on account of high water. First, was that mill idle because of high water, or did it remain idle because the owner was not ready to operate? If it remained idle because he could not get the right kind of logs to manufacture, or for any other purpose, if on its own motion, and at the will of its directors, it remained idle for any purpose other than because of this extra high water, if there was any, then the government ought not to be obliged to pay for that mill remaining idle. The government is only liable if that mill remained idle because it had placed water upon those premises, by reason of this dam, higher than it would have been by the dam as it was in 1866, and only for the time it remained idle because of this additional elevation of water. As to the value of the use of the mill per day, you will, of course, be governed by the testimony, exercising your good judgment as to whether the price charged is exorbitant or not.

In the consideration of all the evidence in this case, gentlemen, you have heard the different witnesses under oath. You are to judge of the credibility of their evidence from their appearance and manner upon the stand. You are to inquire, and have the right to inquire, whether they are in any way interested in the result of this suit, and to take that interest into consideration in determining to what extent you will credit their evidence. It is not the volume of evidence that counts. It is the character of the evidence, and character of the witness that gives the evidence. And the court will make this further observation to you,—not that it deems it absolutely necessary, because it thinks you are sufficiently intelligent to know that the consideration against which I shall warn you ought not in any way to influence your verdict: This is a suit between a private corporation and the government of the United States. It should be tried and determined, gentlemen, just as a suit between two private individuals. Because the United States of America is a great and wealthy nation is no reason why the plaintiff should be

awarded one cent more than it is entitled to, and is no reason why the plaintiff should not recover all that it is entitled to. You are to give to the plaintiff nothing, and you are to withhold from the plaintiff nothing, because the defendant is the United States of America; and you are to give or withhold nothing because it is a claim by a private corporation against a public corporation,—against a sovereign nation. But you are to determine this case, and give damages, if you shall find the plaintiff entitled to damages, according to the very justice and right of the case, closing your eyes as to the parties to it, and determining it just as the facts and the evidence require you to determine it,—as they shall convince your judgment.

So that, gentlemen, to resume, if the waters of the Fox river have not been raised, by any operation of this dam, over the extent to which they were raised by the dam of 1849 down to 1866, then this plaintiff is not entitled to recover. If the premises of the plaintiff, claimed by the plaintiff to have been injured, are within the banks of the river, under the principles of law which the court has declared to you, and are within the navigable part of the river,—navigable in fact,—then the plaintiff could not recover for this injury; but if this water has been raised, and the premises of the plaintiff are real estate belonging to the owner, under the law, as the court has declared it, and are not within that part of the river which is within its banks, and is navigable in fact, then, to the extent that it has been injured by the additional rise of water, you should allow such damages as naturally flow from that rise, and the retention of the water upon the premises for the additional time it was retained, if it has been so retained at all. You will carefully look at all the evidence, carefully weigh it, and come to such just and conservative and honest conclusion as the evidence compels your judgment.

Something has been said during the argument with respect to this Neenah dam. The government, whether wisely or not, has undertaken to say that the improvement of navigation in these rivers could be made only by means of dams. Of course, if there was a dam in the Menasha channel, the waters of the lake would be discharged largely through the Neenah channel—if there was a dam in the Menasha channel, and no dam in the Neenah channel. The court does not consider that the Neenah dam cuts any figure in this case at all. If the government has raised the water upon these premises by means of this Menasha dam, then, under the instructions I have given you, if you find the plaintiff should recover, that Neenah dam cuts no figure in the case at all, and will not be considered by you.

DOUGLAS v. DE LAITTRE.

(Circuit Court, D. Minnesota, Third Division. October 31, 1892.)

DEED—POWER OF ATTORNEY.

An irrevocable power of attorney to sell and convey land, coupled with a release to the attorney of the grantor's claim to the proceeds of any sales made by the attorney, does not vest in the attorney the title to the land.

At Law. Suit in ejectment brought by George Douglas against John De Laittre. Judgment for defendant.

W. C. Goforth, for plaintiff.

Jackson & Atwater, (E. C. Chatfield, of counsel,) for defendant.

NELSON, District Judge. This is a suit in ejectment, and a jury being waived, per stipulation filed, it is tried to the court. The following facts are found:

That the land in question was entered in 1873, and patents therefor issued. Each of the patentees, in 1873, duly executed and delivered to one George W. Chowen, for a valuable consideration, instruments in writing, one of which is here given as follows:

"Know all men by these presents, that I, James McDonald, of the county of Ramsey, in the state of Minnesota, have made, constituted, and appointed, by these presents do make, constitute, and appoint, George W. Chowen, of Hennepin county, in the state of Minnesota, my true and lawful attorney, for me, and in my name, place, and stead, to enter into and upon, and take possession of, any and all pieces and parcels of land, or the timber and other materials thereon, in the state of Minnesota, which I now own, or which I may hereafter acquire or become seised of, or in which I may now or hereafter be in any way interested, and to prosecute and defend any and all suits at law in the courts of said state of Minnesota, or of the United States, relating to the title to said lands; and I further authorize and empower my said attorney to grant, bargain, sell, demise, lease, convey, and confirm said land, or any part thereof, or the right to sever and remove timber and other materials therefrom, to such person or persons, and for such prices, as to my said attorney shall seem meet and proper, and thereupon to execute, acknowledge, and deliver, in my name and on my behalf, any deeds, leases, contracts, or other instruments, sealed or unsealed, and with or without covenants and warranty, as shall to him seem meet, to carry out the foregoing powers, with full power to my said attorney to appoint a substitute or substitutes to perform any of the acts which my said attorney is by this instrument authorized to perform, with the right to revoke such appointments at pleasure. Hereby giving and granting to my said attorney and his said substitutes full power to do and perform everything proper or convenient in carrying out and executing said powers, as fully as I could do if personally present, and acting in the premises. And in consideration of the sum of two hundred and fifty dollars to me in hand paid by my said attorney at the ensealing hereof, the receipt whereof I do hereby acknowledge, I do further appoint and ordain that my said attorney is hereby irrevocably vested with the powers above granted, and I do hereby forever renounce all right in me to revoke any of said powers, or to appoint any person other than my said attorney to execute the same, and forever renounce all right on my part personally to do any of the acts which my said attorney is hereby authorized to perform, and do hereby release unto my said attorney all my claim to any of the proceeds of any sale, lease, or contract relative to said land, or timber or material thereon. And I hereby revoke all powers of attorney by me heretofore made, authorizing any person to do any act relative to any part of said lands. Hereby ratifying and confirming what-

soever my said attorney, or any substitute appointed by him, may do in the premises by virtue hereof. In witness whereof, I have hereunto set my hand and seal this 22d day of April, A. D. 1873.

"James McDonald. [Seal.]

"Signed, sealed, and delivered in presence of

"Archy McDonald.

"Dana White."

"State of Minnesota, county of Ramsey—ss.: On this 22d day of April, A. D. one thousand eight hundred and seventy-three, before me personally appeared James McDonald, personally known to me to be the individual described in, and who executed, the foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned. In witness whereof, I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

Dana White,

[Notarial Seal.]

"Notary Public, Ramsey Co., Minn."

Subsequently, Chowen, as attorney in fact for said patentee, executed certain warranty deeds to one Rufus J. Baldwin, and the latter on December 1, A. D. 1875, duly executed a mortgage on the property to Henry A. Stinson. All of the instruments above mentioned were duly recorded. The mortgage to Stinson was duly foreclosed under a power of sale in said mortgage, and after legal notice, as required by the statutes of Minnesota, and the property therein described was sold by the proper sheriff on July 18, 1881, to the defendant, John De Laittre, and a certificate of sale duly executed by the sheriff, and recorded. On July 17, 1882, George W. Chowen made a quitclaim deed to George Douglas, the plaintiff. No redemption was ever made from the foreclosure sale.

It is claimed that the instruments executed by the patentees to George W. Chowen conveyed the fee in the land to him, and that the deed to Baldwin, executed by George W. Chowen as attorney in fact, through which the defendant claims title, is a nullity, and void. These instruments executed and delivered to Chowen are destitute of any greater legal effect than the creation of an irrevocable power of attorney, the fee of the land remaining in the patentees. Chowen, executing the deeds to Baldwin as attorney in fact for the patentees, conveyed the fee in the land therein described; and the defendant, claiming through Baldwin, has the title, and is entitled to a judgment. Let judgment be entered accordingly.

In re GRIBBON.

(Circuit Court of Appeals, Second Circuit. May 23, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—HANDKERCHIEFS.

Under the tariff act of October 1, 1890, par. 373, imposing a duty of 60 per cent. ad valorem upon the goods therein enumerated, the provision for "embroidered and hemstitched handkerchiefs" covers only handkerchiefs which are both embroidered and hemstitched, and these words cannot be taken distributively, so as to include handkerchiefs which are embroidered only, or hemstitched only. 53 Fed. Rep. 78, affirmed.

Appeal from the Circuit Court of the United States for the Southern Division of New York.

This was an application by William Gribbon to review a decision of the board of general appraisers affirming the action of the collector of the port of New York in the classification for duty of certain imported handkerchiefs. The court below reversed the decision of the board, (53 Fed. Rep. 78,) and the collector appeals. Affirmed.

The goods in question consisted—First, of handkerchiefs with a hemstitched border; second, of handkerchiefs embroidered or scalloped on the edge, and not hemstitched; and, third, of handkerchiefs with a hemstitched border, and embroidered, either with initial letters, or with figures worked by hand or machinery. The collector assessed them all at 60 per cent. ad valorem, under paragraph 373 of the tariff act of October 1, 1890. This paragraph reads as follows:

"373. Laces, edgings, embroideries, insertings, neck ruffings, ruchings, trimmings, tuckings, lace window curtains, and other similar tumboured articles, and articles embroidered by hand or machinery, embroidered and hemstitched handkerchiefs, and articles made wholly or in part of lace, ruffings, tuckings, or ruchings, all of the above-named articles composed of flax, jute, cotton, or other vegetable fiber, or of which these substances, or either of them, is the component material of chief value, not specially provided for in this act, sixty per centum ad valorem: provided, that articles of wearing apparel and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed."

The board of general appraisers held that the provision for "embroidered and hemstitched handkerchiefs" should be understood distributively, the copulative "and" being read "or," so that the clause should apply to handkerchiefs which were hemstitched only, and those which were embroidered only, as well as to those which were both hemstitched and embroidered. The circuit court, however, held that this clause could not be so read, and that the expression "embroidered and hemstitched handkerchiefs" could include only handkerchiefs which were both embroidered and hemstitched. The court further held that those handkerchiefs which were embroidered, only, should be classified under the further provision of paragraph 373 for "textile fabrics" which have been embroidered by hand or machinery, and must therefore pay the same rate of duty that is paid by embroideries of the material of which they are composed; and, as these handkerchiefs were of cotton, they should, under this provision, pay the same duty, viz. 60 per cent. ad valorem. As to handkerchiefs which were hemstitched, and not embroidered, the circuit court held that they were dutiable at 50 per cent. ad valorem, under paragraph 349, simply as "handkerchiefs."

Jas. I. Van Rennsalaer, Asst. U. S. Atty., for appellant.
W. Wickham Smith, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the circuit court whose judgment is now under review, and with the circuit court of appeals for the eighth circuit, that only those handkerchiefs which are both embroidered and hemstitched are subject to the duty of 60 per centum ad valorem imposed by paragraph 373 of Schedule J of the act of October 1, 1890.

In affirming the judgment it is not to be taken that we concur in the opinion of the circuit court that the embroidered handkerchiefs which are not hemstitched are, by the proviso of paragraph

373; dutiable as embroidered "textile fabrics." It would seem that they are manufactured articles advanced beyond and outside of the category of textile fabrics, and, like hemstitched handkerchiefs, are dutiable under paragraph 349, as handkerchiefs. We do not decide this proposition definitely, however, because the case is here upon an appeal by the collector only. The importer, not having appealed, can only be heard in support of the decision below. *Chittenden v. Brewster*, 2 Wall. 191; *Alviso v. U. S.*, 8 Wall. 337; *The Stephen Morgan*, 94 U. S. 599; *Louden v. District*, 104 U. S. 771. And, if an error has been committed by the court below, it was to the advantage of the collector, and furnishes him no ground of complaint. *Campbell's Ex'rs v. Pratt*, 2 Pet. 354; *Tilden v. Blair*, 21 Wall. 241; *Bethell v. Mathews*, 13 Wall. 1. The judgment is affirmed.

ADEE v. J. L. MOTT IRON WORKS.

(Circuit Court of Appeals, Second Circuit. May 23, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—OVERFLOWS FOR BATHS.

Reissued patent No. 6,739, granted November 16, 1875, to James Foley, for an improvement in wash valves and overflows for basins and baths, which consists in bringing up the standpipe, or outer pipe of the overflow, through the casing or slab contiguous to the basin or bathtub, and securely attaching it to a removable cap resting upon the outside of the casing or slab, is not infringed by the device made under letters patent No. 170,709, to William S. Carr, in which the standpipe is secured by a screw flange resting on the top of the slab, but has no cap covering its upper end, as has the prior patent. 46 Fed. Rep. 77, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Bill by Fred Adee against the J. L. Mott Iron Works for infringement of a patent. The bill was dismissed, (46 Fed. Rep. 77,) and complainant appeals. Affirmed.

A. v. Briesen, for appellant.

Francis Forbes, for appellee.

Before LACOMBE, Circuit Judge, and WHEELER, District Judge.

PER CURIAM. This suit was brought in the circuit court of the southern district of New York for infringement of reissued patent No. 6,739, dated November 16, 1875, and granted to James Foley, upon surrender of original patent No. 153,250, dated July 21, 1874, for an improvement in waste valves and overflows. The alleged infringement consists in the making of the device patented to William S. Carr in No. 170,709, dated December 7, 1875, for an improvement in waste valves and overflows for baths and basins, and in which the device patented to Foley was required by the patent office to be, and was, disclaimed. The bill was dismissed for want of infringement. 46 Fed. Rep. 77. This patent was be-

fore the circuit court of the district of Connecticut, (Wallace, J.,) in *Adee v. Peck*, 42 Fed. Rep. 497.

The improvement of Foley, as stated by Judge Wallace, consisted in bringing the standpipe of the overflow up through the casing of the bowl or bath, and securely attaching it by a removable cap to the upper side of the casing. The claim was for the standpipe passing through the casing, and receiving at its upper end the removable cap, in combination with the overflow pipe, valve, and means of suspending the overflow pipe and valve from the cap, substantially as set forth. The means of attaching the standpipe to the upper side of the slab described in the original patent was the flange of the removable cap extending outwardly around the standpipe upon the slab. In the reissue this function of the removable cap is omitted from the description, and the removable cap is left to be a cover, only, of the standpipe. The drawings remain the same, but the retention there of the parts omitted from the description does not help the effect of the omission. *James v. Campbell*, 104 U. S. 356. The removable cap described in the reissue is not one securing the standpipe to the upper side of the slab. In Carr's device the standpipe is so brought up, but is secured by a flange. It is combined with an overflow pipe, valve, and means of suspending the overflow valve and pipe, but not from a cap. It has no cap as a cover of the standpipe. These means of suspension are bayonet fastenings, turning, when raised, between the overflow pipe and the standpipe. This is not the combination of the reissued patent. Carr altered Foley's invention and improved upon it, but did not appropriate it as patented in the reissue. Decree affirmed.

LEWIS v. PENNSYLVANIA STEEL CO.

(Circuit Court, E. D. Pennsylvania. May 29, 1893.)

No. 33.

PATENTS FOR INVENTIONS—INFRINGEMENT—ROLLING MILLS.

In letters patent No. 247,665, issued September 27, 1881, to Christopher Lewis for an improvement in continuous rolling mills, the fourth claim, which covers a combination of "laterally adjustable" carriages having a tilting arrangement for the purpose of turning over the rail or girder before it is passed back through the adjoining set of rolls, is strictly limited to a combination of which a laterally adjustable carriage is one of the elements, and there is no infringement in the use of a combination in which the carriage is vertically adjustable, and adapted for use in "three high" rolls.

In Equity. Suit by Christopher Lewis against the Pennsylvania Steel Company for infringement of a patent. Bill dismissed.

Rudolph M. Schick, Frank R. Savidge, Henry N. Paul, and S. S. Hollingsworth, for complainant.

Philip T. Dodge, for respondent.

DALLAS, Circuit Judge. This case has been argued and considered upon the pleadings and proofs. It was originally brought for alleged infringement of two letters patent, Nos. 247,665 and 247,931, but, as now presented, it involves only the fourth claim of the patent No. 247,665, granted to the complainant upon September 27, 1881, for an improved continuous rolling mill. The only question to be considered is whether certain mechanism, admittedly used by the defendants, is within the scope of this claim; but, before dealing with that question, a brief explanation of the general subject to which the patent relates must be made.

Steel rails are formed by passing a red-hot billet or bloom of metal through a series of passes or apertures between large rollers, by which the billet is gradually reduced to the required size and shape. Where two rolls, one above the other, are arranged in pairs, and revolve always in the same direction, it becomes necessary to return the bloom, after it has gone through each pass, to the side of the rolls from which it started. This is the mode of operation where what is called the "two-high roll" system is practiced without modification; but in the specification of the patent in suit a class of rolling mills is referred to "in which several pairs of rolls have their alternate pairs arranged to be run in reverse direction to those next adjacent," and this is the class which the inventor proposed to improve. Where three rolls, one above the other, form a set, the passes between the lower and middle roll are all in one direction, and those between the middle and upper roll are all in the opposite direction, and thus the necessity for either returning the bloom after it has gone through each pass, or of transferring it from one pair of rolls to another, is avoided; but it is necessary to alternately raise and lower it, so that it may be successively subjected to the action of the several passes. This is the "three-high roll" system. Both of these systems were in use when this patent was applied for, and the purpose of the applicant was to provide an organism which might be more rapidly worked, and with less labor, than any of the existing mills. His general scheme, as disclosed by his specification and claims, was radical and fundamental. It was not confined to a single alteration or addition for effecting one particular object, but comprehended a "new and improved continuous rolling mill." He was familiar with the three-high roll manner of arrangement, but seems to have directed his attention solely to two-high mills of the modified kind already mentioned. In his specification he said:

"My invention is an improvement in that class of rolling mills in which several pairs of rolls have their alternate pairs arranged to be run in reverse direction to those next adjacent, and in which a laterally adjustable carriage takes the rail and transfers it from one pair of rolls to the next, so that it is passed through one pair of rolls in one direction and is returned through the next pair of rolls in the reverse direction."

The claims are all in accord with this statement. Each of the first three is for a combination of a series of pairs of rolls with

(among other things) "laterally adjustable carriages;" and the fourth, being the claim in question, is as follows:

"(4) The combination, with a set of stationary abutments, L, of the laterally adjustable carriages having tilting support, K, arranged transversely to the same, and provided on their under sides with a bulge or projection adapted to be struck by the said abutments when the carriage is shifted for the purpose of turning over the rail or girder, as set forth."

The specification describes the subject-matter of this claim in these words:

"L is a stationary abutment or cam, bolted down fixedly beneath the carriage in position to be struck by the bulge on the lower side of K as the carriage is shifted, so that when the carriage is shifted laterally the piece, K, is turned over by contact with L, and the rail or other object is also turned over."

The mill of the defendants is of the three-high roll construction. Consequently they do not, and could not, use laterally adjustable carriages, and in connection with the vertically moving carriage which they do use it would not be possible to conform to the mode of action which is especially indicated and described in the claim and specification. Their carriage cannot be "shifted laterally;" so as to operate a "tilting support," and therefore a "bulge or projection," adapted to be struck when the carriage is so shifted, would be worse than useless, and is not present, upon the tilting piece of the defendants, which in fact is operated, not by being "struck," but by means of a link connection between the tilting piece and a standard near the side of their table or carriage. There are other differences between the complainant's turn-over and that of the defendants, but they do not result from the different construction and operation of their respective carriages, and I do not deem it necessary to discuss them. It is not possible so to interpret the words "the laterally adjustable carriages" as to make them inclusive of a carriage which is only vertically adjustable; or to hold, without disregarding the necessarily exclusive significance of those words, that the claim in which they occur covers a vertically moving carriage as the equivalent of one whose motion is lateral. The language of the patent is too plain to require construction, and too restrictive for expansion under the doctrine of equivalents. The claim is so expressly limited as to make laterally adjustable carriages a primarily essential element of the combination claimed, and it is a consequence of this limitation that, where, such a carriage is not employed, the patented invention is not practiced. It may be conceded that what the patentee claimed he is entitled to; but with respect to the carriage, at least, he confined himself to a distinctly defined device, and, therefore, his monopoly does not extend to a combination in which that specific device is not present, even though it be assumed that he might have claimed it.

A decree will be made dismissing the bill, with costs.

SEAGER v. NEW YORK & C. MAIL STEAMSHIP CO.

(Circuit Court of Appeals, Second Circuit. May 23, 1893.)

1 DEMURRAGE — DELIVERY OF CARGO — CUSTOMARY DISPATCH — WHARF FACILITIES.

A charterer who is bound to furnish facilities for discharging "with customary dispatch" is not liable for demurrage when the delay is caused by want of space on the dock, caused solely by the ship's attempting, without orders from the charterer, to keep separate the bales belonging to different consignees. 55 Fed. Rep. 324, affirmed.

2. SHIPPING — DISCHARGING CARGO — EXPENSE OF PILING — USAGE OF PORT — CHARTER PARTY.

The custom of the port of New York, requiring a vessel discharging hemp to pile the bales on the dock for one-half its width and the length of the vessel, is not inconsistent with a clause of a charter party providing that "cargo shall be received and delivered alongside of the vessel * * * within reach of her tackles," and the charterer is not liable to the vessel for the expense of such piling. 55 Fed. Rep. 324, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by John C. Seager against the New York & Cuba Mail Steamship Company for demurrage and for extra compensation for handling freight. The court below dismissed the bill. See 55 Fed. Rep. 324, for the opinion of Judge Brown, in which the facts are fully stated. Libellant appeals. Affirmed.

J. P. Kirlin and E. B. Convers, for appellant.

Geo. H. Balkam, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. 1. Without expressing an opinion as to the precise meaning to be given to the clause in this charter party providing that the vessel "discharge with customary dispatch," we concur with the district judge in his conclusions that whatever delay there was for which demurrage is claimed "arose solely from the ship's attempt to keep separate not merely the bales belonging to the different consignees, but the different lots of the same consignee, according to the different marks;" that no such instructions were given by the charterers, and that for delay consequent upon such attempt they are not chargeable.

2. As to the claim for expense of piling, we do not think the custom of the port, which was abundantly proved, requiring the vessel to pile the hemp on the dock for one-half its width and the length of the vessel, is inconsistent with the printed clause of the charter party providing that "cargo shall be received and delivered alongside of the vessel * * * within reach of her tackles."

The decree of the district court is therefore affirmed, with costs.

BRIGHAM et al. v. C. C. THOMPSON LUMBER CO.

(Circuit Court, W. D. Wisconsin. May 15, 1893.)

REMOVAL OF CAUSES—LIMITATION—EFFECT OF AMENDED PETITION.

A cause was remanded to a state court because of the failure of the petition for removal to show the requisite jurisdictional facts, after which further proceedings were had in the state court, and more than six months after the expiration of the time in which a removal might originally have been had, an amended petition was filed, and an order for removal made. *Held*, that the amended petition did not relate back to the filing of the original petition so as to bring the application within the limitation, and that an order to remand must be granted. *Freeman v. Butler*, 39 Fed. Rep. 4, disapproved.

At Law. Action by E. K. Brigham and others against the C. C. Thompson Lumber Company. Heard on plaintiff's motion to remand to state court. Motion granted.

Lamoureux, Gleason, Shea & Wright, (George G. Green, of counsel,) for plaintiffs.

Dockery & Kingston, and McDonald & Barnard, (Hayden & Start, of counsel,) for defendant.

BUNN, District Judge. This is a motion to remand the cause back to the circuit court of Bayfield county, Wis., whence it originated. It was begun in that court on September 24, 1892. The summons and complaint were served, and the time to answer the complaint expired on October 14, 1892. On October 12th, two days before the time to answer expired, the defendant filed a petition and bond, and applied for a removal of the cause to this court. An order for the removal was made by the state court, and a copy of the record was filed in this court on October 17, 1892. On November 1st an answer to the complaint was filed by the defendant in this court, and on November 21st a reply by the plaintiffs. On December 8, 1892, a motion by the plaintiffs was made to remand the cause to the state court, and the same was so remanded, on the ground that the requisite jurisdictional facts were not alleged in the petition to entitle the defendant to a removal. The diverse citizenship of the parties was not set out, nor did it appear anywhere in the record. On April 8, 1893, four months after the case was sent back to the state court, and after further proceedings were had by the parties in that court, and six months after the time for removal had expired, a second or amended petition was filed by the defendant in the state court for a removal of the cause to this court, and an order was made for the removal. The cause comes up now on a second motion to remand to the state court, and the question is whether, under these circumstances, a removal of the cause to this court has been effected.

This court had supposed that the rule was fairly well settled in this circuit that the right of removal depended upon the defendant's filing a proper petition alleging all the necessary jurisdictional facts, accompanied by a proper bond, within the time prescribed

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by the act of congress of August 13, 1888; that is to say, before the expiration of the time for answering the complaint under the law and practice of the state court. That act gives a definite rule, easily to be complied with; but if the rule prescribed by congress is not binding, but it is rather to be left to the discretion of each state court, then there is no certain rule on the subject. If a second and amended petition may be filed after the cause is properly remanded to the state court, and six months after the time prescribed by the act of congress has passed by, and after issue has been joined, and proofs taken, and other proceedings had in the state court, subsequent to the remanding of the cause, then there is no rule to govern except the discretion of the state court, which may be exercised in one case in favor of a removal, and in another case, under precisely the same state of facts, against a removal. It has been the uniform holding under all the different jurisdiction acts of congress that the right of a removal and the jurisdiction of the court depended upon a compliance with the law of congress, and not at all upon the action or nonaction of the state court; and it would be very strange if, under the act of 1887-88, which prescribes a more stringent rule than has ever before existed except under the original judiciary act of 1789, the practice and ruling of the court should be any different in this respect from what it has been under former statutes.

By the jurisdiction act of 1789 the application for removal had to be made by the defendant "at the time of entering his appearance." If, at the time of appearing in the case, the defendant did not make his application and file a petition stating the necessary jurisdictional facts, the right was lost. He could not do it afterwards. Under the acts of 1866 (14 Stat. 306) and of 1867 (14 Stat. 558) the application might be made at any time before the trial or final hearing of the cause in the state court. These statutes mark the extreme swing of the pendulum in favor of the jurisdiction of the federal courts over cases begun in the state courts. Under these statutes abuses sprung up. The defendant could experiment as long as he pleased in the state courts, and then, after the case could be delayed no longer, apply for a removal; so that the right came to be too frequently exercised to delay the cause, rather than to obtain an unprejudiced hearing in the federal court. The judiciary act of 1875 (18 Stat. 470) in some measure was intended to correct these abuses by restricting the right. Under that act the petition must be made and filed "before or at the term at which such cause could be first tried, and before the trial thereof." As will be seen, this act, although a great restriction upon the acts of 1866 and 1867, still gave great latitude in making the application, compared with the original judiciary act passed by the first congress. By the acts of 1887 (24 Stat. 552) and of 1888 (25 Stat. 435) the time was further greatly restricted. Under those acts the defendant must make and file a petition "at the time, or any time before, the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or

plead to the declaration or complaint of the plaintiff." This rule is definite, and is liberal enough. It was no doubt the object of congress by the acts of 1887 and 1888 to restrict the right of removal in several ways: First, in regard to the person who might remove; and, second, as regards the time of making the application. He need not make the application at the moment of appearing in the cause, as under the original judiciary act. He might even answer the declaration or complaint before moving. On the contrary, he could not wait until the first term at which it could be tried, and until after the pleadings were settled, and perhaps proofs taken. He must make his application before the time for answering expired. In Wisconsin the defendant has 20 days after service of the summons and complaint to answer. Within that 20 days, whether answer has been put in or not, he should make his application and file his petition; and the time cannot be enlarged by order of the state court nor by the stipulation of the parties. *Austin v. Gagan*, 39 Fed. Rep. 626; *Velie v. Indemnity Co.*, 40 Fed. Rep. 545; *Rogers v. Van Nortwick*, 45 Fed. Rep. 513; *Rock Island Nat. Bank v. J. S. Keator Lumber Co.*, 52 Fed. Rep. 897; *Car Co. v. Speck*, 113 U. S. 84, 5 Sup. Ct. Rep. 374; *Gregory v. Hartley*, 113 U. S. 742, 5 Sup. Ct. Rep. 743. As was said by Judge Sawyer in *Austin v. Gagan*, 39 Fed. Rep. 626: "The policy of the law is to require parties to take the first opportunity to change the forum, and, in default thereof, the right is waived." The case relied upon mainly by the defendant as an authority for this second attempt at removal six months after the time for making the application and filing the petition had expired is *Freeman v. Butler*, Id. 4; and, if the principles of that case can be sustained, it is no doubt an authority in point for the defendant. But the decision in that case seems to be not only against the great weight of authority, but in derogation of the law of congress. The case, in its facts, is somewhat analogous to this, although the defendant, after the case was remanded to the state court, was more prompt in making his application to amend his petition. The court held that it had obtained jurisdiction of the case by the second order for the removal, on the ground that the second petition for removal in the state court, being filed as an amended petition, related back to the time when the original petition was filed.

The objection in practice to this doctrine is that it sets aside the rule of the statute, and substitutes in its place the discretion of the state court. It was held in that case, very properly, that the United States circuit court, upon remanding the cause, had lost all control over it, and could neither entertain a new petition for removal, nor an application to amend the old one. The defendant must make his application to the state court. But, suppose the state court had refused to allow an amendment to the petition; it would follow that no removal could be had. But, if it be discretionary with the state court to allow an amendment to the petition on a second application after the time prescribed by congress has

elapsed, then it is difficult to see what bounds can be prescribed to such discretion, or why the case may not be removed at any time, even after the time would have elapsed under any law of congress that has ever existed.

The rule of the United States courts has always been that no discretion existed in the state court. It may pass upon the right of removal, and grant or refuse to grant an order; but, so far as the question of removal goes, and the jurisdiction to be acquired thereby by the United States circuit court, it is of little moment what the order or decision of the state court may be. The jurisdiction of the United States court will always depend upon a compliance or noncompliance with the law of congress in force at the time, and not in any measure upon the decision of the state court. Neither an order refusing nor an order granting a removal can affect the jurisdiction of the circuit court. *Bank v. Corbett*, 5 Sawy. 172; *Kern v. Huidekoper*, 2 Morr. Trans. 597; *Fisk v. Railroad Co.*, 6 Blatchf. 362; *Hatch v. Railroad Co.*, Id. 105, 111; *Kanouse v. Martin*, 15 How. 198; *Railroad Co. v. Mississippi*, 102 U. S. 136; *Railroad Co. v. Koontz*, 104 U. S. 5. The answer, in theory, to such a doctrine is that there is nothing in substance to be related back to. The petition not alleging the necessary jurisdictional facts, it is a nullity, and the doctrine of relation has no application. There is, of course, no objection on principle to the amendment of a petition. There is no objection to the filing of a second petition, provided it is done within the time prescribed by congress. But when the time goes by the right is lost. To allow an amendment to the petition after that is the same as allowing a new petition, and either is a clear violation of the law. One purpose of the law was a severe restriction in respect to the time. The object was to require the party to change the forum at once, before waiting to experiment in the state court, either to contest the tribunal, or for mere purposes of delay. In this case six months had elapsed since the time to answer had expired. Other proceedings had been had in the state court after the case was remanded. Since the statutory time for removal had elapsed, there have been two terms of the state court in that county when the cause may have been tried, and it now stands noticed for trial there during the present month. The pleadings have been amended in the state court, and the time for answering an amended complaint had expired before the second petition for removal was filed. Depositions, it seems, were also taken. If the cause can be removed upon the discretion of the state court by allowing an amendment to an original and insufficient petition there can be no limit, so far as time goes, and the removal can be allowed at any time.

Another purpose of the statute was to secure certainty. It was never contemplated that a case should be dangling for so long a time in midair between the two courts, neither party nor the court knowing whether it might or might not be removed. The rule of the statute is certain, and easy to be complied with. This

question in regard to the necessity of setting up the jurisdictional facts has been well settled by a long course of federal decisions, and there is no longer any possible excuse for practitioners not complying with it.

The motion to remand the case to the state court is granted.

SCHINDELHOLZ et al. v. CULLUM.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1893.)

No. 192.

1. INSOLVENCY LAWS—PUBLIC POLICY—PREFERENCES.

The insolvent laws of Colorado are of a purely voluntary character, and the requirement that all assignments made shall be for the benefit of all creditors, alike, does not compel creditors to participate in the benefits of an assignment, or to relinquish any of the ordinary remedies for the collection of their debts when a debtor is insolvent or in failing circumstances. Hence there is nothing in the policy of the law to prevent a nonresident creditor of a failing Colorado corporation from attaching lands thereof which are situated in the state of his residence.

2. RECEIVERS—POWER OF COURT—LAND SITUATED IN ANOTHER JURISDICTION—INJUNCTION.

A court of equity which has appointed a receiver of lands situated in another state or jurisdiction has no power to enjoin a citizen of such jurisdiction from levying an attachment on such lands, unless he is a party, either in person or by representation, to the litigation in which the receiver was appointed.

3. SAME—PLEADING—ESTOPPEL.

The fact that plaintiff in such attachment suit was erroneously described by his pleadings therein as a citizen of the state in which the receiver was appointed (his citizenship being neither jurisdictional, nor otherwise material) will not estop him or his successors in interest from showing his true citizenship, in a proceeding brought by the receiver to enjoin him.

4. SAME—PARTIES—PURCHASE OF LIENS.

A lien having been established by the attachment suit, which neither the receiver nor the corporation's other creditors could divest, there was nothing to prevent a party to the receivership litigation, and a citizen of that jurisdiction, from taking an assignment of the judgment and lien, with all the rights of enforcement belonging to the original owner.

5. SAME—RIGHT TO ACQUIRE LIENS BY ATTACHMENT.

But where a party who had joined in the receivership litigation, and had been active in extending the receivership to the lands in question, afterwards caused suit to be brought in the jurisdiction where the latter were situated, to collect a debt, and thereby obtained a lien on the lands, the court had authority to enjoin him from enforcing the lien, or in any way interfering with the receiver's possession or disposition of the property.

Appeal from the Circuit Court of the United States for the District of Colorado.

In Equity. Bill by Henry B. Cullum, receiver of the Wendling Cattle & Land Company, against Anton Schindelholz and John G. Benkleman, to enjoin them from enforcing certain judgment liens against the lands of the company. An injunction was granted by the court below, and defendants appeal. Reversed.

Statement by THAYER, District Judge:

This case was submitted to the circuit court on the bill and answer, without the introduction of any evidence. The facts are therefore undisputed, and they are substantially as follows: The Wendling Cattle & Land Company (hereafter termed the "Land Company") is a corporation of Colorado. On the 4th day of March, 1889, Irving J. Atwood and others filed a bill of complaint against the Land Company, its officers and directors, in the circuit court of the United States for the district of Colorado. Among the defendants in that suit was the appellant Anton Schindelholz, who was at the time one of the directors of the Land Company. The bill charged that Edward F. Lamb and Samuel S. Smythe, who were, respectively, the president and secretary of the Land Company, had been guilty of various fraudulent acts in the management of the corporate affairs, and, among other things, that as officers of the corporation they had executed a mortgage, without any consideration, and for their personal benefit, upon the Glen Mora ranch, situated in the territory of New Mexico, which belonged to the Land Company, to secure notes of the Land Company to the amount of \$60,000. The bill also charged that the Land Company was insolvent, and it contained a prayer that Lamb and Smythe might be enjoined from negotiating the notes above referred to; that the mortgage securing the same might be canceled; that the Land Company might be dissolved, and wound up; and that a receiver of its property might be appointed. On April 27, 1889, Anton Schindelholz filed an answer to said bill, wherein he averred that he was the owner of 320 shares of the Land Company's stock; that he had given no attention, until recently, to the management of its affairs by Lamb and Smythe; and that he was satisfied, by a recent investigation of its condition, that a receiver should be appointed, as prayed for by the complainants. On the same day (April 27, 1889) Henry B. Cullum, the appellee, was duly appointed and qualified as receiver of the Land Company. The order of appointment directed him to take possession "of all and singular the real estate and personal property held, owned, and possessed by the said Wendling Cattle & Land Company, whether situated within the state of Colorado, or elsewhere;" but no order was made on the Land Company, requiring it to convey any of its lands to the receiver, and no such conveyance was in fact made. The order also contained the usual clause enjoining all parties to the suit from interfering with the receiver. Prior to these transactions, and in January, 1887, John K. Woodburn had recovered a judgment against the Land Company in one of the state courts of Colorado for some \$15,000, and, on an appeal taken to the supreme court of the state, Anton Schindelholz had become surety for the Land Company on its appeal bond. On June 13, 1890, the judgment appealed from was affirmed by the supreme court of Colorado, and thereafter Woodburn brought a suit by attachment against the Land Company and Schindelholz upon said appeal bond in one of the district courts for the territory of New Mexico, and recovered a judgment against them, in the sum of \$21,361, on the 8th day of October, 1890. A transcript of said judgment was filed with the recorder of the county where the Glen Mora ranch is situated, with a view of fixing a lien thereon pursuant to the laws of New Mexico. Schindelholz afterwards paid the amount of said judgment to Woodburn, and caused it to be assigned for his benefit to John G. Benkleman, who is also an appellant.

In September, 1890, Schindelholz further assigned to Benkleman a certain note of the Land Company, which he then owned, with a view of having a suit brought thereon by Benkleman in the courts of New Mexico. Such suit was thereupon brought by attachment in Benkleman's name, but for the sole benefit of Schindelholz, which resulted in a judgment against the Land Company in the sum of \$48,342 on the 9th day of October, 1890. A transcript of the latter judgment was likewise filed in the proper counties, with a view of fixing a judgment lien on the real estate of the Land Company situated in New Mexico. The receiver appointed by the United States circuit court did not defend either of the two attachment suits thus brought in the territory of New Mexico, for the reason, as alleged, that he was not notified that such suits were pending. In the month of June, 1890, the receiver of the Land Company was ordered by the United States circuit court for the district of

Colorado to sell the Glen Mora ranch at a price not less than \$1.25 per acre, and the same had been advertised for sale pursuant to said order, but had not in fact been sold, when the two attachment suits aforesaid were instituted in the courts of New Mexico. It does not appear that the receiver ever had any possession of the Glen Mora ranch, either in person or by agent, save such constructive possession as may have been conferred by the order appointing him as receiver.

The present proceeding is an original bill filed by the receiver in the United States circuit court for the district of Colorado to compel Schindelholz and Benkleman to release the judgment liens which they have acquired on the real property of the Land Company in the territory of New Mexico. On the hearing in the circuit court it was stipulated that the indebtedness of the Land Company to John K. Woodburn, on account of which the latter recovered a judgment against the Land Company in the courts of Colorado, was contracted by the Land Company in New Mexico while Woodburn was a resident of that territory; that Woodburn had become a resident and citizen of Colorado when he commenced a suit to recover the debt in that state, and that he remained such when the appeal bond was signed, in January, 1887, but that he had again become a resident and citizen of New Mexico in September, 1890, when he brought suit against the Land Company and Schindelholz upon the appeal bond in the courts of New Mexico. The circuit court entered a decree in favor of the receiver, enjoining the appellants from enforcing either of the judgments obtained in New Mexico, as against the property of the Land Company situated in that territory, and further commanding them to recall the executions which had been issued on said judgments, and to release the real estate of the Land Company from the liens created by filing transcripts of said judgments in the counties where the lands were situated.

H. E. Luthe and S. D. Barnes, for appellants.
John F. Shafroth, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, after stating the case as above, delivered the opinion of the court.

It is a doctrine which has recently been approved by the supreme court of the United States that the courts of one state or sovereignty have authority over their own citizens to restrain them from prosecuting suits by attachment in a foreign jurisdiction against other citizens of the home state or sovereignty, when the maintenance of such suit in the foreign jurisdiction is contrary to equity and good conscience, and tends to defeat the policy of local insolvent laws. The authority in question is said to be a part of the inherent power of a court of chancery over persons subject to its jurisdiction. But to warrant its exercise the complaint must show a clear equity. The courts of one state or sovereignty will not restrain a citizen of that state from suing another citizen by attachment in a foreign jurisdiction unless such proceeding clearly contravenes the policy of some local law or statute to which both parties owe obedience by reason of their common citizenship. *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. Rep. 269; *Dehon v. Foster*, 4 Allen, 545; *Warner v. Jaffray*, 96 N. Y. 248; *Jenks v. Ludden*, 34 Minn. 482-487, 27 N. W. Rep. 188; *Barnett v. Kinney*, 147 U. S. 476, 13 Sup. Ct. Rep. 403.

It is evident, we think, that the doctrine last referred to has no application to the case in hand, and that it cannot be successfully invoked by the receiver of the Land Company. The statutes of Colorado provide that "no deed of general assignment * * * by an insolvent * * * for the benefit of creditors shall be valid unless * * * it be made for the benefit of all of his creditors, in proportion to the amount of their respective claims." Section 171, Mill's Ann. St. 1891. But the statute in question contains no provisions which can be held to preclude a citizen of that state from attaching the property of another citizen of the state, either at home or in a foreign jurisdiction, merely because the latter has become insolvent, and because such attachment may result in a preference. The insolvent laws of Colorado are of a purely voluntary character. They do not constrain persons to execute an assignment in the event of insolvency. Neither do they compel creditors to participate in the benefits of a general assignment, when made, or to relinquish any of the ordinary remedies for the collection of debts when a debtor is in failing circumstances, or has become bankrupt. In this connection it is also proper to remark that the receiver's title to the assets of the Land Company, and the mode of administering upon the same, is not aided or affected by any existing statute of the state of Colorado relative to the dissolution of private business corporations when they become insolvent. The suit brought by Atwood and others to obtain the appointment of a receiver, and to wind up and liquidate the affairs of the Land Company, on the ground of its insolvency, does not appear to have been founded on the provisions of any local statute which authorized such a proceeding, but was an appeal to the ordinary jurisdiction of a court of chancery, whatever that may be.

We are of the opinion, therefore, that the conduct of the appellants in causing suits to be brought against the Land Company in the territory of New Mexico, with a view of obtaining a preference, was not in contravention of any policy of the state of Colorado, as evidenced by its laws, and that an injunction such as was awarded by the circuit court cannot be supported on such grounds. It goes without saying that the conclusion reached on this branch of the case would be the same if all of the persons concerned in the controversy, including John K. Woodburn, one of the attaching creditors, were citizens of Colorado.

In another class of cases, which are chiefly relied upon to sustain the decree of the circuit court, it is held that courts which have appointed receivers over property situated in a foreign jurisdiction may either restrain or punish persons who interfere with the receiver's possession of such property, even though the interference consists in attaching it under process obtained from some court in the foreign state. *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792; *Chafee v. Quidnick Co.*, 13 R. I. 442; *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. Rep. 606; *Langford v. Langford*, 5 Law J. Ch. (N. S.) 60. In all of the cases last cited, however, the

person proceeded against for interfering with the receiver's constructive possession of property located in a foreign jurisdiction was either a party to the litigation in which the receiver had been appointed, or in privity with a party, or was otherwise subject to the jurisdiction of the court by virtue of his residence or citizenship. It is also worthy of notice that the property involved was personalty, and that the owner thereof was domiciled in the state where the receivership was created. In considering the question of a receiver's title to property located in a foreign jurisdiction a distinction has sometimes been taken between personalty and realty, but, as the case at bar simply involves the right to attach realty, situated in a foreign state, we need not stop to inquire whether the distinction is well founded, or whether the power of a court to restrain persons from intermeddling with a receiver's possession of personal property thus situated is in any respect, or for any reason, more extensive than its power to restrain a like interference with real property. For present purposes it will suffice to say that in our opinion a court has no power to enjoin a citizen of a foreign state or sovereignty from causing a levy to be made on lands which are situated in the foreign state, and beyond its territorial jurisdiction, because it has appointed a receiver of such property, unless the person so enjoined is a party, either in person or by representation, to the litigation in which the receiver was appointed. Courts of chancery, doubtless, have power to compel persons subject to their jurisdiction to execute conveyances of property located in a foreign state, which will generally be respected by the courts of the latter sovereignty if they are executed in conformity with their laws. *Phelps v. McDonald*, 99 U. S. 298-308; *Miller v. Sherry*, 2 Wall. 237-249; *Watkins v. Holman*, 16 Pet. 25-57; *Mitchell v. Bunch*, 2 Paige, 606-615. By means of such orders, and conveyances made thereunder, a court may be able to vest its receiver with the title to realty situated in a foreign jurisdiction, which will be there recognized as valid. But an order appointing a receiver of realty has no extraterritorial operation, and cannot affect the title to real property which is located beyond the jurisdiction of the court by which the order was made. *Booth v. Clark*, 17 How. 322-328. Such orders, therefore, only operate in personam, and upon those persons who are so related to the court, either as parties to the litigation, or by virtue of residence and citizenship, that they are bound to yield obedience to its orders. In conformity with these views we are led to conclude that John K. Woodburn acquired a valid lien on the property of the Land Company in the territory of New Mexico, which the circuit court for the district of Colorado was without power to divest. He was in nowise concerned, as a party or otherwise, in the Colorado suit wherein the receiver was appointed. He was a citizen and resident of New Mexico when the attachment suit was brought, and it is conceded that the indebtedness which he sought to enforce by that suit had its origin in New Mexico, and grew out of business transactions between himself and the

Land Company in the territory of New Mexico, while he was domiciled in that jurisdiction. We can attach no weight to the suggestion of counsel that a suit was first brought by Woodburn to recover the indebtedness in the courts of Colorado, and that the appeal bond was there executed, or to the further suggestion that, in the suit brought upon the appeal bond in New Mexico, Woodburn was described in the complaint as being at that time a citizen of Colorado. With reference to the first of these suggestions it is sufficient to remark that, if Woodburn's right to maintain the attachment suit is at all dependent upon the place where the indebtedness was contracted, then we must look to the origin of the indebtedness, and to his citizenship at that time, rather than to the form which the indebtedness subsequently assumed. And with respect to the second suggestion we deem it sufficient to say that the appellants are not estopped in this suit from showing that Woodburn was in reality a citizen and resident of New Mexico when he sued on the appeal bond, by the fact that he was inadvertently and erroneously described by his attorney as being a citizen of Colorado. The averment as to citizenship in the attachment suit was not jurisdictional in its character, and seems to have had no bearing upon Woodburn's right to maintain the action in the courts of New Mexico. We fail to perceive any reasonable ground, therefore, upon which an averment thus innocently and erroneously made could operate as an estoppel in this proceeding, whatever effect might be accorded to it in the suit in which the averment is found. *Reynolds v. Aden*, 136 U. S. 348, 10 Sup. Ct. Rep. 843.

The next question to be considered is whether Schindelholz, as assignee of the Woodburn judgment, has the same rights thereunder as his assignor. It is insisted by the appellee that Schindelholz is estopped from enforcing that judgment, and that the circuit court properly enjoined him from so doing, for the reason that Schindelholz is a citizen of Colorado, and a party to the suit in that state to wind up the Land Company, and because he was also instrumental in procuring the appointment of a receiver of all of its property, including the New Mexico lands. These may be, and we think they were, adequate reasons for restraining him from enforcing the judgment in his own behalf, which was recovered in the name of Benkleman; but they are insufficient, we think, to deprive him of the right of subrogation, with which he became vested when, as a surety for the Land Company, he paid the amount of the Woodburn judgment, and caused it to be assigned to Benkleman for his benefit. There is no element of estoppel in the conduct of the appellants, so far as we can discover. When Woodburn secured a valid lien on the New Mexico lands, which the other creditors of the Land Company were without power to divest, they had already sustained whatever loss or damage the enforcement of such lien could possibly entail. It was thereafter a matter of no concern to the receiver, and to the other creditors of the Land Company, whether such lien was en-

forced by Woodburn, or whether Schindelholz, by assignment of the judgment, became subrogated to his rights. In either event the result would be the same. It is obvious, therefore, that the right to compel Schindelholz to relinquish his lien under the Woodburn judgment, so that the lands may be sold, and the proceeds distributed ratably among the general creditors of the Land Company, must be predicated solely on the ground that he is a party to the suit wherein the receiver was appointed, and was instrumental in securing such appointment. With reference to that ground of recovery, we deem it sufficient to say that the fact that he was thus a party to the suit to wind up the Land Company did not deprive him of the right to purchase the Woodburn judgment. Neither does his connection with that suit give the other parties thereto a right to insist that he shall cancel the lien of the Woodburn judgment, to which he has become subrogated. As well might it be claimed that he should surrender other liens upon the property of the Land Company, lawfully acquired before the suit to wind up the company was instituted. Courts of equity have always gone to the extreme limit of their power in aiding a surety who has discharged the debt of his principal to obtain the benefit of securities, liens, and priorities held by the original creditor, but we are not aware of an instance where they have lent their aid to deprive a surety of such benefits. *Hunter v. U. S.*, 5 Pet. 173; *Lidderdale v. Robinson*, 12 Wheat. 594; *Thompson v. Taylor*, 72 N. Y. 32; *Fleming v. Beaver*, 2 Rawle, 128; *Rice v. Rice*, 108 Ill. 199; *Brandt*, Sur. 271-274.

Our conclusion is that Schindelholz has succeeded to all of the rights of Woodburn with respect to the judgment recovered by the latter in the courts of New Mexico, including his right, which we think was unquestionable, to enforce it in the mode provided by the laws of that territory. The decree of the circuit court, divesting him of those rights, was therefore erroneous. With respect to the other judgment the appellants occupy a less favorable attitude, as we have heretofore intimated. That judgment was recovered by Schindelholz in the name of Benkleman, after the former had joined in the suit to wind up the Land Company, and to obtain an equitable distribution of its assets among all of its creditors. At his solicitation the circuit court was induced to extend the receivership over the lands located in New Mexico, and to make an order directing them to be advertised and sold. Under these circumstances, and without reference to the nature of the receiver's title, we think it was competent for the trial court to restrain the appellants from taking any action under the Benkleman judgment that would prevent the receiver from obtaining possession of the property in New Mexico, or that would obstruct him in any way in the discharge of his trust, or that would interfere with the proceeding to wind up the Land Company. The jurisdiction which the court had theretofore acquired over Schindelholz was fully adequate, in our judgment, to warrant the exercise of such coercive powers.

For the reasons indicated the case must be reversed and remanded, and all of the provisions of the decree from which the appeal was taken must be canceled, which in any wise interfere with the appellant's right to enforce the Woodburn judgment.

In view of possible future action which may be taken by the creditors of the Land Company, we think it would be unwise to require the appellants to execute a present release of the lien acquired under the judgment obtained in the name of Benkleman. Therefore the case will be remanded to the circuit court, with directions to vacate its former decree, and in lieu thereof to enter a decree restraining the appellants from taking any present action to enforce the judgment recovered in the name of Benkleman, or any future action in that behalf save such as may be first sanctioned and approved by the United States circuit court for the district of Colorado, and further requiring said appellants to take all such future proceedings with respect to said judgment as may be required of them by said court in the suit to wind up the Land Company.

FAILEY v. TALBEE et al.

(Circuit Court, D. Rhode Island. May 27, 1893.)

No. 2,380.

1. EQUITY JURISDICTION—RECEIVERS—POWER TO COLLECT FUNDS IN FOREIGN JURISDICTIONS.

Where a court of competent jurisdiction has, by the appointment of a receiver, assumed the administration of the funds of an insolvent benevolent association, it is competent for a court of equity in another state, on a bill filed for that purpose by such receiver, to order the trustees of the local branch of such association to pay over the funds in their hands to the receiver.

2. SAME—BENEVOLENT ORDERS—REGULATIONS.

It is no objection to making such an order that the fund in question constitutes a reserve fund which, by the rules of the association, the central authority could only call in at certain times and for certain purposes, and not for the general purpose of liquidating the whole trust fund; for while the rules of the association may impress different parts of its funds with different equities, yet its rules as to the manner of ascertaining and marshaling these equities are abrogated when it becomes insolvent and is placed in the hands of a receiver; and the methods of the court are then substituted for the methods provided by such rules.

3. PLEADING—DEMURRER.

Although the bill filed by the receiver in such case does not set out the proceedings of the court in which he was appointed, for which reason it is impossible to determine the scope of the decree entered in that court, or whether the receiver is entitled thereunder to fully administer the whole trust, a demurrer to the bill will be overruled, as the matters in question can be made to appear by evidence at a hearing on the merits.

4. SAME.

The safe rule on a general demurrer to a bill in equity is that the demurrer must be overruled unless it appears that on no possible state of the evidence could a decree be made.

In Equity. Bill by James F. Failey, receiver of the Supreme Sitting of the Order of the Iron Hall, against Henry C. Talbee

and others, to gain possession of certain funds of the order. On demurrer to the bill. Overruled.

W. F. Angell and G. B. Barrows, for complainant.

E. D. McGuinness and W. B. W. Hallett, for respondents.

CARPENTER, District Judge. This is a bill in equity in which the complainant, who has been appointed by the superior court of Marion county, Ind., receiver of all the assets of the corporation called the "Supreme Sitting of the Order of the Iron Hall," prays that the respondents, who are trustees of the branches of that society situated in this state, may pay over to him the money held by them as the reserve fund; the same to be held and disposed of by him according to the instructions of the court by which he was appointed. The respondents demur generally to the bill, and as the first ground of their argument main'tain that it is not competent for this court to make a decree ordering the payment of these sums of money into the hands of a receiver appointed and controlled by another jurisdiction. I think, however, it is abundantly well settled that where a court having proper jurisdiction has assumed the control and administration of a trust like this, and where it appears that the funds to which the litigation relates are properly part of the fund so to be administered, and will be properly administered, in such case it is competent to order the funds to be paid over.

The respondents, however, further contend that the moneys here in dispute do not belong to or form a part of the fund to be administered under the order of the court in Indiana; and they refer me to the first section of the second law of the Supreme Sitting, which has reference to the reserve fund, and which provides that the same "is the property of the Supreme Sitting, and shall be subject to its control at all times, as hereinafter provided." The argument, then, is that, according to this law, the Supreme Sitting can call for the reserve fund only at certain times and for certain purposes, and therefore the receiver can call it in only at those times and for those purposes, and not for the general purpose of liquidating the whole trust fund. This argument, I think, rests on a misapprehension of the effect of the laws of the society. They undoubtedly do impress upon the funds the character of trust funds, and perhaps affect different parts of the fund with different equities; but as to the time and manner of ascertaining and marshaling these equities, and as to the method of administration of the fund accordingly, they must be taken to be abrogated in the case where, as this bill alleges, the society is insolvent. The methods of the court are now to be substituted for the methods provided by the laws.

Coming, then, to consider whether the rights of the parties in this case will be best promoted by such a decree as the complainant prays, I find it impossible to determine from the bill itself what answer shall be given to this question. The bill alleges,

but does not set out, the proceedings on which the decree of the Indiana court is based, and I cannot, therefore, determine certainly what the scope of that decree is, and whether the receiver who holds thereunder can fully administer the whole trust which is here disclosed. Still further, the method of his proceedings may be controlled by the state laws of Indiana, of which the court takes notice, but perhaps takes notice only as a matter of evidence, and which, therefore, cannot be taken into account in a hearing on a general demurrer.

There are still other questions of the relative rights of various members of this society which were suggested by the respondents at the hearing, and which, so far as I can see, can be rightly solved only after full knowledge of all the facts regarding the history of these payments, and the disposition which has been heretofore made of such parts of the funds as are no longer in the hands of the society. These facts can be made to appear only by the evidence in the cause. The safe rule on a general demurrer to a bill in equity is that the demurrer must be overruled unless it appears that on no possible state of the evidence could a decree be made. It seems to me that no such conclusion can be reached in this case; in short, it seems to me that the questions suggested by the bill, as well as the questions suggested by the respondents themselves in their argument, can be solved only after a full hearing of the cause on bill, answer, and proofs.

The demurrer must therefore be overruled.

BEAL v. NATIONAL EXCH. BANK OF DALLAS.

(Circuit Court of Appeals, First Circuit. May 23, 1893.)

No. 32.

BANKS AND BANKING—COLLECTIONS—INSOLVENCY.

Where a bank sends commercial paper to another bank for collection and credit on general account, the custom between them being to enter the credit only when the paper is collected, the relation between the banks is that of principal and agent until the collection is made and the money received by the second bank; and if the latter sends it to another bank, which collects the paper, but does not remit the proceeds until after the agent bank has failed, the principal can recover the proceeds from the receiver thereof. 50 Fed. Rep. 355, affirmed. *Bank v. Armstrong*, 13 Sup. Ct. Rep. 533, followed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Bill by the National Exchange Bank of Dallas against Thomas P. Beal, receiver of the Maverick National Bank of Boston, to recover the amount of a certain draft collected through the latter bank. A demurrer to the bill was overruled. 50 Fed. Rep. 355. By a stipulation filed, the allegations of the bill were taken, at the hearing, as an agreed statement of the facts, and the court entered a decree for complainant. Defendant appeals. Affirmed.

The facts as alleged in the bill were, in substance, as follows: The plaintiff bank sent to the Maverick Bank a draft for collection and credit on general account. The draft was payable in Taunton, and the Maverick Bank sent it to the Taunton National Bank at Taunton for collection and credit; and on October 31, 1891, the Taunton Bank collected the draft, and credited its amount to the Maverick Bank, and mailed a letter to the Maverick Bank stating that it had done so. October 31st was the last day that the Maverick Bank did business, it being taken charge of the next day by a national bank examiner, and closed by the direction of the comptroller of the currency. The letter written by the Taunton Bank did not, therefore, arrive until after the failure, and consequently no entry of credit on account of this draft was made by the Maverick Bank to the plaintiff. The Taunton Bank had no mutual account with the Maverick Bank, and was in the habit of remitting the proceeds of paper sent it by the Maverick Bank for collection every five days, and sent a check for the amount of the draft collected by it to the receiver. The usage between the plaintiff and the Maverick Bank was that the Maverick Bank credited the amounts of drafts sent it by the plaintiff for collection on the day the same were collected on general account, and did not keep the proceeds of such drafts separate, but mingled them with its funds; and this was done with the knowledge of the plaintiff.

Edward W. Hutchins and Henry Wheeler, for appellant.
John C. Gray, for appellee.

Before COLT, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. We are of opinion that this case is governed by the decision of the supreme court in *Bank v. Armstrong*, rendered March 6, 1893, (13 Sup. Ct. Rep. 533,) and it follows that the decree of the circuit court must be affirmed.

KNOEDLER et al. v. GLAENZER et al.

(Circuit Court of Appeals, Second Circuit. May 5, 1893.)

1. RIGHT TO FIRM NAME—INJUNCTION—EVIDENCE.

The firm of Goupil & Co., Paris and New York, sold to complainant M. K. the New York stock, good will, etc., together with the right to designate his business as "Formerly Goupil & Co. M. K., Successor;" agreeing to supply M. K. with a stock of prints and paintings for six years as agent, but refusing to allow him to use the name Goupil or Goupil & Co., without words to indicate succession, allowing him, however, to state that he was sole agent for Goupil & Co. in America. In 1887 the Paris firm, which, by legal succession had become "Goupil & Co., of Paris. B., V. & Co., Successors," established a branch of their business in New York under that name. *Held*, that they were entitled so to do in the absence of any express contract to the contrary. 47 Fed. Rep. 465, affirmed.

2. SAME—GOOD WILL.

There being no evidence of any attempt on the part of defendants B., V. & Co. to injure or impair the good feeling of the customers of complainant M. K., or deprive him of the advantages of the good will of the American business purchased by him, he was not entitled to an injunction against defendants.

3. SAME—CONSTRUCTION OF CONTRACT.

The sale of the good will of Goupil & Co. in New York to M. K. did not include the good will or rights of Goupil & Co., of Paris, including the rights of succession, and the right of the successor to do business whenever they saw fit, provided that they did not represent their business as

the business of complainant, and therefore M. K. was not entitled to an injunction on the ground that defendants attached to their name the words "of Paris."

4. SAME—COMPLAINANT MUST DO EQUITY—WAIVER.

Complainant, having illegally and wrongfully represented himself as Goupil & Co. by advertisements, letter heads, flags, and other devices, and not as "K., Successor to Goupil & Co.," was not entitled to relief, and the fact that Goupil & Co., of Paris, being foreigners, made no objection thereto, was no waiver of objection to such misuse.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Bill by Michael Knoedler and others against Eugene W. Glaenger, impleaded with other defendants. The bill was dismissed below, (47 Fed. Rep. 465,) and complainants appeal. Affirmed.

F. R. Condert, for appellants.

Eugene H. Lewis, for appellee.

Before SHIPMAN, Circuit Judge, and TOWNSEND, District Judge.

TOWNSEND, District Judge. For some years prior to 1857, Adolph Goupil and Leon Boussod had carried on a general business as dealers in works of art and artists' materials in Paris and New York under the firm name of Goupil & Co. On March 26, 1857, they sold to Michael Knoedler, the manager of their New York house, the business of said house, including the furniture, fixtures, supplies, lease of premises, and the good will attached thereto, including the right to designate the business house as "Formerly Goupil & Co. M. Knoedler, Successor." Goupil & Co. reserved to themselves certain debts, money, and securities, and the ownership of certain prints and paintings. They agreed that until December 31, 1862, they would continue to consign to Knoedler a complete assortment of such of their prints and pictures as should be suitable for the American trade. The firm of Goupil & Co. continued to do business in Paris under said name until 1884, when, Albert Goupil having died, and Adolph Goupil having become a special partner, the remaining partners, Leon Boussod and Rene Valadon, succeeded to the business, and acquired the right to the use of the name "Goupil & Co. Boussod, Valadon & Co., Successors," and said business has ever since been conducted under said name. In 1886 said firm purchased all the interest of the Goupils in said business. In the spring of 1887, they established, and still maintain, a branch of their business, at No. 303 Fifth avenue, New York, under the name "Goupil & Co., of Paris, Boussod, Valadon & Co., Successors."

Said Michael Knoedler and his sons have, up to the present time, continued to carry on, in New York, the business bought in 1857. They have not only used the name "Goupil & Co. M. Knoedler, Successor," but have adopted a seal for the use of the firm, consisting of a peculiar device, with the words, "Goupil's Fifth Avenue & Twenty-Second Street," thereon. They have also placed

upon all articles of merchandise sold by them a label containing no words other than "Goupil's Fifth Avenue & Twenty-Second Street," irrespective of the question whether they were manufactured or produced by or purchased from Goupil & Co. or not. Furthermore, by large signs, and a flag exhibited at their place of business, by letter heads, by advertisements in the directory, and otherwise, they have held themselves out to the public as Goupil's, or the establishment of Goupil & Co., in such a way as to produce the impression that their place of business was that of the old house of Goupil & Co., not of Knoedler, Successor to Goupil & Co. These complainants now seek to enjoin the defendants from directly or indirectly making use of the name Goupil & Co., or the name Goupil, or words indicating succession thereto, in New York or elsewhere in the United States. The grounds on which this injunction is prayed for are that the aforesaid acts of defendants in establishing a branch house in New York were "for the purpose and with the intent and result of diverting unto themselves the valuable patronage and custom enjoyed by the complainants in their business."

The decision of the questions at issue between the parties depends upon the construction of the contract between Goupil & Co. and Knoedler in 1857. Counsel for complainants claim that thereby Goupil & Co. severed their business into a European part and an American part, and for a valuable consideration transferred the American part to Knoedler, and that, therefore, no other firm could be their successor in this country, except through Knoedler. Defendants claim that there is nothing in the contract of sale which expressly or impliedly suggests that the right to the use of the name Goupil & Co. was to be either perpetual or exclusive. The question, then, is whether Goupil & Co., by said contract, agreed that neither they nor their successors would thereafter do business in New York under the name Goupil & Co., or under the name of the vendee as their successor, or, in other words, what restriction, if any, was imposed upon Goupil & Co. by the terms of the sale to Knoedler. The counsel for complainants admits that, if the defendants were the successors in New York of a firm of Goupil & Co., which, down to the transfer to such successors, had been doing business in New York as Goupil & Co., there would be no ground for complaint. Goupil & Co., by said contract, sold to Knoedler the business and good will of their New York house, together with certain furniture, fixtures, and supplies. This sale carried with it the right to the use of the title "Goupil & Co. M. Knoedler, Successor," irrespective of the express provisions of the contract to that effect. Goupil & Co. further agreed to establish and maintain, with Knoedler, as their agent, during six years, a deposit of certain classes of prints and paintings, provided he should make sales amounting to 100,000 francs per year, of their prints. They reserved the right, in case he failed to reach this amount, to withdraw their deposit of prints and paintings from his hands. So much appears from the contract itself.

It further appears from the contemporaneous correspondence
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that Goupil wrote Knoedler, refusing to allow him to retain the name Goupil, or Goupil & Co., or to use it without words indicating his succession, but authorized him to state to the public that he was the only agent for the publications of Goupil & Co. in America. There is no express or implied covenant in the contract that Goupil & Co. will not again go into business in New York. Assuming the contract to be uncertain, there is nothing in the correspondence between, or conduct of, the parties to indicate that they understood that such restriction, or any restriction, upon the future sale of the Paris business was implied in the New York sale. For aught that appears in the contract, Goupil & Co., or their vendees, could thereafter do business in New York, or, at the end of six years, or earlier, on breach of the contract, could transfer the exclusive agency for their prints and paintings to another agent.

In the absence of an express covenant, or of fraud, there is nothing to prevent the vendor of a business and good will from establishing a like business in the same place, under his own name, provided he does nothing to injure the good disposition of the public towards the old place of business, or impair any of the advantages which the purchaser has properly acquired by the purchase of the good will of the old customers. *Churton v. Douglas*, 1 Johns. Eng. Ch. 174, 28 Law J. Ch. 841; *Hogg v. Kirby*, 8 Ves. 215; *Crutwell v. Lye*, 17 Ves. 335; *Hall's Appeal*, 60 Pa. St. 458; *Leggott v. Barrett*, 15 Ch. Div. 308; *Cottrell v. Manufacturing Co.*, 54 Conn. 122, 6 Atl. Rep. 791; *Wm. Rogers Manuf'g Co. v. Rogers*, 58 Conn. 356, 20 Atl. Rep. 467; *Massam v. Food Co.*, 14 Ch. Div. 748; *Gilman v. Hunnewell*, 122 Mass. 139; *Carmichel v. Latimer*, 11 R. I. 395; *Browne, Trade-Marks*, § 420. There is, in this case, no evidence of an attempt on the part of Boussod, Valadon & Co. to injure or impair the good feeling of the customers of Knoedler & Co. towards them, or to take away the advantages which they derived 30 years ago from the purchase of the good will of the business of Goupil & Co. in New York, except the fact that the defendants call themselves successors of the Paris firm; but it is said that, as Goupil & Co. had parted with their right, so far as New York is concerned, their successors cannot enjoy it. If Goupil & Co., without attempting to interfere with the good will which belonged to Knoedler, could rightfully have opened a shop in New York for the sale of prints and engravings, the argument that the Paris firm, which, 30 years after the Koedler purchase, was the owner of a name which expresses its legal status in France, could not come to New York and simply announce themselves by their French name, is technical, rather than convincing.

The defendants attach to their name the words "of Paris." Complainants strenuously urge that Goupil & Co., of Paris, was the very firm which sold its American business to Knoedler. The answer to this claim is that Goupil & Co. sold to Knoedler the branch house of Goupil, in New York, in 1857, and the good will attached thereto, but that it did not thereby sell the good will or rights attached to the house of Goupil & Co. of Paris, including the rights of succession, and the right of such successors to do business

wherever they saw fit, provided they did not represent their business as the business of the complainants.

But complainants contend that defendants have been guilty of disloyal competition, or unfair trade, and that this question was not considered or passed upon by the court below. The learned judge, in his opinion, accurately stated what constitutes unfair competition. He said:

"The good will of a business comprises those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which had been identified in the past with the name and repute of his predecessor. Any conduct on the part of a vendor of a good will, calculated to impair the value of these advantages, is a breach of promise, implied in sales of every description, that the vendor will not disturb the vendee in the enjoyment of his purchase."

It does not appear that the defendants or their vendors have done anything which would tend to disturb the complainant in the enjoyment of the good will purchased by him in 1857.

In *Goodyear's India Rubber Glove Manuf'g Co. v. Goodyear Rubber Co.*, 128 U. S. 604, 9 Sup. Ct. Rep. 166, Mr. Justice Field says:

"The case at bar cannot be sustained as one to restrain unfair trade. Relief, in such cases, is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff."

Counsel for complainants has cited a number of cases in support of the rule that a person may be enjoined against an unfair or dishonest use of his own name. The law is well settled, as stated by Mr. Justice Brown in *Chemical Co. v. Meyer*, 139 U. S. 542, 11 Sup. Ct. Rep. 625, that "cases are not wanting of injunctions issued to restrain the use even of one's own name when a fraud is manifestly intended, or when he has assigned or parted with his right to use it." But an examination of the cases indicates that they do not apply to a case like the present one. They show that the use of one's own name has never been enjoined except where it has been accompanied by fraudulent misrepresentations, or imitation of trade-marks or labels, or where the person has, by some express contract, parted with the right to the use of such name; and that, in the absence of such express contract, no abandonment of such right will be presumed. In *Meneely v. Meneely*, 62 N. Y. 427, the referee found that the use of the name Meneely by the defendants was calculated to mislead, and did mislead, the public into the belief that they were the proprietors of the Meneely bell foundry, carried on by the plaintiffs, and that the defendants expected and intended to derive a profit and advantage by reason of the good reputation and celebrity of the plaintiffs' foundry. But the injunction against the use of the word Meneely was denied, the court saying that "every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead." The use of one's

own name by a vendee fraudulently or in violation of an express contract not to do so is what the law characterizes as unfair or disloyal competition. But, in the absence of such elements, the party using his own name is only exercising his legal rights. *Qui jure suo utitur nullum damnum facit*, and, if damage does result therefrom, it is *damnum absque injuria*.

The defendants sharply criticise Knoedler's use, in advertisements and representations in various ways, that his store is Goupil & Co.'s, as conduct which a court of equity should regard as improper, while the complainants seek to show that their conduct was authorized, or at least assented to, by Goupil & Co., and from this assent derive an argument in support of the breadth of their claim to the use of Goupil & Co. But, if Knoedler & Co. had confined themselves to the authorized use of the words Goupil & Co., holding their firm out merely as its successors, during the past 30 years, there would have been no occasion for this suit. The reputation of the successors would gradually have become substituted for that of the predecessors; the transfer of the good will, or "probability that the old customers will resort to the old place," would have been complete; and the new body of customers would have had no interest, except in the new firm. It is because the public have been misled, by Knoedler's announcement that his house is the "Maison Goupil," by the statement signed "Goupil & Co.," that "the central house at Paris has branches at London, Berlin, Vienna, and La Haye, with which the New York branch is in constant connection," and by other unlawful appropriations of said name, that the name "Goupil" has become a valuable element in their business. What the complainants now seek to secure is not the probability that the old customers of 1857 will resort to the old place, but the probability that the new customers of 1889 will resort to the establishment of Knoedler in the belief that they are thereby dealing with Goupil & Co. They are not claiming merely the rights under the contract of 1857, the full benefit of which they have presumably enjoyed during the past 30 years, but they are also trying to deprive these defendants of the constantly increasing reputation which the defendants have acquired since said sale in connection with the Messrs. Goupil, and under the name of Goupil & Co.

It is claimed that by the failure of Goupil & Co. of Paris to object to the continued unlawful use by Knoedler of the name Goupil & Co. they have waived the right to now found any claim upon such misuse thereof; but, in order to constitute a waiver, there must be an intentional relinquishment of a known right. When there is no occasion for its exercise, such intention will not readily be presumed. Especially is this so when, as in this case, the party whose rights were invaded was in a foreign jurisdiction, and was not apparently aware of the extent of the use of the name. To sanction the breadth of the complainant's claim would be to enable the infringer to found a right upon his own wrong. Here the complainants have unlawfully misrepresented themselves as Goupil & Co. If they might have been originally enjoined against such misrepresentation, I see no reason why the fact that they have per-

sisted therein should affect the rights of Goupil & Co., or their successors, whenever they should see fit to exercise those rights. There can be no estoppel, or even waiver, by silence, except under circumstances where it becomes the duty of the party to speak.

The decree of the circuit court is affirmed, with costs.

WOOD v. OREGON DEVELOPMENT CO. et al.

(Circuit Court, D. Oregon. May 20, 1893.)

No. 2,005.

RECEIVERS — APPOINTMENT OF WITH REFERENCE TO PROCEEDINGS IN STATE COURT.

A receiver was appointed by the United States circuit court, for the Oregon Development Company, upon the representation that the appointment was concurred in by the officers of that corporation, and all parties in interest. It afterwards appeared that the development company was auxiliary to the operation of the road of the Oregon Pacific Company, and was indirectly involved in a controversy going on in a state court over the latter company; that two factions were contending for the control of the Pacific Company, one of which had succeeded in ousting the other; and proposed to apply to the state court for the appointment of a receiver for the development company, the defendant company herein. The dispossessed faction secured the resignation of the trustee of the bondholders of the development company, who was a citizen of the state, and the substitution of another, who was not, so as to give the federal court jurisdiction, and thereupon secured the appointment of a receiver before the state court could act. *Held*, that a receiver would not be appointed with a view to controversy with a receiver in the state court, or with reference to proceedings in such court; that the receiver appointed would be removed, and another appointed, who would stand indifferent between the contending factions.

In Equity. On motion to remove a receiver appointed in the cause of George S. Wood, trustee, against the Oregon Development Company and the Manhattan Trust Company. Motion granted.

E. H. Peery, for complainant.

John P. Fay, for interveners Brown & Blair.

E. C. Bronaugh, for receiver, R. A. Bensell.

Wallis Nash, for bondholders.

BELLINGER, District Judge. The receiver was appointed at chambers on May 1, 1893, upon the filing of the bill of complaint herein. It was done upon an application in behalf of what is claimed to be all but a small proportion of the creditors of the Oregon Development Company, acquiesced in by the attorney of the Manhattan Trust Company, the other defendant, and by the defendant as well. Mr. William M. Hoag, the then manager of the company, was also present, apparently co-operating in the movement to secure the appointment of such receiver. The appointment was made by the judge of this court, under the belief that substantially all interests to be affected by what was done were united in such application. Mr. R. A. Bensell was appointed

at the request of the parties so moving. It now appears that there are two hostile camps, waging war over the Oregon Pacific Railroad Company's property; that the Oregon Development Company's property is auxiliary to the operating of the former's road; that one of these factions has recently been dispossessed of the control of the railway property by the action of a state court, and, according to the representation of the dispossessed party, the other faction installed instead; that the successful party was about to proceed in the state court for the appointment of a receiver of the Oregon Development Company's property when their opponents, by securing the resignation of a trustee who was a citizen of Oregon, which was done on Sunday, the 30th of April, and the substitution of a new trustee, with the requisite citizenship to give this court jurisdiction, were able to move in this court, on the following Monday morning, for the appointment of their receiver, and to secure it in advance of the proceedings of their opponents, which were begun in the state court on Tuesday, in ignorance of what had been done in this court in the mean time.

As a reason for the appointment of a receiver, the complaint alleges the insolvency of the development company, and the alleged fact that a large part of the property of the company is in imminent danger of being lost and wasted or sold for taxes, and that the rentals thereof are in danger of being squandered; and, as if to emphasize the fact of this danger, Mr. William M. Hoag, the then manager of the property, was present, as already stated, in apparent co-operation with the movement for a receiver, to preserve the property of which he was manager from being thus wasted, lost, and squandered; and, the appointment being made, Mr. Hoag, acting as attorney in fact for his brother, T. Edgerton Hoag, the leader of one of these warring factions, executed the receiver's bond, as one of the sureties thereon.

Upon these facts I do not doubt as to the course to be pursued. I do not care to consider any matters touching the integrity, independence, or qualifications of Mr. Bensell, the receiver, nor to consider the averments of the affidavits filed by the respective parties. I may, for the purposes of this motion, presume that either party is quite ready to do all that the other has done; but it is due to this court to discourage, as far as practicable, the enterprise that has been shown in the particular features of the case under consideration. As was said by Mr. Justice Miller in *Meier v. Railway Co.*, 5 Dill. 478: "It becomes a duty of the court to see that its powers are exercised on principles of strict neutrality as regards the belligerents; and this can be done in this case by removing the representative of these hostile interests, and appointing a receiver who, in feeling and in conduct, will be strictly neutral and strictly honest." The receiver is solely the officer of this court. He must be, in the full sense of the term, the "representative of the court." He is in no way the representative of either party. His past relations, the influences that secured his appointment, his sympathies from whatever cause, must not be

such as to predispose him either way. He must be the appointee of the court. This, Mr. Bensell is not. He is the nominee of one hostile party, bitterly opposed by the other, whose appointment was made in the mistaken belief that all interests were united in him. The feeling which his appointment creates in the party opposed to those asking his appointment is such that his position will be an embarrassing one, and his usefulness as an officer of the court impaired. The unmistakable inference from the argument in support of the appointment is that the receivership of the Oregon Pacific property in the state court is one-sided and partisan; that such receiver's position is a menace to the interests of the development company; and that it is the duty of this court to interpose for the protection of such interests. I cannot consider such a suggestion. The propriety of what the state court has done or may do cannot be the subject of discussion here. I shall not appoint a receiver upon the idea that there is to be controversy with the receiver of the state court. On the other hand, it is the duty of this court to make such an appointment as will avoid any controversy between the two receivers, which would be an unseemly thing.

The motion for the removal of Mr. Bensell as receiver is allowed, for the reasons stated, to take effect upon the appointment and qualification of his successor. I will give opportunity for an agreement between the parties; and, if they are unable to agree, I will make an appointment agreeable to myself.

CENTRAL TRUST CO. OF NEW YORK v. VALLEY RY. CO.

(Circuit Court, N. D. Ohio, E. D. June 1, 1893.)

No. 4,994.

RECEIVERS—LIABILITIES—ATTORNEYS' FEES.

A trust company, which has been compelled to come into court in order to collect from the receiver of a railroad company certain rentals justly due, cannot claim compensation for the services of its solicitors in procuring the order for payment, when such services were entirely for its own benefit, and not for the purpose of saving or adding to the fund which is to be distributed to the creditors in general. *Investment Co. of Philadelphia v. Ohio & N. W. R. Co.*, 46 Fed. Rep. 696, and *Easton v. Railroad Co.*, 40 Fed. Rep. 189, distinguished.

In Equity. Application for an order requiring the receiver to pay solicitors' fees. Denied.

C. E. Pennewell and Amos Dennison, for petitioner.

S. E. Williamson, for bondholder committee.

RICKS, District Judge. This case comes before the court on the application of the Fidelity Insurance, Trust & Safe-Deposit Company of Philadelphia, Pa., trustee, for compensation to its solicitors for services rendered in procuring an order upon the receivers to pay the car rental due under the contract. In support

of this application counsel have cited the case of *Investment Co. of Philadelphia v. Ohio & N. W. R. Co.*, 46 Fed. Rep. 696, and the case of *Easton v. Railroad Co.*, 40 Fed. Rep. 189. In both these cases the party claiming compensation from the court was a trustee named in the mortgage foreclosed, upon whom, by virtue of that contract relation, certain duties devolved connected with the mortgages. In the case in 46 Fed. Rep. the trustee, having declined to proceed with a suit of foreclosure, and that duty having devolved upon the complainant for himself and other bondholders, the court disallowed the claim of the trustee for compensation, but did allow compensation for the complainant. The trustee in that case had been made a defendant, and his duties were merely nominal. No active service on his behalf was performed in executing the trust and bringing the fund into court available for distribution to the beneficiaries under the mortgage. In the case in 40 Fed. Rep. compensation was allowed the trustees of the several mortgages in that case, because it appeared from the report of the master, as reviewed by the court, that active duties had devolved upon those trustees, and that by virtue of their relation to the mortgage compensation was justly due to them.

But in the case now before the court the services rendered by the applicant were solely on its own behalf, and to recover a claim due it under the contract with the defendant railroad company. The applicant in this case stands as every other creditor of the receiver, with the exception that it is to a certain extent preferred, having a right to the possession of the cars for which rental is claimed in case said rental is not paid. In the case of *Trustees v. Greenough*, 105 U. S. 527, the supreme court reviews very fully the circumstances under which compensation is allowed to a complainant for services rendered for rescuing and bringing into court a fund which is afterwards distributed for the benefit of all the creditors. In that case the complainant, suing for himself and all other creditors, had in the fullest sense of the word rescued a fund which was being neglected and dissipated by the inattention of the trustee charged with the duty of protecting it. Large risks were taken by the complainant in said suit; not only the risk of being obliged to pay the costs of the proceeding, but liability for very expensive counsel fees, and for a very large outlay of money necessary to secure testimony to establish his case. All this risk and outlay was as much for the benefit of the other creditors as for himself, and the facts disclosed a case in which the complainant literally rescued a very large fund, which would otherwise have been lost to the creditors. In that case the court allowed him liberal compensation, upon the ground that he had rendered great service to the other creditors, and without such service and expenditures on his part they would probably have lost all they had risked in the fund.

No such services are claimed for the applicant in this case. It has not added to the fund to be distributed among the creditors, nor has it saved a fund which would otherwise have been dissipated and lost. Its only claim is that it has been compelled to come into

court to have allowed an undisputed claim. Counsel contend that the receivers ought to have moved in this matter, because the claim was one which the receivers recognized to be just, as rentals for cars which they had in their possession and actual use; and because the receivers did not move in these proceedings, and the applicant was compelled to do so, therefore counsel fees are due to it out of the fund to arise in this case. But it is not the duty of the receivers to proceed affirmatively, and procure the allowance of every claim preferred against them. The receivers are the officers of the court, and the order appointing them states generally the nature of the claims which they are authorized to pay. The claim represented in the motion now under consideration was one which required the issuing of receivers' certificates, and for which affirmative action on the part of some one was necessary. It was not part of the receivers' duty to move affirmatively in this matter, but it was the duty of the creditor so to do. The same duty devolves upon every creditor having a claim against this insolvent railroad. If compensation were allowed the solicitors for this complainant, for the same reasons it would be the duty of the court to pay counsel for almost every creditor having a claim against the receivers. The receivership, therefore, instead of conserving the property, and husbanding its resources for the payment of the largest sum possible to the creditors, would result in dissipating the fund largely by the payment of fees to the solicitors of every intervening petitioner. This would make the administration of an insolvent railroad company a very expensive proceeding. The federal courts recognize the hardship and injustice of compelling just creditors to institute proceedings in court to establish just claims by allowing to counsel for the prevailing party a docket fee. Of course, this docket fee is not a large sum, but it is a partial compensation to the creditor for being compelled to assume the expense of establishing a claim which the debtor ought to have recognized and paid without a suit; but this policy is not carried into cases involving the distribution of the assets of insolvent corporations, which are trust funds for the benefit of all creditors. The policy of the courts in such cases is to lessen the expenses as far as can be done, and bring into court for distribution the largest fund possible. I think, therefore, the claim of counsel must be disallowed.

SIMONS et al. v. FISHER.

(Circuit Court of Appeals, Third Circuit. May 23, 1893.)

1. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—EVIDENCE.

In an action by the receiver of a national bank on a note made by defendants to their own order, and indorsed by them, the note clerk of the bank testified to entries on the discount book indicating that the note was discounted on a certain day, and that the account of the proceeds was handed to the president, who put his signature upon it, thus making it an order on the teller for the amount therein stated; that this order was returned to the clerk, together with the president's own check for an amount sufficient to make up the face of the note; and that this amount was used to pay a former note of defendants. As to the former

note, he testified to entries on the discount book indicating that it had been discounted, and that the proceeds were deposited to the credit of the president. The bank shortly became insolvent. *Held*, that this did not sufficiently show the bank was a bona fide holder for value, as against the defense that the notes were procured from defendants by the president, who was also the sole managing officer of the bank, by fraud and without consideration. Butler, J., dissenting.

2. SAME—FRAUD IN PROCUREMENT.

Defendants offered to show that the note in suit, and former notes which were renewed by it, were given at the solicitation of the president, who in the actual conduct of the business of the bank was its sole managing officer, and upon his execution of a receipt, also offered in evidence, reciting that the note was for the use of the bank and was to be paid by it at maturity; and that he stated that he proposed to use it in the clearing house, as it would look better for the credit of the bank than numerous small notes which it held, and which it would retain to protect this note of defendants. The court refused to admit the evidence offered. *Held*, that this was error, as the facts, if shown, would make a valid defense to the action. Butler, J., dissenting.

3. SAME—AUTHORITY OF BANK PRESIDENT.

It was also error to refuse defendants' offer to show that the president was the sole managing officer of the bank, in the actual conduct of its business, and that the cashier occupied more the position of a clerk than that of actual cashier; for, if the president exercised the functions of cashier, and was the sole managing officer of the bank, he had authority to borrow money for the use of the bank in the regular course of its business. Butler, J., dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

At Law. This was an action by B. F. Fisher, receiver of the Spring Garden National Bank, against John F. Simons, Frederick M. Simons, and Edwin S. Simons, partners trading as Simons, Bro. & Co., on a note. The court directed a verdict for plaintiff, and defendants bring error. Reversed.

Robert H. Hinckley, for plaintiffs in error.

Silas W. Pettit, (D. H. Stone and Read & Pettit, on the brief,) for defendant in error.

Before ACHESON, Circuit Judge, and WALES and BUTLER, District Judges.

ACHESON, Circuit Judge. This was a suit brought by the receiver of the Spring Garden National Bank against the firm of Simons, Bro. & Co. upon a promissory note dated Philadelphia, February 13, 1891, at three months, for \$5,000, made by the defendants to their own order, and by them indorsed.

At the trial the plaintiff, instead of relying upon the presumption arising from the mere possession of the note that the bank was a bona fide holder for value, for the purpose, evidently, of anticipating and precluding the defense, examined, as part of his case in chief, the note clerk of the bank, who testified to entries on the discount book indicating that the note in suit was discounted by the bank on February 17, 1891. He then stated:

"The account of the proceeds—\$4,940.67—was handed to President F. W. Kennedy, who put his signature on it, making it an order on the teller for that much money. After the president had put his signature on this O. K.

slip, it was returned to me with his own check for \$59.33, the two together making it \$5,000. It was used to pay a former note of Simons, Bro. & Co. of \$5,000."

Touching the former note which bore date October 15, 1890, this witness testified to entries on the discount book indicating that it was discounted by the bank on November 20, 1890, and he stated that for the proceeds "an O. K. slip was issued and deposited to the credit of F. W. Kennedy in his ledger account." F. W. Kennedy was the president of the bank.

Such being the plaintiff's case, the defendants' counsel made the following offers, one of the defendants being on the witness stand:

First. "I offer to show that this note, dated October 15, 1890, at four months, for \$5,000, was delivered to the president of the Spring Garden National Bank on or about November 20, 1890, which note was the first of a series of four notes given by the firm to the president, and taking from him at the time an acknowledgment in writing, signed by him as president of the bank, that he received this note for the use of the bank, and to be paid by it at maturity; and saying also at the same time to the witness that he desired to use this note in the clearing house; that he had a large quantity of small mercantile paper that he did not care to put through the clearing house, as it would look better for the bank to have a large note of a responsible firm like Simons, Bro. & Co. to go into the clearing house, and that he would retain these small mercantile notes to protect Simons, Bro. & Co. I propose to show that the receipt was given by the president in the banking house."

Second. "I offer to show that on the 8th of December, 1890, the witness, having been called upon by the president of the bank to give two additional notes to the one of October, 1890, visited the banking house, and there had a conversation with the president, in which he stated that it was necessary for the bank to have large promissory notes of a firm of the standing of Simons, Bro. & Co. for use in the clearing house; that the bank was entirely solvent; that they had a quantity of mercantile paper of small amounts, which the president would lay aside for the protection of Simons, Bro. & Co. if they would loan them the use of their credit by giving the notes he asked for,—four in all; and that at the date of this interview, December 8, 1890, at the banking house, the president gave the witness the receipt dated December 8, 1890."

Each of these offers was overruled. The defendants' counsel then recalled the note clerk, and made the following offer:

"I recall the witness for the purpose of showing that in the actual management of the business of the Spring Garden National Bank the president was the sole managing officer; that the cashier occupied the position more of a clerk than of actual cashier in the sense in which that word is used in the authorities cited by my friend."

This offer was also overruled.

In connection with the above offers of evidence, the defendants offered receipts given them by the president of the bank, of which the following are copies:

"Dec. 8/90. Received of Simons, Bro. & Co. their four promissory notes for \$5,000 each, dated as follows: No. 1,151, Oct. 15/90; No. 1,152, Oct. 31/90; No. 1,172, Nov. 15/90; and No. 1,174, Dec. 8/90; all at four months,—which notes are for the use of the bank and to be paid by it.

Francis W. Kennedy, Pt."

"February 24/91. Received of Simons, Bro. & Co. their note 1,231, dated February 13/91, 3 mos., \$5,000, which note is for the use of the bank, and to be paid by it.

Francis W. Kennedy, Pres't."

By direction of the court the jury rendered a verdict for the plaintiff.

In dealing with this case we must at the outset assume two things: First, the actual good faith of the plaintiffs in error in the transactions between them and the president of the bank; and, second, that they could have shown the facts to be as set forth in their offers. Were those offers properly rejected? In answering this question it is first to be noticed that Simons, Bro. & Co. were not in court as plaintiffs seeking to enforce as against the bank a contract made in its behalf by its president. They were defending against a note, for which they had received no consideration, made for the accommodation of the bank at the instance of its president, and delivered to him in his official capacity for the use of the bank in its clearing house business. Now, it is a familiar principle that in an action by the indorsee against the maker of a promissory note proof by the defendant that the note was fraudulently obtained from him puts the plaintiff to proof that he is a bona fide holder for value. *Lerch Hardware Co. v. First Nat. Bank of Columbia*, 109 Pa. St. 240; *Stewart v. Lansing*, 104 U. S. 505. The evidence here made the ground for excluding the defendants' offer strikes us as very meager and inadequate. The circumstances connected with the alleged "regular discount" of the paper were not shown. Whether the paper came before the board of directors at all was left to mere inference from book entries. Indeed, the testimony of the note clerk rather suggests that in this matter Francis W. Kennedy, the president of the bank, was permitted to exercise unlimited control. Nor did it appear that the bank directly paid any money to Kennedy. The most shown was that a credit was entered in his account with the bank, but the state of that account then or afterwards was not disclosed. Now, if a bank, or its receiver, can successfully maintain an action against an innocent maker of a promissory note which came to it by the hands of its own president, who, acting in its behalf, and as its representative, procured the note for the accommodation of the bank in the course of its regular business, surely it can only be upon fuller proofs than this record discloses that the bank became a bona fide holder of the note for value.

But the defense did not rest alone upon Kennedy's official character as president of the bank. The defendants' counsel offered to show that "in the actual management of the business of the Spring Garden National Bank the president was the sole managing officer; that the cashier occupied the position more of a clerk than of actual cashier in the sense in which that word is used in the authorities cited by my friend." The latter clause of this offer does not weaken what immediately precedes. Evidently it was intended to meet authorities which had been cited to show the powers with which the cashier of a bank is ordinarily invested, *virtute officii*, as distinguished from those usually appertaining to the office of president. The fair meaning of the offer, as a whole, was to show that, as the affairs of the Spring Garden National Bank were ac-

tually conducted, the president was "the sole managing officer," performing, among other functions, those of a cashier. Assuming the president to have been "the sole managing officer" of the bank in the conduct of its business, can the bank, or its receiver, recover against the defendants upon a note procured from them by its president in the manner, for the purpose, and under the arrangement set forth in the defendants' offers? We think not.

It is, indeed, urged that the transaction which the defendants proposed to show was *ultra vires*. But, if it were, it does not follow that the bank can set up its want of legal capacity to compel Simons, Bro. & Co. to pay their accommodation note, made solely for the benefit of the bank itself. *Bank v. Case*, 99 U. S. 628; *Bank v. Graham*, 100 U. S. 699. The transaction, however, was not *ultra vires*. It was a loan to the bank of an accommodation note apparently for legitimate use at the clearing house in lieu of mercantile paper of small amounts, which was to be set apart and held by the bank for the protection of Simons, Bro. & Co. In *Morse, Banks*, § 160, it is said, (and the text seems to be well supported by the cited authorities:) "The cashier has inherent power to borrow money in the regular course of the business of the bank, and may secure the loan by note or pledge of the bank's property." In *Coats v. Donnell*, 94 N. Y. 168, 176, the court of appeals said: "The cashier of a bank is its executive officer, and it is well settled that as an incident of his office he has authority, implied from his official designation as cashier, to borrow money for and to bind the bank for its repayment; and the assumption of such authority by the cashier will conclude the bank as against third persons who have no notice of his want of authority in the particular transaction, and deal with him on the basis of its existence." But if the cashier as the executive officer possesses such authority, why not a president, who, "in the actual management of the business" of a bank, is also its "sole managing officer?"

The case of *Coats v. Donnell*, *supra*, had features very like those appearing here. The cashier of a bank orally agreed with a firm that if the latter would accept certain drafts negotiated by the bank, it would keep on deposit with the firm until their maturity a balance equal to the amount of the drafts, upon which the firm should have a lien; the firm to be kept informed of the condition of the bank, which the cashier stated to be embarrassed, but, with certain expected aid, able to continue business. The agreement was held to be valid, and within the power of the cashier to make, both under his general authority and by virtue of a by-law which gave him supervision of the bank, with the duty to attend to the making of loans, discounts, and other active business transactions of the bank.

In *Merchants' Bank v. State Bank*, 10 Wall. 604, 644, the supreme court said:

"Where a party deals with a corporation in good faith, the transaction is not *ultra vires*, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there

is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them. * * * Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and, as the case appears in the record, upon the plainest principles of justice the loss should fall upon the defendant. The ethics and law of the case alike require this result. Those who created the trust, appointed the trustee, and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party."

This language was used with reference to the cashier of a national bank. We think it has great pertinency here, where the receiver of the Spring Garden National Bank is attempting to compel Simons, Bro. & Co. to pay a promissory note, with no consideration behind it, made by them for the accommodation of the bank in its clearing house business, upon the solicitation of its president, who, (as the defendants proposed to show,) "in the actual management of the business" of the bank, was "the sole managing officer."

We have only to add that if the president of the bank wrongfully appropriated the note or its proceeds to his individual purposes, Simons, Bro. & Co. are not to be prejudiced by the fraud he perpetrated upon his principal. *Bank v. Armstrong*, 50 Fed. Rep. 798.

We are of the opinion that the evidence under all of the defendants' offers should have been received.

The judgment is reversed, and the record is remanded to the circuit court, with directions to set aside the verdict and grant a new trial.

BUTLER, District Judge, (dissenting.) The defendants' offer of testimony raises the only question presented. The court holds the offer admissible: First, because the plaintiff (below) did not prove consideration for the indorsement, and, second, because the facts stated in the offer constitute a defense, even with such proof. I am not prepared to assent to the first position, though I do not consider it very important. Production of the note was, of itself, sufficient proof of such consideration, in the first instance. The defendants could have put plaintiff to further proof by proper averments, and call for it by the usual notice before trial. I am not satisfied that such averments were made, and the customary notice was not given. In support of the court's views in this respect, *Stewart v. Lansing*, 104 U. S. 505, and *Lerch Hardware Co. v. First Nat. Bank of Columbia*, 109 Pa. St. 240, are cited. In the first it does not appear whether such notice was given or not. As authority for the general statement there found, *Smith v. Sac Co.*, 11 Wall. 139, is cited. In that case the issue (of plaintiff's bona fides) was distinctly raised by the pleadings. Where the common-law method of pleading is pursued the question is al-

ways raised by notice, (*Holme v. Karsper*, 5 Bin. 471;) and the practice of giving such notice is still observed where new methods have been adopted. Since the introduction of affidavits of defense in Pennsylvania, it has been held sufficient to prevent judgment by default to aver fraud in the inception of the note. Whether, however, this contemplates the customary notice to prove consideration is not entirely clear. An examination of the cases leaves the mind in some doubt. In practice the notice is usually given. Where, however, the alleged fraud is not connected with the inception of the note, but with the use made of it, the rule requiring proof of consideration by the indorsee, does not apply. The distinction seems shadowy, if not unreasonable, but it is well settled. *Sloan v. Banking Co.*, 67 Pa. St. 472; *Hutchinson v. Boggs*, 28 Pa. St. 296. Whether, in view of the affidavit, the fraud here involved, was connected with the inception of the note, or simply with the use subsequently made of it, is too nice a question to be considered without greater occasion for it than exists. The affidavit avers that the note was executed for the bank's use. If so, it might well be argued that the fraud consisted in applying it to another purpose. Nor am I satisfied that if the question was properly raised, so as to put the plaintiff to proof of the bank's bona fides, he has not furnished it. In his sworn statement he distinctly avers that the note was taken in due course and for valuable consideration; and this is not denied in the affidavit of defense. On the trial he showed that the note was discounted and the proceeds placed to Kennedy's credit. It is by no means clear that this was not sufficient proof under the circumstances. *Shoe Co. v. Eichenlaub*, 127 Pa. St. 169, 17 Atl. Rep. 889. It is unnecessary, however, to discuss either of these questions because as the case must go back for retrial they can be eliminated by the customary notice, or without it by proof that Kennedy drew against the credit. If nothing else was embraced in the decision I would not, therefore, feel called upon to express dissent. The second proposition stated above is, however, vital to the parties' rights, and so important generally, that it seems to be my duty to express a dissent, and to state my reasons therefor.

The proposition is that even though the bank received the note in good faith, paying value, the facts alleged in the offer constitute a defense. These facts are substantially that Kennedy, president of the bank and "its sole managing officer," obtained the note without consideration, for the bank's use in its clearing house transactions. That the act of Kennedy was a pure fraud is not doubted. He desired the note for his individual purposes alone, and so used it. Nevertheless if he had authority to represent the bank in the transaction it stands in his shoes, and cannot recover, notwithstanding it received the note in good faith, for value. That his office as president, did not confer such authority is, I think, reasonably clear. The duties and powers of national banks, of their presidents, directors and other officers, are derived from the statute, relating to this subject. The provisions principally applicable

are found in section 5136 of the Revised Statutes, and are as follows: "The bank may exercise by its board of directors, or duly-authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes, according to the provisions of this statute;" also "that the bank may elect or appoint directors, and by its board of directors appoint a president, vice president, cashier, and other officers, define their duties, * * * and dismiss them at pleasure;" may also "prescribe, by its board of directors, by-laws regulating the manner in which its stock shall be transferred, its directors and other officers elected or appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised or enjoyed."

The president and cashier are the executive officers of the bank, and as such may represent it in the routine business ordinarily transacted by these officers; but without any express or implied delegation of authority by the directors, they cannot represent it in, and bind it to, such transactions as that under consideration. If they can, what becomes of the office of directors, to whom, for the protection of stockholders and the public, the management of the bank is intrusted, and what function of the bank may they not discharge? I need not pursue this subject, however, for the defendants do not stand upon Kennedy's authority as president, but upon an alleged delegation of authority, as set out in the offer. An intelligent discussion of the subject requires a clear understanding of what is proposed as evidence of such delegation. The terms of the offer in this respect are that "in the actual management of the business of the Spring Garden National Bank, the president was the sole managing officer; that the cashier occupied the position more of clerk than of actual cashier." What is the proper signification of this language? I am not clear that it amounts to more than an offer to prove that Kennedy discharged the duties of cashier as well as those of president. If more was intended why were the words "that the cashier occupied the position more of clerk than cashier," inserted? Any other interpretation than that suggested requires the exclusion of this language as immaterial. Apparently it was introduced to qualify or illustrate the preceding terms "sole managing officer of the bank." That the defendants so understood the offer seems to be shown by their assignment of error, in this respect, which is as follows: "Because the learned judge overruled the offer of defendants to show that the president was the executive officer of the bank." In this view of the offer it clearly does not embrace what is necessary to prove the alleged delegation of authority to represent the bank in this transaction. But in any possible interpretation of the language it is no more than an offer to prove that he was the "sole managing officer of the bank" in the transaction of its ordinary and legitimate

business; that is, to prove that the directors expressly or impliedly conferred such authority upon him. There is no pretense of an express delegation; no by-law, order, or minute of the bank on the subject is suggested. The allegation is that the directors acquiesced in his exercise of the authority, and thus justified an implication that it had been delegated. There can be no doubt that the board of directors may delegate its authority; the statute so provides; nor is there any room for doubt that such delegation may be implied from its acts; as where it has acquiesced in the exercise of its authority by others. If, therefore, it were shown that the directors of the Spring Garden National Bank acquiesced in the president's "sole management of its business," it might be inferred that they had authorized him to so manage. But it nowhere appears that the borrowing of commercial paper, especially for the purpose avowed here, is any part of the usual, or unusual, business of national banks. The court certainly has no knowledge that it is; and I do not believe it is. In this view the implied authority alleged, would not embrace this transaction, even if the bank itself might lawfully have entered into it. In my judgment, however, the bank could not have lawfully entered into it; and in this view it is, of course, clear that no authority in Kennedy to do it, could be implied from his "sole management of the bank's business." The implied authority could not possibly extend, in any construction of the offer, beyond the lawful business of the bank. Thus we are brought to the question: Is the borrowing of commercial paper, for the purpose here avowed, embraced within the legitimate business of national banks? In my judgment, as before suggested, it is not. Not only is no warrant for it, express or implied, found in the statute, but on the contrary the scheme there provided for the protection of stockholders, creditors and the public, in my judgment, forbids it. Its direct purpose and effect is deception. The inflation of assets, and the creation of fictitious credit. The allegation in this instance that the paper was desired to supply the place of smaller and less desirable notes on hand, is unimportant. It was avowedly wanted because "it would look better for the bank to have a large note, of a responsible firm, like Simons, Bro. & Co.,"—in other words it would enable the bank to conceal its exact situation, and give it a credit which it did not deserve. If the purpose had been to create a better appearance before the bank examiner the impropriety would have been little greater.

There are many apparently harmless things which national banks may not do. They may not deal in lands, or stocks, or commercial paper, except in the manner and for the purposes authorized by the statutes, act as brokers, nor enter upon any other business or transactions foreign to the object of their creation. *First Nat. Bank v. National Exchange Bank*, 92 U. S. 122; *Bank v. Hoch*, 89 Pa. St. 324; *Weckler v. Bank*, 42 Md. 581; *Bank v. Johnson*, 104 U. S. 271; *Danforth v. Bank*, 48 Fed. Rep. 271, 1 C. C. A. 62. I do not propose to remark upon the authorities cited by counsel on either side, bearing on this question, except to the ex-
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tent they are relied upon by the court. *Merchants' Bank v. State Bank*, 10 Wall. 604; *Coats v. Donnell*, 94 N. Y. 168; *Bank v. Armstrong*, 50 Fed. Rep. 798; and *Morse, Banks*, § 160,—are cited by the court on this subject. In the first of these cases the defendant's cashier purchased gold coin of the plaintiff, paying for it with the check of Mellon, Ward & Co. What the case decides is embraced in the two following propositions, stated by the court:

"First. If the gold actually went into the bank, as was admitted by the cashier, the bank was liable as for money had and received, whatever might have been the defect in the cashier's authority, to make the purchase. Second. It should have been left to the jury to determine whether, from the evidence (if the gold did not go into the bank) as to the powers exercised by the cashier with knowledge and acquiescence of the directors, and of the usage of other banks in the same city, it might not fairly be inferred that the cashier had authority to bind the bank by the contract which he made for the coin."

These statements fully cover all the case decides. The judge delivering the opinion, however, uses certain general expressions, considered important, among which are the following:

"Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect of authority, the corporation is bound by the contract, although such defect or irregularity in fact exists."

It is no doubt my fault, or misfortune, that I cannot understand precisely what this language is intended to express. Of course it is to be read in connection with the facts of the case; but when the facts are considered it does not seem to have any very close relation to them. It surely was not intended to be understood as asserting that one who deals, in good faith, with the agent of a corporation, clearly outside the limits of the ordinary authority of such agents, can hold the corporation, (in the absence of fault on its part,) responsible for such unauthorized act. The acts of an agent bind his principal within the scope of his authority, express and implied; but no further, unless the principal is in fault, or has ratified the unauthorized act. The books contain numerous cases which illustrate this statement. No more striking example is found than that of *The Freeman*, 18 How. 187, in which it is held that the authority of a master to sign bills of lading does not render the vessel, or his employers, liable to a third person to whom such a bill, which he had signed without receiving the goods, had been transferred. His power extended only to signing for goods received; within this limit it was plenary. His position gave him credit, and made the perpetration of fraud easy. And yet his principals could not be held responsible for his unauthorized act, to one defrauded by it. If the law was otherwise, no sensible person would employ an agent. In passing from the case of *Merchants' Bank v. State Bank*, it may be remarked that no question of *ultra vires* was involved; the banks have express authority to buy coin; and also that while no more was involved than I have stated, the court was seriously divided over the result.

Coats v. Donnell, the second case above referred to, decides simply that a bank, after enjoying the benefit of a transaction, entered into by its cashier in its name—which in that case was, substantially, the borrowing of money from brokers, (through drafts which the latter accepted,) could not object to the brokers' retaining the bank's funds (in their hands) in payment of balances due, and liabilities assumed. There the by-laws expressly empowered the cashier to attend to all the active business of the bank, * * * exercising his own judgment as to all matters," etc. The court points to the fact that the cashier's object was to obtain money to carry on the bank's business, and that it got the fruits of the transaction. What is said about the cashier's authority by virtue of his office, is aside of the case, and unimportant.

Bank v. Armstrong, the last of these cases, is almost identical with Coates v. Donnell; in principle it is quite so. The vice president of the bank, who had charge of its general business, used its securities to borrow money in the name, and ostensibly for the use, of the bank. The money was placed to the credit of the bank, and directly after applied to the vice president's use. Having lawful possession of the securities he could undoubtedly negotiate them; and the bank would be defenseless against his innocent indorsee. His fraud affected the bank alone, who intrusted him with its securities and business. There does not appear to have been any contest whatever over this question. The court dismissed it in a dozen lines, without citing any authority. The controversy was about another matter. Here again the general expressions of the court were unnecessary, and must be confined to the facts before it.

The citation from Morse, Banks, § 160, is principally, if not entirely, founded on general observations contained in the cases just noted, and signifies nothing more than they decide. An examination of all the cases I have found in which the exercise by the president or cashier of other than the ordinary authority of executive officers has been sustained, shows that it was because of power delegated by the directors, either expressly or impliedly; and, also, because, almost uniformly, the bank received the fruits of the transaction.

Now I trust I may not be misunderstood. Of course the question of ultra vires would be wholly unimportant if the bank itself had directly entered into the transaction, or had authorized Kennedy to do so. It could not, in such case, take advantage of its own wrong, and enforce the note. As before stated there is no pretense that the bank itself directly entered into it. The allegation is that Kennedy did so as its agent—not expressly but impliedly authorized. What I mean to assert, therefore, is that no agency to perform this act can be implied from the evidence proposed by the defendants' offer, even in its broadest possible construction,—evidence that Kennedy "was the sole managing officer of the bank." If upon a retrial the evidence shall go so

materially beyond the offer as to show that Kennedy had previously entered upon such transactions, or that he had entered upon this particular transaction with the bank's knowledge, or under circumstances from which such knowledge can properly be inferred, then in my judgment a valid defense will be established; but not otherwise—unless, of course it shall then appear that the bank did not receive the note in good faith, for value. I have assumed that the defendants were faultless in executing the note. Whether the purpose avowed by Kennedy should not have warned them against executing it, has not been considered.

MUSER et al. v. KERN et al.

(Circuit Court, E. D. Louisiana. May 26, 1893.)

No. 12,142.

ATTACHMENT—PRIORITY OF LIENS—CLAIM OF PROVISIONAL SYNDIC.

Where, after the levy of an attachment in a federal court, defendants are adjudicated insolvents, and a provisional syndic is appointed, but the attachment suit goes to trial on the answer of defendants, without any intervention by the syndic until after judgment is rendered sustaining the attachment, and for the debt on which it was founded, the right of the attaching creditors to the fund realized from the sale cannot be defeated by the syndic, although the same would have been paid to him if he had intervened at the proper time.

At Law. Action commenced by attachment by Muser Bros. against H. Kern & Son. There was a judgment sustaining the attachment, and awarding plaintiffs the amount of their claim. The case is now heard on the claim of the provisional syndic of the defendants that the money realized from the attachment sale should be paid to him.

R. G. Dugue, for plaintiffs.

Bayne, Denegre & Denegre, for E. S. Jaffray & Co. and Siegfried & Brandenstein.

Girault Farrar, for provisional syndic of H. Kern & Son.

BILLINGS, District Judge. This cause is submitted for the court to determine to whom a fund shall be paid. E. S. Jaffray & Co. and Siegfried & Brandenstein, who had seized under the judgments and writs of fieri facias, and Muser Bros., who had attached, and the syndic, T. C. Sachse, provisional of the defendants, are the contesting parties. The right of the creditors who made a seizure under the writs of fieri facias having already been adjudged by previous decree to outrank the syndic and Muser Bros., and the fund to the extent of \$5,350.34 having been awarded to them, the issue now remains to be decided between Muser Bros. and the said syndic as to which has the right to the balance of said fund.

The court finds the following facts in this case, a jury having been waived: This suit was commenced on November 10, 1892, writ of attachment issued, and a levy was made under it on

the same day. On December 8, 1892, the defendants H. Kern & Son, upon their own petition, were adjudicated insolvents, and on December 9, 1892, at the instance of certain creditors, the syndic, T. C. Sachse, was appointed provisional syndic; the appointment of Victor Mauberret, made the preceding day, having been revoked. An answer was filed by the defendants, being a general denial, on December 1, 1892. On December 17th the case, having been regularly fixed for trial, was tried by jury, and a verdict rendered whereby the plaintiff had a judgment for \$2,734.81. The verdict maintained the lien and privilege of the attachment. On December 20, 1892, Victor Mauberret, claiming to be a provisional syndic, filed a petition averring the adjudication of the defendants as insolvents, and the acceptance of their surrender by the proper court, and prayed for a dissolution of the attachment. On the same day a rule was taken for a new trial by the defendants and by Shwartz & Sons, garnishees, who set up for the first time the insolvency proceedings. These applications, the rule, and the petition were refused, it appearing that Mauberret had been superseded by Sachse, and Sachse did not appear. The motion for a new trial on the part of the defendants and interveners was refused on the ground that they were present with their counsel when their case was tried, and gave no reason whatever for not appearing in the cause in due time. The syndic who claims the balance was appointed on December 9th, and made his appearance in this court for the first time after the close of the term at which the judgment was rendered, in response to the rule of the interveners, which was taken, upon a consensus, for the court to direct the disposition of this fund.

It appears, therefore, that the question is whether the plaintiffs, Muser Bros., or the syndic, is the party entitled to the balance of this fund. There can be no doubt that upon the acceptance by the proper tribunal of the surrender of Kern & Son and the appointment of a syndic, and the appearance of the syndic in this court and his making the proper plea, the attachment would have been dissolved; but there was no such appearance, no such plea was filed; in fact, the present syndic did not appear here until the 13th of May, 1893, and not until after a judgment had been rendered in favor of the plaintiffs, maintaining their attachment. That judgment was signed on March 20, 1893, and was for the sum of \$2,734.81, with legal interest, and contained the following clause with reference to the attachment:

"It is further ordered, adjudged, and decreed that the writ of attachment here be, and the same is hereby, maintained; that the amount of the judgment herein rendered be paid out of the property attached, or its proceeds, with privilege and with preference over all other presents."

The question of law arising upon these facts thus found is whether that judgment cuts the syndic off from asserting a right which he otherwise would have had. It is to be observed that the court that rendered this judgment had jurisdiction of a cause and of the parties, and the money subsequently paid into the registry of the

court had been reached by its process of attachment and garnishment. Under these circumstances, a judgment was rendered without any plea having been filed, either by the defendants or the interveners or the syndic, suggesting the insolvency.

It seems to me that the authorities upon this question show that this judgment is conclusive. The leading case is that of *Eyster v. Gaff*, 91 U. S. 521. In that case a suit to foreclose a mortgage had been commenced in a state court of competent jurisdiction, and while the suit was pending, and before final decree, the defendant and mortgagor was adjudged a bankrupt, and his assignee was appointed. The assignee made no appearance in the cause previous to the judgment, the cause proceeded to a judgment, and there was a sale of the property under a decree of foreclosure. The question was as to the validity of that sale. The court say:

"If there was any reason for interposing, the assignee could have had himself substituted for the bankrupt, or made a defendant on petition. If he chose to let the suit proceed without such defense, he stands as any other person would on whom the title had fallen since the suit was commenced. * * * The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law governing such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit."

In *Miller v. Marigny*, 10 La. Ann. 338, the court held:

"Where the creditor of an insolvent who has been placed upon the bilan, and duly notified thereof, afterwards sues the insolvent for the same debt, and obtains a judgment by default, which he regularly confirms, it is inadmissible to say that such judgment is absolutely null and void. The insolvent, when cited, should have pleaded his *cessio bonorum*, and, if his creditor could show no legal cause to take the case out of the usual category, the plea would have prevailed."

If a third person who had not derived his title from the defendants, after the institution of the suit, and after the levy of the attachment, had asserted here and now title to the property covered by the attachment or the writ of *fieri facias*, averring a title in himself, he could have been heard, and, if he had established his title, he would have received this fund; but the syndic occupies the position of a person who derived his title after the property was in the hands of the court in a pending suit against a defendant from whom he derived his title, and as the court say in *Eyster v. Gaff*, *supra*, if he chose to let the suit proceed without such defense, he stands as any other person would on whom the title had fallen since the suit was commenced. It is a principle of law too well settled to require reference to authorities that, after the institution of a suit against the defendant which touches property, asserting a right to it, the person who takes title from the defendant is concluded by an adverse judgment, equally with the defendant himself. The assignee of an insolvent or syndic, as he is termed, like

the assignee in bankruptcy, occupies no different position in this respect from any other third person.

The syndic asks that the property be taken away from the attaching creditor, and delivered over to him to be distributed pro rata among all the creditors, on the ground that the statute of congress required a dissolution of the attachment. The answer to this is that a judgment maintaining the attachment stands now between the syndic and this property. The very force of the judgment in a case where there has been an attachment under our law gives the plaintiff the right of having his judgment satisfied out of the proceeds of the property in preference to other creditors, who were to be paid in the order of the date of their attachments. 1 Hen. Dig. verbo "Attachment," § 11, par. 8, p. 148. My opinion, therefore, is that the plaintiffs, Muser Bros., have a prior right to the fund in the registry of the court by virtue of their judgment maintaining their attachment. The judgment must be accordingly.

WHITTLE et al. v. ARTIS et al.

SAME v. BOOKWALTER.

(Circuit Court, S. D. Ohio. May 12, 1893.)

1. EJECTMENT—ACTION BY TENANTS IN COMMON—NECESSARY PARTIES.

One or more tenants in common may sue in ejectment to recover their undivided interest without joining all their cotenants.

2. SAME—OBJECTION TO JURISDICTION—DISMISSAL AS TO CERTAIN PLAINTIFFS—RIGHT TO PROCEED.

An action of ejectment, in which partition at law was also sought, was begun in the circuit court for the southern district of Ohio,—some of the plaintiffs being citizens and residents of Virginia; others, of Maryland; and two, of the District of Columbia. All the defendants were citizens and residents of the southern district of Ohio. On defendants' objection the joinder of citizens and residents of the District of Columbia as parties plaintiff was held to be fatal to the jurisdiction of the court. On plaintiffs' motion the action was dismissed without prejudice as to the residents of the District of Columbia, as was also so much of the action as sought partition, leaving the action pending as an action in ejectment by the remaining plaintiffs. *Held*, that the remaining plaintiffs were entitled to proceed with the action, and that it need not be dismissed by reason of the objection to the jurisdiction.

3. SPECIAL APPEARANCE—EFFECT—JURISDICTION.

The court being without jurisdiction of the action, as originally brought, the service of summons was ineffectual, and, defendants having appeared specially for the purpose of objecting to the jurisdiction, the remaining plaintiffs could proceed in the case only by obtaining new summons and service.

At Law. These were actions of ejectment. The first-entitled case arose in the eastern division, and the second in the western division, of this district. They are now heard together on motions to dismiss. Denied on terms.

Matthews & Cleveland, for plaintiffs.

R. A. Harrison and W. H. West, for defendants.

SAGE, District Judge. These cases involve the same questions. They are in ejectment against cotenants for an undivided interest in lands. Some of the plaintiffs are citizens and residents of Virginia, and others, of Maryland. In each petition, as it originally stood, partition at law was also sought, and Jane Barr and her husband, David Barr, citizens and residents of the District of Columbia, were joined as plaintiffs; all the defendants being citizens and residents of the southern district of Ohio. Upon the defendants' objection, under a special appearance for that purpose only, this joinder was held to be fatal to the jurisdiction of this court. Thereupon, on motion of the plaintiffs, the action was dismissed without prejudice as to Jane Barr and David Barr, as was also so much of the action as related to partition of the real estate described in the petition. These dismissals left the actions pending as actions in ejectment by the remaining plaintiffs. Now the objection is made that the case cannot proceed on their behalf only, and it presents the questions whether, by reason of the objection to the jurisdiction, the actions must be dismissed, and whether all the tenants in common are necessary parties to the action. They were necessary parties to the action for partition. But that action, although joined with the action in ejectment, was separable and independent, and might be, as it was, dismissed without prejudice, and without affecting the jurisdiction of the action in ejectment. If Mrs. Barr and her husband, as plaintiffs in the action in ejectment, could be dismissed therefrom, and the action still be maintained, the action could proceed; otherwise, it must be dismissed. Jane Barr and her husband are not necessary parties to the action in ejectment. At common law, tenants in common cannot join, but must sever, in separate demises, in a declaration in ejectment. Chit. Pl. § 71. A tenant in common recovers only his aliquot part or share. *Mobley v. Bruner*, 59 Pa. St. 481; *Minke v. McNamee*, 30 Md. 294; *Jones v. Walker*, 47 Ala. 175. Two or more tenants in common may sue in ejectment, or any one may sue alone for his share. *Tilden v. Tilden*, 13 Gray, 108; *Bush v. Bradley*, 4 Day, 303; *Penrod v. Danner*, 19 Ohio, 218; *Shepard v. Ryers*, 15 Johns. 501. I see no necessity for a dismissal, but service of summons in an action over which the court at the time has no jurisdiction brings nobody into court. The appearance was special, for the purpose only of objecting to the jurisdiction, and there must be new summons and service, (excepting in No. 570, where there was a general appearance,) and the plaintiffs must pay the costs already incurred.

Upon these terms the motion to dismiss will be overruled.

CLOUGH v. UNITED STATES.

(Circuit Court, W. D. Tennessee. April 13, 1893.)

No. 3,127.

1. UNITED STATES COMMISSIONERS—FEES—ACKNOWLEDGMENT OF BAIL BONDS.

A commissioner of the United States courts can charge only one acknowledgment fee for the principal and sureties in a bail bond, and not a separate fee for each. *U. S. v. Ewing*, 11 Sup. Ct. Rep. 743, 140 U. S. 142, followed.

2. SAME—AFFIXING SEALS.

A commissioner, in Tennessee, cannot charge a fee for affixing seals to writs. *U. S. v. Clough*, 55 Fed. Rep. 373, followed.

3. SAME—DRAWING COMPLAINTS.

A United States commissioner is entitled to fees for drawing complaints in criminal cases at the rate of 20 cents per folio. *U. S. v. Ewing*, 11 Sup. Ct. Rep. 743, 140 U. S. 142, followed.

4. SAME—COPIES OF PROCESS—DRAFTING AFFIDAVITS—CERTIFYING OATHS.

A commissioner is also entitled to fees for copies of process returned to court in cases where preliminary examinations in criminal cases have been had; for drafting affidavits of sureties in bail bonds; for certifying to oaths officially taken before him; for entering the returns of, and filing, process, and for issuing mittimus writs. *U. S. v. Barber*, 11 Sup. Ct. Rep. 751, 140 U. S. 177; *U. S. v. Ewing*, 11 Sup. Ct. Rep. 743, 140 U. S. 142, followed.

5. SAME—CERTIFICATES TO WITNESSES.

He is likewise entitled to fees for certificates furnished to witnesses, of the amount due them for attendance before him, as commissioner. *U. S. v. Barber*, 11 Sup. Ct. Rep. 749, 140 U. S. 164, followed.

6. SAME—SETTING OUT NAME OF DEFENDANT.

If the department refuse payment of the account of a clerk of a federal court for services rendered the government in cases of arrest, on the ground that the names of the defendants were not given, and a duplicate of the account filed in the clerk's office shows who the defendants were, and the records of the court show that they were subsequently indicted and tried, the court will direct payment of the fees.

7. SAME—FILING PAPERS—ENTERING ORDERS—RECORDING BONDS.

The clerk of the federal courts is entitled to charge for filing papers sent in by commissioners; for entering orders approving officers' accounts; for recording official bonds on minutes; for making final records; and for certifying to marshal's fees of jurors and witnesses.

8. SAME—FILING REGISTRY REPORT.

He is entitled to a fee of 10 cents for filing a registry report, under Rev. St. § 828, allowing that fee for filing "every declaration * * * or other paper."

9. SAME—COPIES OF MITTIMUS—COPIES OF SCI. FA.

He is also entitled to charge fees for copies of mittimus writs issued under Rev. St. § 1028, and for copies of writs of sci. fa. issued under Rev. St. § 716; they having been issued by order of court, and not as matter of course, in the routine of office.

10. SAME—SEVERAL DEFENDANTS—SEPARATE WRITS.

Where several defendants are jointly indicted for conspiracy, the department erred in refusing payment of the charges of the clerk for capias writs for their arrest on the ground that a separate writ was issued against each defendant under the practice of the court.

11. SAME—SWEARING JURORS.

The swearing on the first day of the term of persons summoned as grand and petit jurors, to make true answer touching their qualifications as

- jurors, is not within Rev. St. § 828, disallowing compensation to a clerk for administering oaths to jurors; and he is entitled to a fee of 10 cents for each person thus sworn.
12. SAME—FILING TICKETS—MAKING DOCKETS.
The clerk is entitled to fees for filing tickets of the district attorney discharging witnesses, and for making dockets and indexes of sci. fa. cases in the district courts. *Taylor v. U. S.*, 45 Fed. Rep. 531, followed.
 13. SAME—OFFICIAL REPORTS TO DEPARTMENT.
The law having made it the duty of the clerk to make official reports to the department of all litigation against the United States, or to which it is a party, he is entitled to charge therefor, under Rev. St. U. S. § 828, allowing him 15 cents per folio "for * * * making any record * * * or report."
 14. SAME—NATURE OF SUIT.
If the department refuses to allow an account of the clerk on the ground that it does not sufficiently describe the nature of the suits in which the service was rendered, the court will direct payment of the account, if its records show that the services were actually rendered.
 15. SAME—ORDERS APPOINTING ELECTION SUPERVISORS.
The clerk is entitled to charge fees for entering orders appointing supervisors of elections at the rate of 15 cents per folio, and also for drafting their commissions.
 16. SAME—PREPARING OATHS OF SUPERVISORS.
He is also entitled to fees for preparing the official oaths of such supervisors. *U. S. v. McDermott*, 11 Sup. Ct. Rep. 746, 140 U. S. 151, followed.
 17. SAME—AFFIXING COURT SEAL.
And he is also entitled to \$1 for issuing each commission, but not to 20 cents for affixing the court seal thereto.
 18. SAME—CERTIFIED TRANSCRIPTS IN CRIMINAL CASE.
The clerk is entitled to charge a fee of 10 cents per folio for certified transcripts in criminal cases, made at the request of the district attorney, to be used outside the state, by the United States, as evidence to prevent the discharge on writs of habeas corpus of defendants undergoing sentences imposed by the federal court.
 19. SAME—ATTENDANCE ON TWO COURTS.
Rev. St. § 828, allows to one who is clerk of both the circuit and district courts a per diem of five dollars, and no more, though both courts are in session at the same time. *Held*, that the clerk might elect as to which court he should charge such per diem, and, having so elected, the department could not disallow the charge as against that court, and charge it against the other.

At Law. Action by John B. Clough against the United States to recover fees for services rendered as clerk of the circuit and district courts, and as commissioner of the circuit court. Judgment for plaintiff.

John B. Clough, pro se.

S. W. Hawkins, Dist. Atty., for the United States.

HAMMOND, J. This suit was instituted by the filing of the plaintiff's verified petition in the circuit court on April 18, 1891, and the jurisdictional requirements of the statute authorizing such suits against the United States have been fully complied with. The petitioner herein claims fees from the United States for services performed as clerk of the circuit and district courts of the United

States for this district, and as commissioner of the circuit courts; and he has so scheduled the items claimed that the respective amounts sought to be recovered as clerk of either court, and as commissioner, are conveniently displayed and itemized, and are all for services rendered previously to January 1, 1891. Accounts have been duly rendered to the government, and properly approved by the courts here,—either circuit or district,—embracing all the items set forth in the petition, and have been audited at Washington, and the items sued for disallowed.

The defendant, “for plea or answer to the plaintiff’s petition herein this day filed, says that the defendant admits the performance of the services by plaintiff, the alleged fees for which he seeks to recover a judgment against the defendant by this suit, and, for a defense to this action, further says that plaintiff ought not, in law, to recover therefor, because defendant says that there is no statute of the United States, or other law, under which plaintiff should or can obtain judgment for said services or for such fees,” and issue has been properly joined thereon.

Among the items claimed here for services rendered by petitioner as a commissioner of the circuit courts are fees for making dockets and indexes, \$367, and an amount erroneously disallowed him, of \$197, on his accounts for the six months ending March 31, 1890; and he produces the treasury statement sent him from the office of the first comptroller of the treasury, where the error is apparent, the total disallowance therein being \$197 in excess of all the items disallowed at the department,—the error being one of addition, apparently. But in the certified transcript from the books of the treasury sent to the district attorney as evidence in this case is an item of disallowance of just this sum, for making “dockets and indexes,” etc.; and the commissioner’s accounts show he charged a like amount for such fees during that period. The error, therefore, was in omitting from the statement sent petitioner the item of \$197 for docket fees. The two items, amounting to \$564, must therefore be disallowed here. *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. Rep. 743; *U. S. v. McDermott*, 140 U. S. 151, 11 Sup. Ct. Rep. 746; *Clough v. U. S.*, 47 Fed. Rep. 791.

He also claims fees for taking acknowledgments of principal and sureties to bail bonds, the charge being made at 25 cents for the acknowledgment of each person thereto. It was ruled in the three cases just cited that only one acknowledgment fee is chargeable for the principal and sureties on each bond. A mere inspection of Schedule C to the petition here shows that under such ruling the petitioner should be allowed the sum of \$31.25; and the \$184.25, balance of the item, must be disallowed.

The sum of \$113.80, being fees for affixing seals to writs, at 20 cents each, must be now disallowed, under the recent decision in *U. S. v. Clough*, (Cir. Ct. App; filed at Cincinnati, Ohio, February 6, 1893,) 55 Fed. Rep. 373; *Id.*, 47 Fed. Rep. 791, 795, 796.

The amount claimed for drawing complaints (only disallowed in two out of the six accounts here embracing them) must, of course,

be allowed. *U. S. v. Ewing*, supra; *U. S. v. McDermott*, supra; *U. S. v. Barber*, 140 U. S. 177, 11 Sup. Ct. Rep. 751; *Clough v. U. S.*, supra. Petitioner originally charged these fees at 15 cents a folio, while the supreme court, in the cases just cited, has since ruled that the statute authorized the charge at 20 cents per folio. He is therefore entitled to a decree for the sum of \$57.60 in this behalf.

The fees claimed for "copies of process," etc., returned to the court under section 1014, Rev. St., in cases where preliminary examinations were had, (\$13.80,) as well as those for drafting affidavits of sureties in bail bonds, (\$10.10,) and for certifying to oaths officially taken before him, (31.65,) have been adjudged in favor of commissioners by the supreme court in *U. S. v. Barber*, supra; and in *U. S. v. Ewing*, supra, that court held that fees for entering the returns of and filing process, and for the issuance of mittimus writs, were also properly chargeable against the United States by commissioners. These items, amounting, respectively, to \$22.20 and \$1.80, are therefore allowed here.

The small item of \$2.55 for issuing certificates to witnesses for payment by the marshal of their fees for attendance before him as commissioner, charged at 15 cents each, is allowed. In all the accounts of the commissioner involved in this case, and extending over a period of two years, such fees have only been questioned to this trifling extent; and fees for like services, charged in a different mode, were allowed in *U. S. v. Barber*, 140 U. S. 164, 167, 11 Sup. Ct. Rep. 749.

Payment of the remaining item, of \$11.05, was refused at the department because the "name of the defendant" was not given in the account. The retained duplicate filed in the clerk's office shows who the defendant in the case was, and the records of this court show that he was subsequently indicted and tried for the offense for which he was held to bail. The item is adjudged in petitioner's favor. It follows from the foregoing that petitioner is entitled to a decree in his favor, for services rendered by him as commissioner, in the sum of \$242.

The amounts claimed by plaintiff as clerk of our circuit and district courts appear in Schedules A and B, respectively, to his petition, and may be so grouped as to present comparatively few subjects for consideration by the court, although they are composed of numerous items, and cover a period of between four and five years. The legality of none of the fees claimed in this suit had been directly passed upon by the supreme court when the same was instituted, but most of them were considered by that court in the fee cases decided in the summer of 1891, since which time the differences between clerks' charges and rulings of the treasury officials in these matters have naturally very largely disappeared.

Petitioner has withdrawn the items of the petition herein for fees for entering on the court minutes certain orders in criminal and other cases, and hence they need not be considered; and under the decision in *U. S. v. Clough*, supra, all fees for affixing seals of

court to process and commissions issued out of the clerk's offices are disallowed the plaintiff, the total of these items being the sum of \$1,422.25. This only leaves for consideration the following:

Clerk's Fees.		Circuit.	District.	Amounts.
1. For filing papers sent in by commissioners.....	\$ 9 00	\$ 34 10	\$ 43 10	
2. For filing registry reports, (R. S. § 793).....	90	1 60	2 50	
3. For copies mittimus writs issued, (R. S. § 1028)	24 55	22 45	47 00	
4. For copies scire facias writs issued, (R. S. § 716)...	49 05	100 45	149 50	
5. For entering orders approving officers' accounts	5 10	5 35	10 45	
6. For recording official bonds on minutes.....	29 20	12 20	41 40	
7. For issuing court writs, capias, and mittimus...	8 75	4 80	13 55	
8. For making final or complete records	826 80	693 50	1,520 30	
9. For swearing jurors on voir dire.....	44 10	43 40	87 50	
10. For filing tickets of district attorney, discharging witnesses.....	102 20	171 00	273 30	
11. For dockets and indexes, sci. fa. cases in the district courts.....			14 00	
12. For making official reports to department	"	"	8 45	
13. For per diem fees for attendance, circuit courts.....	"	"	10 00	
14. For all fees in two cases in the	"	"	8 90	
15. For entering orders appointing election supervisors, circuit.....	"	"	32 45	
16. For drafting official oaths of	"	"	82 60	
17. For issuing commissions to	"	"	319 70	
18. For copies criminal records sent to penitentiary,	"	"	42 00	
19. For certifying to marshal fees of jurors and witnesses,	"	"	69 60	
20. For errors in addition in comptroller's statement,	"	"	9 50	
21. For transfer of fees by comptroller to district from	"	"	134 40	

It is frankly conceded by the district attorney that the right to the fees embraced in items 1, 5, 6, 8, and 19 of this schedule has been directly ruled in petitioner's favor by the supreme court in *U. S. v. Van Duzee*, 140 U. S. 169, 11 Sup. Ct. Rep. 758, the opinion of the court being delivered by the supreme justice of this circuit. These amounts are therefore allowed, there being no question whatever as to the performance of the services charged for.

The small item of \$2.50 for filing registry reports is also allowed. The statute provides that "at each regular session of any court of the United States the clerk shall present to the court an account of all moneys remaining therein, or subject to its order, stating, in detail, in what causes they are deposited, and in what causes payments have been made; and such accounts, and the vouchers thereof, shall be filed in the court." Rev. St. § 798. The clerk is required to file them, the plea admits he has filed them, the records of the court show they are on file, and the statute prescribes a fee of 10 cents for filing "every declaration, plea, or other paper." Rev. St. § 828.

The copies of mittimus writs, the fees for which are here sued for, (Schedule 3, *supra*.) were made by the clerk under this provision of the statute:

"Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff or jailer, as his authority to hold the prisoner; and the original writ or warrant or mittimus shall be returned to the proper court or officer, with the officer's return thereon." Rev. St. § 1028.

In *Taylor v. U. S.*, 45 Fed. Rep. 531, 535, the question presented for decision was whether such copies should be authenticated by the certificate of the clerk and seal of the court thereto, and it was ruled that "a copy not authenticated by such certificate and seal

would not, in law, be a compliance with the statute quoted;" but there was no contention that it was not the duty of the clerk to issue the copies, and the record there showed that the fees for such copies, under the rulings of the present treasury accounting officers, were no longer questioned; and such is the case here. There is no reason why petitioner should not recover for these fees, as well as for like fees for copies of scire facias writs, (Schedule 4, *supra*), issued with such writs, by the clerk for service by the marshal on the defendants therein. *Jones v. U. S.*, 39 Fed. Rep. 410, 413. These fees are no longer questioned at the treasury department, and the district attorney does not question them here, for the copies were made and issued with the original writs, according to the uniform practice of the court for more than 20 years, and under the express orders of the court, made in the cases, at the instance of the law officer of the government. And in *U. S. v. Van Duzee*, *supra*, Mr. Justice Brown, for the supreme court, uses this language:

"When the clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services."

The small item marked 7 in said schedule is composed of fees for issuing *capias* writs in the circuit court, and a *mittimus* and removal writ in the district court. All these writs were ordered by the court. The fee for the *mittimus* was disallowed by the late comptroller because one had issued the previous term; but, the prisoner having escaped after sentence, this second writ properly issued. The correctness of the writ for the removal of a prisoner from one division of the district to another is satisfactorily established in *Taylor v. U. S.*, 45 Fed. Rep. 531, 538, 539, where the exact point was raised and decided in this state in 1891. The fees for these *capias* writs were disallowed because a single writ issued against each of several defendants in a case for conspiracy to defraud the United States. For the convenience of the marshal and his deputies in executing writs for the arrest of defendants charged by indictment with crime, this course was proper, and is usual. Ordinarily the district attorney moves the court for separate writs in such cases, as an extended examination of the records of the court here shows; and the motion is always granted, and separate writs always issue. It is doubtful if a case can be found in the courts here, or at Jackson, where a single writ has ever issued for the arrest of more than one defendant. Let this amount be allowed petitioner.

The fees grouped in Schedule 9 are for swearing jurors, on their *voir dire*, at 10 cents each. The statute prescribes a fee to clerks, "for administering an oath or affirmation, except to a juror, ten cents." Rev. St. § 828. The petitioner's contention here is that this exception in the statute pertains only to oaths administered to grand jurors, when selected as a grand jury, to "diligently inquire, and true presentment make, of all offenses given them in charge," etc., and to petit jurors, when impaneled in a case as a petit jury,

"well and truly to try the issue therein joined between the parties," or "well and truly to assess the plaintiff's damages," etc., when there is a writ of inquiry on a judgment by default in favor of a plaintiff; and that the exception in the statute does not apply to oaths preliminarily administered to men summoned to serve on juries, concerning their statutory qualifications to become jurors at all, any more than to oaths administered to them after their discharge as jurors, in verification of their claim to compensation for attendance and travel. The fees for these latter oaths have never been called in question at the treasury. In this district all claims for payment of their fees to jurors and witnesses by the United States are thus verified by oaths taken before the clerk; and, in speaking of the practice concerning such claims of witnesses, Judge Jackson, in *Taylor v. U. S.*, 45 Fed. Rep. 531, 536, says:

"Affidavits of these government witnesses are taken severally by the clerk, as to the number of days they have attended court, and the number of miles traveled. These services are usual, and highly proper, and the fees therefor are according to the statute. The claim of the witness to his fees is thus based upon his oath as to the facts, and the evidence of the clerk's care in the premises is preserved as a part of the records of the court."

In *Brewer v. Jacobs*, 22 Fed. Rep. 217, 231-244, this court, in 1884, had occasion, on motion for new trial, partly on the ground that an unqualified juror had sat in the case, to carefully and very fully examine "the whole practice of the court in the matter of impaneling its juries," and found "that, substantially, it now conforms to the requirements of the law, and is supported by the authorities." This practice is as follows: On the first day of each term the marshal returns to the court or clerk's office the writ of *venire facias* returnable to that day, and usually the first business after the appointment of a crier and the bailiffs is the impaneling of the grand jury. The persons shown by the writ to have been summoned are called by the marshal, appear at the bar of the court, are severally sworn by the clerk, under its direction, "well and truly to answer the questions propounded to them touching their residence, citizenship, age, property qualification, previous service in the court as jurors," etc., and those of them found to possess the statutory qualifications are impaneled, and those not qualified are then excused, without ever becoming jurors at all, or serving in such capacity. The record entry, to copy at random from the court minutes, is as follows:

"Upon the regular call, now had in open court, of the panel to the writ of *venire facias* duly issued and returnable before this court to-day, the following named persons, returned as served by the marshal thereunder, answered, were sworn in open court by the clerk, and examined before the court touching their qualifications as jurors, and were duly impaneled as grand jurors," etc.

And a similar entry is made, and a like practice prevails, in ascertaining those possessing the requisite qualifications to become petit jurors. Subsequently, as cases are called for trial, the petit juries are impaneled from those so previously examined, when they are sworn on their *voir dire*, strictly, if need be, and when "elected"

are sworn in the case. But the fees claimed here are only for these preliminary oaths on the first day of the term, and, in strictness, they are not administered to persons examined as jurors upon voir dire at all, though they are so scheduled in the petition here. *Id.*, 244. "So, strictly speaking, and at common law, a jury is impaneled only when they have been elected, and are ready to be sworn, though the modern use of the term often indicates the jury as sworn in a particular case. *Thomp. & M. Jur.* § 257; 2 *Bac. Abr.* 742, tit. 'Juries,' B 8; *Co. Litt.* 158b; 1 *Abb. Law. Dict.* 200, 'Challenge;' 2 *Bouv. Law Dict.* 271, 'Panel;' *State v. Potter*, 18 *Conn.* 169, 175." *Id.* 242. And speaking of our practice here, and of these preliminary examinations at the opening of the term, it was said in the case last cited:

"It is in no sense whatever an examination of the juror on his voir dire. It is, in law, no trial of a juror for the purposes for which originally triers were appointed, nor would the circumstances give the party in court the right to challenge a juror at that time, nor has a challenge ever, in this court, been made on such a call." *Id.* 243.

The ruling of the court under this practice is therefore in favor of petitioner's contention, and the amount claimed is allowed him. Such was the ruling of late First Comptroller Durham, who in December, 1887, caused to be prepared a printed form for clerks' fee bills, containing this charge, among others, "Swearing ——— jurors on voir dire, at 10 cents, \$———," where the words "voir dire" were evidently used by him in the popular sense in which the petitioner has used it here and in his accounts.

The items 10 and 11 of the above schedule were passed upon in *Taylor v. U. S.*, 45 *Fed. Rep.* 531, 535, 536, 539, before quoted, where Judge Jackson, lately one of the circuit judges of this circuit, and now one of the justices of the supreme court of the United States, considered the right of clerks to such fees. What was said in that case about the practice of the federal courts at Knoxville is equally true of our practice here; and the rulings made by that learned judge, and his conclusions, will be followed here, as there can be no question of their correctness. To the same effect is *Van Duzee v. U. S.*, 48 *Fed. Rep.* 643, 645, 646, affirmed on appeal in 52 *Fed. Rep.* 930, 3 *C. C. A.* 361. These amounts are therefore allowed.

There was disallowed petitioner in one of his 20 accounts as clerk, involved here, (Schedule 12, above,) the small sum of \$8.45 for making reports. The fee was charged at 15 cents per folio, under the statute giving clerks, "for * * * making any record, certificate, return, or report, for each folio, fifteen cents." *Rev. St.* § 828. It was his duty, under the statute, to make the reports, the provision being as follows:

"Every clerk of a circuit or district court shall, within thirty days after the adjournment of each term thereof, forward to the solicitor of the treasury a list of all judgments and decrees to which the United States are parties, which have been entered in said court, respectively, during such term, showing the amount adjudged or decreed in each case for or against the United States, and the term to which execution thereon will be returnable." *Rev. St.* § 797.

-Which was amended by section 2 of the act of congress of March 1, 1879, (20 Stat. 327,) by requiring of him, quarterly, to "report to the commissioner of internal revenue" detailed accounts of moneys paid into court, showing "the name and nature of each case; the date of payment into court; the amount paid on account of debt, tax, or penalty; and also the amount on account of costs," and his disposition of the same. And, by the printed treasury regulations, "where a suit is commenced in behalf of the United States in any district or circuit court, the clerk of such court will promptly report the fact, the time of the commencement, the character of the action, and the parties thereto;" and, by another such regulation, similar reports are required "respecting post-office cases." The law has thus imposed the duty upon the clerk to make these reports, and fixed the compensation therefor; and, having made them, petitioner is entitled to the statutory fees.

Per diem fees for attendance (Schedule 13) were refused in his account on the supposition that the clerk did not attend the circuit court here on two days in 1887. The records show the court was in session on the two days in question, that he was present, and that action of the court was had in civil suits on both days; and he is entitled to "five dollars a day for his attendance on the court while actually in session." Rev. St. § 828.

In the two small items (Schedule 14) all the fees in two cases were disallowed because petitioner's account did not more particularly describe the nature of the suits. One was a criminal case for a violation of the internal revenue laws, in which the trial resulted in an acquittal, and the other was an action at law to recover of the owner of a certain steamboat the amount due the government, under the law, for its inspection, and the United States, being unable to procure service of process on the defendant, dismissed the suit after several terms. The amount here claimed is allowed, as the services were rendered as claimed. The records of this court show these facts.

Schedules 15, 16, and 17, supra, are fees for services rendered by the clerk in and about the appointment by the court of election supervisors at three congressional elections, and embrace items amounting to \$32.45 for entering orders of court pertaining to their appointments, charged at the statutory rate of 15 cents per folio, (Rev. St. §§ 828, 2011-2015, 2025,) and \$82.60 for drafting their official oaths, under the express direction of the court to do so, entered on the minutes of the court at the times of their respective appointments, the fees therefor being charged strictly under the statute, and also the sum of \$319.70 for issuing their commissions, also prepared by petitioner as clerk of the circuit court and issued under its seal, by direction of the court, in every instance, as its records show. No charge is included in said amount for attaching or impressing the court seal upon these commissions. Concerning fees for entering the orders of court appointing these election supervisors, there cannot be the slightest question; and the right to the statutory compensation of 15 cents

per folio from the United States for preparing their official oaths has been affirmatively ruled by the supreme court in *U. S. v. McDermott*, 140 U. S. 151-153, 11 Sup. Ct. Rep. 746, because "it appears to have been the intention of congress that the supervisors should take an oath, which should be reduced to writing, and filed with the chief supervisor," and the expense of these oaths was not held to be chargeable to the supervisors, as in case of court officers, (*U. S. v. Van Duzee*, supra,) "in consideration of the number of such supervisors, their short tenure of office, and presumed inexperience in the drawing of legal documents, and of the desirableness of securing uniformity in the oaths so administered."

Section 2012, Rev. St., provides for the supervisor's commissions, and is as follows: "The court, when so opened by the judge, shall proceed to appoint, and commission, from day to day, and from time to time, and under the hand of the judge, and under the seal of the court," the election supervisors authorized by the statute. The clerk is entitled to a fee of \$1 "for issuing and entering every process, commission," etc. Rev. St. § 828. The petitioner, in his accounts, charged \$1 each for issuing these commissions, and 20 cents for affixing the court seal. In his first account the entire amount charged was disallowed by the accounting officers; in the next, the entire amount so charged was allowed; and, in the last, only the fee for seals was allowed,—while, in an account subsequent to this petition, the \$1 fee for issuing the commission was allowed, that for the seal being disallowed; so that every possible ruling has been made at the treasury that could be made upon this point. The present rulings at the department, however, are in accordance with the amount claimed here, so that there is now really no controversy concerning the items, and they are accordingly allowed. *U. S. v. Ewing*, 140 U. S. 142, 147, 11 Sup. Ct. Rep. 743; *U. S. v. Barber*, 140 U. S. 164, 166, 11 Sup. Ct. Rep. 749.

The next item (Schedule 18) is for making certified transcripts in criminal cases, at the instance and request of the district attorney, to be sent to a penitentiary outside the state, where the defendants therein were undergoing sentence of imprisonment at hard labor, imposed by this court. The transcripts were procured for use as evidence by the United States against said defendants, to prevent their discharge under writs of habeas corpus, as shown by the clerk's duplicate accounts on file. The fees are charged at the statutory rate "for a copy of any record or entry, or of any paper on file, for each folio, ten cents." Rev. St. § 828. The services having been thus rendered for the United States, and upon its proper request, "the government is in no position to repudiate" the service; and the fees therefor, amounting to the sum of \$42, are therefore allowed petitioner. *U. S. v. McDermott*, 140 U. S. 151, 156-158, 11 Sup. Ct. Rep. 746.

The small clerical error of \$9.50 made in the department statement upon one of the clerk's accounts against him is perfectly apparent upon its face, and is, of course, allowed him here.

This only leaves remaining an item of \$134.40, deducted from plaintiff's emoluments as clerk of the district court in his first account, which contained no per diem fees, though his account as clerk of the circuit court contained such fees for attendance for 72 days, covered by the same period, at \$5 a day. Just two-thirds of these fees, or \$240, was transferred by Mr. Durham, then first comptroller, from plaintiff's circuit to his district account, making the excess of his emoluments as clerk of the latter court this sum of \$134.40, by charging against him all fees which had been disallowed. Both courts were in session those days. A statutory allowance is prescribed for the clerk, of "five dollars a day for his attendance on the court while actually in session." Rev. St. § 828. "And, when the circuit and district courts sit at the same time, no greater per diem or other allowance shall be made to any such officer than for an attendance on one court." Rev. St. § 831. And "no clerk of a district court, or clerk of a circuit court, shall be allowed by the attorney general * * * to retain, of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, respectively, for his personal compensation * * * a sum exceeding three thousand five hundred dollars a year for any such district clerk, or for any such circuit clerk, or exceeding that rate for any time less than a year." Rev. St. § 839. All these provisions were compiled from the original fee-bill act of congress, of February 26, 1853, c. 80. From the date of this original enactment to 1885, a period of over 30 years, "the accounting officers of the treasury department construed the statutes as authorizing the clerk to charge such per diem for attendance as he might elect, when both courts were in session on the same day; and, upon such construction and interpretation of the statutes, it had been the practice to adjust and allow such accounts." *Butler v. U. S.*, 23 Ct. Cl. 162, 163. The novel ruling of the comptroller in *Butler's Case* was identical with his ruling here, and the decision of the court of claims was against it, saying, "We conclude that the previous rulings of the department, to which, we are informed, it has returned since this controversy arose, were correct," and judgment was rendered for plaintiff. *Id.*, 166. This case was decided in February, 1888, and in April of the same year the identical question was presented to Judge (now Mr. Justice) Brewer for decision in *Goodrich v. U. S.*, 35 Fed. Rep. 193, who, in arriving at the same conclusion in his opinion, says:

The clerk "was entitled to the per diem in the court in which he charged it. Congress has so enacted. How can he be deprived of that by reason of the fact that he might be also entitled to a per diem in another court? Suppose a party is subpoenaed in two cases tried on the same day, and the law prohibits more than one witness fee on the same day. Might he not exercise the right of demanding his fee in the case where the solvency of the parties would secure its payment, and could such parties insist that it be charged in the other case, in which, perhaps, the insolvency of the parties would prevent his receiving any pay? Or suppose the per diems in the two courts were different. If he attends both courts, would he not be entitled to charge the larger per diem, rather than the less? In other words, may he not

insist upon anything that the statute gives him, and can the fact that he might have made another charge on another account be pleaded as a defense to a legal charge on the one account? While it is true that the government ought not to pay any more fees than congress has determined that it should pay, yet I think an officer may avail himself of everything the statute gives him, and that, where there are two charges possible, he is not bound to take the least valuable." *Id.* 195, 196.

In view of these decisions, and of the present ruling at the department, which really removes all controversy upon this item between the parties here, (for, except in this single instance, there has been no such action taken by the accounting officers upon petitioner's accounts, as the record of this case shows,) and of the unquestioned uniformity of decision for 40 years at the treasury, with an exception of but one comptroller, adhered to only during a portion of his official term, and of the earlier rulings made contemporaneously with the original act of 1853, and for so long followed almost without interruption, (*U. S. v. McDermott*, 140 U. S. 151, 154, 11 Sup. Ct. Rep. 746,) as well as upon principle, and a proper construction of the statute, our holding is that, the clerk having legally charged his *per diem* fees for attendance upon one court, the comptroller has no authority, under the statute, to disallow them, no matter for what purpose, nor whether, by any further action, he at the same time allows like *per diem* fees for attendance in the other court, in which they were not claimed, nor proven in accordance with the statute, nor at all, nor approved by any court. *Rev. St. § 846; Act Feb. 22, 1875, (18 Stat. 333; 1 Supp. Rev. St., 2d Ed., p. 65.)* The comptroller did not claim to have the power, arbitrarily, to simply disallow these fees; but he went further, and arbitrarily allowed a like amount, not claimed nor proven, nor passed upon by the court. Both actions were erroneous, beyond question, and the amount, in this regard, claimed by petitioner, is allowed him, accordingly. Therefore, let a judgment be entered for the petitioner in this cause, for the amount to which he is entitled under this opinion, and for costs.

Decree accordingly.

PULLMAN'S PALACE-CAR CO. v. HARKINS.

(Circuit Court of Appeals, Third Circuit. May 25, 1893.)

No. 5.

1. JURY—CHALLENGES TO ARRAY.

In a federal court it constitutes no ground of challenge to the array of jurors that three of the persons named in the *venire* had died after their names were placed in the wheel, and before the time of the drawing.

2. EXPERT EVIDENCE—DANGEROUS MACHINERY.

In an action to recover damages for a death caused by being caught in a small, rapidly revolving shaft while deceased was working near it, there being no evidence that he saw it, there was no error in admitting evidence of experts that revolving shafting is dangerous machinery, the danger being latent.

3. WITNESS—EXAMINATION.

In an action for damages for a death caused by unguarded machinery, where a witness for plaintiff is asked, on cross examination, if it occurred

to him at the time that there was danger about the work, to which he answers in the affirmative, there is no error in permitting him, on redirect examination, to be asked wherein the danger consisted.

4. MASTER AND SERVANT—DANGEROUS MACHINERY—FELLOW SERVANTS.

Where a workman is killed by being caught in an unprotected revolving shaft, of whose dangers he is ignorant, the liability of the employer is not dependent upon whether he moved against it involuntarily, or was pushed against it by the shoving forward of a timber, which he and other workmen were lifting into place.

5. SAME—INSTRUCTIONS.

In such case it is within the sound discretion of a federal court to say in its charge to the jury that it is beyond reasonable doubt that, if the shaft had been boxed over, guarded with boards, or stopped while deceased was working there, the accident would not have happened.

6. SAME—DUTY OF MASTER.

In such case it is not error to charge that "a servant knowing the fact of machinery being in motion close by the place where he is working may be entirely ignorant of the risk he would incur by falling against or coming in contact with it. In such case it is the duty of the master not only to exercise due care, but good faith, towards the servant, and to inform him of the risks he undertakes."

7. SAME.

Where the proximate cause of a servant's death was unprotected machinery, of whose dangers he was ignorant, it was not error to refuse a charge that, if death resulted from the negligence of a certain fellow servant, with whom he was working, there could be no recovery, and to charge instead that it was the special and untransferable duty of the master to take reasonable precautions in protecting its servants from dangerous machinery.

8. TRIAL—INSTRUCTIONS—FEDERAL COURTS.

It is a settled rule in the federal courts that it is not error for the judge to express his opinion on the facts when the matters of fact are ultimately submitted to the jury, and the rules of law are properly stated.

In Error to the Circuit Court of the United States for the District of Delaware.

At Law. Action to recover damages for personal injuries resulting in death. There was a verdict for plaintiff for \$7,000, and a motion for a new trial was denied. 52 Fed. Rep. 724. Defendant brings error. Affirmed.

Allan McCulloh and Geo. H. Bates, for plaintiff in error.

Levi C. Bird, (A. E. Sanborn, on the brief,) for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER, District Judge.

ACHESON, Circuit Judge. This was a suit by Mrs. Maggie Harkins against Pullman's Palace-Car Company for the recovery of damages for the death, alleged to have been occasioned by the defendant's negligence, of her husband, Michael Harkins, who, while in the employ of the defendant at its works in the city of Wilmington, Del., on the morning of January 8, 1891, was caught by a rapidly revolving shaft, and killed. The action was brought under a statute of Delaware in a state court, but was removed by the defendant into the United States circuit court. Harkins, who was about thirty years of age, and by occupation was a common laborer, inexperienced in the use and operation of machinery, went into the employ of the defendant seven or eight days before

his death. He was first set to polishing with pumice stone the exterior of cars, and continued at that work until the morning of January 8th, when he was taken to make one of a crew of seven men, who were engaged, under the directions of William Roach, a carpenter and a foreman in the defendant's employ, in raising heavy joists twenty feet long, which were to be used in the construction of a new second-story floor, and placing them in position on the top of a plate about eighteen feet above the ground floor of the building in which they were working. This plate rested against the inside wall of the building. At the distance of about four feet from the bottom of the plate, and about two feet from the side of the building, was a girder running parallel with the plate, with a bar of railroad iron fastened lengthwise on the top of it. About three feet from the top of the girder and between it and the bottom of the plate, was a revolving iron shaft one and one-half inches in diameter. This shaft was parallel with the plate and girder, and distant from the bottom of the plate about ten inches. It was used to communicate power to five sewing machines in an upper room. The end of the shaft projected from the pulley which operated it about three or four feet. A ladder had been placed against the girder at a distance of about five feet from the end of the shaft, and to the right of it. The company's head carpenter had put the men under the charge of Roach, and Harkins and the others were assigned their places by Roach, and acted under his orders. The accident about to be mentioned happened while the first joist was being put in place on the side of the building where the shafting was. A rope was tied around each end of the joist, and, the other end having been pulled up, Roach ascended the ladder followed by Harkins, and they took their stand on the bar of railroad iron, and, with their backs resting against the side of the building, they pulled up by means of the rope their end of the joist. They then turned around their faces to the plate and proceeded to lift the end of the joist to the top of the plate with their hands and shoulders. In doing this they stood on the bar of railroad iron on the top of the girder, between the ladder and the revolving shaft, the two men close together, one on either side of the joist, Harkins being next the shaft, and in close proximity to the end of it. The shaft was revolving at the rate of 170 revolutions a minute. After placing the end of the joist on the top of the plate it was found necessary to shift it around a piece of studding, and move it several inches more to the left, towards the shaft; and in making this change Harkins' clothing was caught by the shaft, and he was thrown against the bottom of the plate, between which and the shaft his body became wedged. He received injuries which resulted in his death in a few moments.

There was no covering or guard of any kind placed at the end of the shaft. It did not appear that any caution was given to Harkins in respect to the shafting. Roach testified that he gave him no warning, and heard none given to him. Roach further

testified: "I do not believe the man saw the shafting at the time he was caught. He might have seen it before. But at the time I do not think the man did, because his attention was drawn to something else,—drawn to putting this around the studding." There was no evidence tending to show that Harkins' attention had ever been called to the shafting; nor did it appear that during the short time he had been in the defendant's employ he had worked near to the shafting, or had any occasion to notice it. It was 16 or 17 feet above the floor, off to the side of the building, and was not used in connection with the work done in that shop. At the time of the accident tinsmiths were working nearly under the shaft, and there was hammering on trucks, and other noises occurring in the shop. The facts, as above narrated, appeared by the uncontradicted evidence. The assignments of error are 31 in number. We will specially notice such of them as were here urged.

The first assignment is to the refusal of the court to sustain the challenge to the array of jurors made by the defendant on the ground that before the venire issued three of the persons named therein had died. It did not, however, appear that in the filling of the wheel or in drawing the names of jurors therefrom there was any want of compliance with the provisions of the act of congress. The rule of court has not been furnished us. Presumably its terms were fulfilled. The act of congress does not fix the number of the panel of jurors to be summoned for the trial of civil causes. The mere fact, then, that three of the persons whose names had been placed in the wheel afterwards die before their names were drawn therefrom was not good ground of challenge to the array. *Foust v. Com.*, 33 Pa. St. 338. Perhaps, for cause shown, the court might have issued a special venire, returnable forthwith, to fill up the panel; but this was not asked.

Assignments third and fourth and from the sixth to the eleventh, inclusive, raise the question whether the testimony of expert witnesses that revolving shafting is dangerous machinery was admissible. Upon a careful consideration of this record we are entirely satisfied that the testimony was properly received. Revolving shafting, it appears, is attended with peculiar and latent danger. It seizes with fatal result the clothing of any person who unconsciously or incautiously comes in contact with it. Usually it is noiseless. To an inexperienced person the motion of a rapidly revolving shaft one and one-half inches in diameter would not be observable unless he should happen to notice the pulley connected with it. One of the witnesses, an experienced machinist, speaks of revolving shafting as "a very harmless looking thing to an ignorant man." These facts are not of common observation and knowledge. We think, then, that upon the question of the peculiarly dangerous character of this particular species of machinery, the case belongs to that class in which persons having special knowledge, experience, and judgment may give their opinions. *Ogden v. Parsons*, 23 How. 167; *Transportation Line v. Hope*, 95 U. S.

297; *Spring Co. v. Edgar*, 99 U. S. 645; *Insurance Co. v. Smith*, 124 U. S. 405, 8 Sup. Ct. Rep. 534; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. Rep. 514; *Huizega v. Lumber Co.*, 51 Mich. 272, 16 N. W. Rep. 643; *Railway Co. v. Frawley*, 110 Ind. 18, 9 N. E. Rep. 594.

The assignments last enumerated embrace questions which elicited from the witnesses their opinion upon some other points, but the record does not show that any objection was made to those questions or exception taken to the answers. The general objection noted does not cover those matters, and therefore we are not at liberty to consider them.

The fifth assignment is as follows:

"That in the redirect examination of Joseph Farrell, a witness called on behalf of the plaintiff, the court erred in admitting the following evidence: 'Question. You were asked about this being a place of danger. In reply to that I will ask you if, in your opinion, it was a place of danger. (Objected to by counsel for the defendant. Objection overruled. Exception noted for defendant.) Q. State to the jury what constituted the danger of that place. Answer. It was an open pulley; nothing to cover it; very close to the side of the building; and the man could not help being caught the way he was working there.'"

Now, it will be perceived that the first of these questions was not answered at all, and, if the objection can be regarded as embracing the second, we think that question was properly allowed, because, on the cross-examination of this witness, he had been asked, "Did it occur to you at the time that there was danger about that job that he was engaged in?" to which the witness answered, "There was danger." The defendant having thus opened up the subject, it was not error to permit the plaintiff, on the re-examination of the witness, to inquire in what the danger consisted.

The assignments from the twelfth to the eighteenth, inclusive, are to portions of the charge of the court, and may be treated together. In considering them and the assignments which follow, we must bear in mind that, as to all the material facts of the case, there was no conflict of evidence. It was clearly proved that when Harkins "went into the employment of the defendant he was ignorant of and unfamiliar with the use and operation of machinery;" and, in view of the indisputable facts, we cannot say that there was anything objectionable in the following statement: "It does not satisfactorily appear from the proof that, even if the revolving shaft was as noisy as the defendant's witnesses testified, Harkins could have distinguished its noise from the numerous other sounds which filled the building. He had been in the establishment only a few days. Everything around him was new and unfamiliar, and he was presumably as ignorant as a child of the uses and dangers of the revolving shaft." That "the work Harkins was doing at the time of his death was that of a carpenter, but it can be done by a laborer," was testified by Roach without contradiction. The statement that Harkins "involuntarily and unconsciously moved against the shafting" was substantially correct, even if he was pushed against it, as Roach thinks, by the workmen who were at the other end of the joist assisting in handling it, and who were

ordered by Roach to shove it forward when he had got his end around the studding. And most certainly, if Harkins was thus shoved against the shaft, the defendant's responsibility for the catastrophe was not lessened. The evidence quite justified the statement: "But all the witnesses agree in the opinion that shafting, when in motion, is very dangerous, and that it should be boxed or covered or protected in some manner when in a place where persons are liable to come into contact with it." Nor do we find any just ground for reversal in the following comments of the judge:

"Exactly what was the immediate cause of his being thrown against the shaft,—whether by a slip of the foot on the rail or by his moving sideways towards the shaft, or by the pushing of Roach against the other side with the joist,—it is idle to speculate, but it is reasonably certain that if he had known or had been warned of the fatal danger of coming in contact with that piece of machinery he would have taken care to avoid the risk of doing so; and it is beyond reasonable doubt that if the shaft had been boxed over, guarded with boards, or had been stopped while Roach and Harkins were working there, this accident would not have happened."

These observations were pertinent, and within the sound discretion of the trial judge.

The nineteenth assignment is as follows: That the court erred in charging the jury:

"The servant, knowing the fact of machinery being in motion close by the place where he is working, may be entirely ignorant of the risk he would incur by falling against or coming in contact with it. In such a case it is the duty of the master not only to exercise due care, but good faith, towards the servant, and to inform him of the risks he undertakes."

With reference to the facts of this particular case this instruction was unobjectionable. *Paulmier v. Railroad Co.*, 34 N. J. Law, 151; *Railway Co. v. Frawley*, 110 Ind. 18, 25, 9 N. E. Rep. 594.

The twentieth and twenty-first assignments are to portions of the following extract from the charge:

"Applying the law to the facts of the present case as they have been developed by the testimony, you will first consider the question whether the defendant was guilty of negligence in ordering Harkins into a situation, to him of unknown peril, but which was known to the defendant, and which could easily have been guarded against by the exercise of ordinary care and prudence on the part of the defendant, either by giving special instructions to Harkins, or by fencing off the end of the shaft near which he was working, immediately before the accident, or by stopping it. It is conceded that unprotected shafting, when in motion, is dangerous, and there was testimony before you to show that it was customary and usual to box, cover, or fence off this class of machinery, including flywheels and cogwheels, when in a situation where workmen or others passing in close proximity to them may be caught. You will consider, also, whether, in the absence of such visible guards as have been mentioned, the omission to stop the operation of the shaft while Harkins was working near it does not constitute negligence. That Harkins was ordered to a place of unusual and imminent peril to an ignorant and inexperienced man is clearly illustrated by the sudden manner of his death. Had he known of and appreciated the danger, it might be said that he assumed the risk by going up the ladder, when ordered to do so by Roach, and taking his station near to the end of the shaft. In that case, with full knowledge of the possibilities, and with the instinct of self-

preservation common to human nature, he might have avoided the accident; but he was ignorant of and inexperienced in the use of machinery and of its dangers, and on that account was all the more entitled to the protection and care of the defendant. That Roach did not give him warning does not excuse the defendant, for the duty of the master to protect his servant under such circumstances cannot be assigned to another. A single board or scantling nailed up between the plate and the girder at the end of the shaft would have protected Harkins. The throwing off of the belt for a few minutes would have stopped the motion of the shaft, and would have afforded him equal security."

Much of what we have already said is applicable to these instructions. There was, we repeat, no conflict of testimony as to the controlling facts of the case. The particular statements of fact contained in the portion of the charge just quoted are, we think, fairly sustained by the proofs. If it were not expressly conceded that shafting in motion is dangerous, there was no evidence to counteract the positive testimony to that effect. It is the settled doctrine that in the courts of the United States it is not reversible error in the judge to express his own opinion on the facts if the rules of law are correctly laid down, and all matters of fact are ultimately submitted to the jury. *Rucker v. Wheeler*, 127 U. S. 85, 8 Sup. Ct. Rep. 1142; *Doyle v. Railway Co.*, 147 U. S. 413, 13 Sup. Ct. Rep. 333. Now, looking at the whole charge, we think the portions complained of were no more than expressions of the opinion of the trial judge, and did not amount to binding instructions. Moreover, upon the uncontradicted evidence, it is very difficult for us to see how reasonable men could differ upon the question of the defendant's negligence in putting Harkins, without warning, into the position of undoubted danger in which he lost his life. But the judge did not withdraw the question from the jury. He distinctly submitted to the jury the question of the defendant's negligence, and also the question of the alleged negligence of Harkins. The concluding words of the charge were these:

"You will have to consider the question of negligence. It is one of fact, and should be considered by you under the instructions of the court on the law applicable to the particular circumstances of this case. Almost every case of this kind varies in its facts. We have endeavored to state as briefly as we could the points of law which should govern you in making up your verdict. If, on due deliberation, you shall find that the defendant was guilty of negligence, and that Michael Harkins, the deceased, was not guilty of contributory negligence at and before his death, then your verdict will be for the plaintiff. * * * If you find that the defendant was not guilty of any negligence, or that, if so guilty, Harkins was also guilty of contributory negligence, or that his death was caused by the negligence of a fellow servant, then, of course, you must return a verdict for the defendant."

The twenty-second, twenty-fifth, and twenty-sixth assignments relate to the supposed negligence of Roach, and the instructions of the court relating thereto. The defendant, in its third point, asked the court to charge "that, if the jury believe that the accident was caused or contributed to by the negligence of William Roach, who was working with Harkins at the time of his death, the said Roach was a fellow servant of Harkins, and the plaintiff

cannot recover;" and in its fifth point prayed the following instruction: "That if the jury from the evidence believe that the death of Harkins was caused by any negligence on the part of Roach, it was from the negligence of a fellow servant, and the plaintiff cannot recover."

The portion of the general charge complained of in the twenty-second assignment evidently was called forth by these requests, and what the court there said upon the subject of negligence had relation to the respective duties of Roach and the defendant. If there was an apparent assumption of negligence on the part of the defendant, it was in a fair discussion of the defendant's theory of negligence. It was not unqualifiedly affirmed. We quote this portion of the charge:

"On behalf of the defendant it is claimed that, if Harkins' death was caused by the negligence of his fellow servant, Roach, the plaintiff cannot recover. As a general proposition, and under ordinary circumstances, this would be true; but in the present case the direct and proximate cause of Harkins' death was the uncovered and rapidly revolving shaft, of the danger of which he had no knowledge. It was the duty of the defendant to take reasonable precautions in protecting its servants from the danger of exposed machinery. This duty was the special and untransferable duty of the defendant, and the omission to fence off the end of the shafting, or to stop its motion, was the negligence of the defendant, and not the negligence of Roach. It does not appear that Roach had any authority to stop the shaft or to fence off the end of it. He was a carpenter, and, as far as the evidence shows, had nothing to do with this particular piece of machinery."

These instructions were repeated substantially in the specific answers to the defendant's third and fifth points. We find no error therein, nor in the refusal of the court to affirm those points without qualification.

In *Hough v. Railway Co.*, 100 U. S. 213, where a locomotive engineer in the defendant's employ was killed in consequence of defects in the engine, owing to the negligence of the company's master mechanic and foreman, the former of whom had exclusive management of the motive power of the company, and the latter the control of the engineers in assigning them to duty, it was held that the defendant was liable. While recognizing the rule exempting the common master from liability to a servant for injuries caused by a fellow servant, the court states that to the rule there are well-defined exceptions, one of which arises from the obligation of the master not to expose the servants, when conducting his business, to perils or hazards against which they may be guarded by proper diligence on his part. The like ruling was made in *Railroad Co. v. Herbert*, 116 U. S. 642, 647, 6 Sup. Ct. Rep. 590; and, speaking of the responsibility of the master to his servant, the court said: "Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability." In the very latest decision of the United States supreme court upon the general subject,—*Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914,—which, against the trend of some former cases, holds that a fireman on a locomotive engine is a fellow servant with the engineer, we find this emphatic language in respect to the duty

of the master to provide a safe place for the servant when in the performance of his work:

"Again, a master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employe in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employe by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects."

These principles prevail in the courts of Delaware and Pennsylvania. *Foster v. Pusey*, (Del. Super.) 14 Atl. Rep. 545, 547; *Trainor v. Railroad Co.*, 137 Pa. St. 148, 20 Atl. Rep. 632.

But, again, where a servant receives an injury, occasioned in part by the negligence of his master and in part by that of a fellow servant, the master is liable. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Paulmier v. Railroad Co.*, supra. We think Roach occupied the position of vice principal, but, even if he was a mere fellow servant with Harkins, and guilty of negligence, the defendant could not escape the consequence of its own negligence.

The twenty-ninth, thirtieth, and thirty-first assignments relate to the instructions of the court in answer to the defendant's requests upon the question of the supposed negligence of Harkins. Without quoting those instructions, we content ourselves with stating that we think they are entirely free from error, especially in view of the final instruction of the court in the general charge. But we must add that we can discover nothing in this record which would sustain a finding that Harkins was guilty of contributory negligence.

The judgment of the circuit court is affirmed.

NORTHERN PAC. R. CO. v. PETERSON et al., (two cases.)

(Circuit Court of Appeals, Eighth Circuit, May 1, 1893.)

Nos. 198, 199.

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—EVIDENCE.

Plaintiffs, riding in a wagon immediately in the rear of another wagon driven by a boy of 15, were approaching a railroad crossing, with whose surroundings they were unfamiliar, on a dark night. The wagons were stopped at a point which was some 85 feet from the track, with whose

exact location they were unacquainted. From this point there was a view of less than 500 feet of the track, owing to a deep cut near the crossing. Here they looked and listened, but, perceiving no train, started on again. At this moment their attention was attracted to a light some 40 rods in front and a little to the left of them, which they took to be on the railroad, and which they watched until the second wagon was on the track, when for the first time they discovered a train to their right, some 10 or 15 rods distant, and approaching at the rate of 30 miles an hour. Before they could avoid the danger the engine struck the wagon, killing the horses and injuring plaintiffs. *Held*, that it could not be said as matter of law that they were guilty of contributory negligence, and the case was one for the jury.

In Error to the Circuit Court of the United States for the District of Minnesota.

These were actions by Charles U. Peterson against the Northern Pacific Railroad Company and by Frank O. Peterson against the same defendant for personal injuries. There was judgment for plaintiff in each case, and defendant brings error. Affirmed.

Tilden R. Selmes, for plaintiff in error.

John W. Arcander, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. These writs of error were sued out to reverse two judgments against the Northern Pacific Railroad Company, the plaintiff in error, and in favor of the defendants in error, respectively, which were rendered on account of personal injuries resulting to them from the collision of an engine and train of cars operated by the company with a wagon in which they were crossing the railroad upon the public highway. The defendants in error, who were the plaintiffs below, and who will be so designated, brought separate actions, but these actions were tried together to the same jury, and the verdicts and judgments rest upon the same record. This record discloses the following facts:

Between 7 and 8 o'clock in the evening of November 28, 1890, the engine drawing a passenger train struck the wagon in which the plaintiffs were crossing the track, and seriously injured them. There was no moon. The night was dark and cloudy. The plaintiffs were returning from St. Paul, where they had been to market some produce, to their homes in Chisago county, about 37 miles northeast of the city. White Bear is a town between St. Paul and Chisago county, and the accident occurred at the crossing of one of the highways between St. Paul and White Bear, about six miles from the city. The railroad runs east and west at this point and the highway crosses it at grade, and at right angles. The train that injured the plaintiffs came from the east, and struck them as they crossed the track going north. Two hundred feet east of the crossing the railroad enters a cut which is 400 feet in length, about 9 feet in depth at its deepest point, and which diminishes in depth in each direction from that point. For about 1,900 feet east of the crossing the track is straight, but at that

point there is a sharp curve in a cut about 16 feet deep. On account of the cut 200 feet east of the crossing, and other obstructions to the vision, one approaching the railroad from the south on the highway could not see an engine approaching the crossing from the east at a distance of more than 540 feet when he was further south than 47 feet from the middle of the track, but from that point to the track the line of vision rapidly extended until, when he reached the track, he could see an engine approaching at a distance of about 2,000 feet. As the plaintiffs approached the crossing, August Peterson, a boy 15 years old, and the son of the plaintiff Frank O. Peterson, was driving the latter's team of mules, which was attached to a lumber wagon, and the plaintiff Charles U. Peterson was driving his own team of horses, attached to a similar wagon, just behind the mule team, and Frank O. Peterson was riding with him. No one of these three persons was familiar with the topography of the land about this crossing, or knew of the cuts or curves to which we have referred. None of them was familiar with the highway, or had traveled over it more than three or four times. None of them knew where this railroad crossing was, though they knew there was such a crossing somewhere between St. Paul and White Bear. The teams traveled about three miles an hour. They stopped when the mule team was about 85 feet south of this crossing, and the plaintiffs and the boy looked and listened, but neither heard nor saw anything of the coming train. The teams walked forward, and, as they started, the attention of all three of the travelers was directed to a light about 40 rods in front and a little to the left of them, which they supposed was on the railroad. They watched this light until the forward team had just crossed the track and the rear team was just upon it, when they first saw and heard the engine which was approaching from the east at the rate of 30 miles an hour, and at a distance of only 10 or 15 rods from them. Before the second team could cross, the engines struck it, killed the horses and injured the men. The headlight of the engine was brightly burning. There was the usual conflict of testimony as to whether or not the whistle was sounded or the bell rung as the engine approached the crossing. The plaintiff's witnesses swore that they were not; the defendant's, that they were.

At the close of the testimony the defendant requested the court to instruct the jury to return a verdict in its favor. The court refused the request, and this refusal is the only error assigned.

The question of the negligence of the defendant could be determined only by finding whether or not the whistle was sounded or the bell rung as the engine approached the crossing. These facts were disputed, and the court was compelled to submit their determination to the jury; so that the only question raised by this request was whether or not, under this evidence, the plaintiffs were so conclusively shown to be guilty of contributory negligence that they were not entitled to recover. It is only when the facts are undisputed, and are such that reasonable men can fairly

draw but one conclusion from them, that the question of negligence is ever considered one of law for the court. *Railway Co. v. Jarvi*, 53 Fed. Rep. 65-70, 3 C. C. A. 433; *Railway Co. v. Ives*, 144 U. S. 409-417, 12 Sup. Ct. Rep. 679; *Railway Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569; *Railroad Co. v. Pollard*, 22 Wall. 341; *Bennett v. Insurance Co.*, 39 Minn. 254, 39 N. W. Rep. 488; *Abbett v. Railway Co.*, 30 Minn. 482, 16 N. W. Rep. 266. Tested by this rule, the court below properly refused to take this case from the jury. The question was whether or not the plaintiffs were at the time of the accident exercising that ordinary care and diligence to protect themselves from injury that reasonably prudent and careful men would have used in similar circumstances. The evidence in this case was not such, in our opinion, as would compel all reasonable men to draw the inference that they did not exercise that care. The darkness of the night; the proximity of the cut to the crossing, and plaintiffs' ignorance of it; the facts that they were not familiar with the highway; that they did not know the place of the crossing; that when the forward team was 85 feet from it they stopped, looked, and listened for the train, but neither saw nor heard anything of it; that the train was running at a speed which enabled it to pass from the cut to the crossing in less than 5 seconds; that, as the jury must have found, no bell was rung or whistle sounded; and that from the time their teams started forward again until they were upon the track, and the approaching engine was within 15 rods of them, their attention was absorbed by the light 40 rods in front of them and on their left, which they supposed was on the railroad,—present an array of facts and circumstances from which we are unable to say that reasonable men might not fairly infer, as did the jury at the trial, that these plaintiffs exercised as much care as reasonably prudent men would have used under such circumstances.

The judgments below are accordingly affirmed, with costs.

BOHN MANUF'G CO. v. ERICKSON et al.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1893.)

No. 194.

1. INJURY TO MINOR EMPLOYEE—WARNING OF DANGER.

It is the duty of a master to notify a minor servant of the ordinary risks and dangers of his employment, which the former knows, or which a master of ordinary prudence and intelligence would, under like circumstances, know, the minor does not understand or appreciate, and to instruct him how to avoid them.

2. SAME—ORDINARY RISKS.

No duty rests upon the master to notify the minor servant of the ordinary risks and dangers of his occupation which the latter actually knows and appreciates, or which are so open and apparent that one of his age, experience, and capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate. These dangers the minor assumes.

3. SAME—LATENT DANGERS.

It is the duty of the master, however, to notify the minor servant of any latent dangers connected with a hazardous employment which are known to him, and of which the servant is not aware.

4. SAME—LATENT DANGERS—INSTRUCTION.

A boy of 15, at work at a relishing machine in defendant's woodworking factory, had his hand cut by the knives of the machine; and all the circumstances of the accident as shown by the evidence were such that he must have been held to have assumed the risks, and defendant exonerated from any negligence in the premises, because the danger incurred was well known to the boy, unless the jury found that the revolving knives created a suction that tended to draw into or against the knives any body which, like the boy's hand, was placed close to them, and that this was known to defendant, but was not known to the boy. *Held*, that it was error to refuse an instruction to this effect, requested by defendant, and to give a general charge in which the issue as to this alleged suction was not mentioned.

In Error to the Circuit Court of the United States for the District of Minnesota.

This was an action by Ernest Erickson and Swan Erickson, his guardian ad litem, against the Bohn Manufacturing Company, for personal injuries to Ernest. There was judgment for plaintiffs on the verdict of a jury in the court below, and defendant brings error. Reversed.

Statement by SANBORN, Circuit Judge:

Ernest Erickson, who was a minor, and the plaintiff below, brought an action by his guardian ad litem for a personal injury, and recovered a judgment of \$5,000 against the Bohn Manufacturing Company, the plaintiff in error, a corporation engaged in the manufacture of sash, doors, and blinds, and it is to reverse this judgment that this writ of error was sued out.

On September 16, 1890, three of the fingers and a portion of the plaintiff's left hand were so badly cut by the revolving knives of the defendant's relishing machine that it became necessary to remove them. The knife head of this relishing machine had two sharp knives bolted to it, and projecting about two inches, that made about 3,000 revolutions a minute when in operation. They were driven by steam, and were used for shaping the shoulders of tenons. The plaintiff was a Swede boy, 15 years old, who came to this country in December, 1889. About the 1st of May, 1890, he was employed to sweep the floors in a large factory of the defendant, where there were many machines driven by steam. About a week later he was put at work on a pinning machine. About two months later the foreman took him to the relishing machine, took rails and worked with it, and thus by example instructed the plaintiff how to operate it. The plaintiff then operated it, and continued to do so from that time until he was hurt. There was not sufficient work to occupy this machine all day each day, but a small portion of each day was sufficient to do the work upon it, and the plaintiff worked on the pinning machine when there was no work for the relishing machine. He testified that he worked on it about three days altogether before he was hurt. While the machine was running one day, the foreman brushed the shavings away from the machine with his hands, and thus by example instructed the plaintiff how to do so. The plaintiff testified that he did not understand the English language, and that he received no instructions that he understood, other than the examples furnished him by the foreman. He testified that he was hurt while brushing away the shavings. No one but the plaintiff saw the injury inflicted. The plaintiff, in his complaint, alleged the jurisdictional facts, his age, his ignorance of the English language, his inexperience in the use and risks of machinery, and his employment to sweep floors. He then alleged generally the duty of defendant to explain to him the dangers of any machinery it placed him at work upon, and how to avoid such dangers; that the defendant, on the 16th day of September, 1890, carelessly put the plaintiff at work at the relishing machine; that this was a dangerous machine; that the plaintiff did

not appreciate its dangers on account of his youth and inexperience; that the defendant failed to explain them, or to instruct him how to avoid them; and then, without any allegation of any specific danger or hazard connected with the operation of the machine, except that referred to in the following quotations, proceeded thus: "But that, on the contrary, the defendant then and there carelessly and negligently directed plaintiff to clean off with his hands, while working said machine, the shavings congregating on the table of said machine, near the place where said knives on said machine were revolving at a great and dangerous speed; that so to clean off said shavings with the hands was extremely dangerous, for the reason that the rapid revolution of said knives created a strong suction towards the place where said knives were revolving, by which the hand of any person placed within the force of said suction was liable to be drawn into and under said knives with such force and violence that it would be extremely difficult, if not impossible, to withdraw the same before the hand had been cut and lacerated by said knives, of all of which the said defendant was then and there well aware, but of which plaintiff was, by reason of his youth and inexperience, to defendant's knowledge, wholly unaware; that on said 16th day of September, 1890, while plaintiff was discharging the duties of his service, to which he was by the defendant wrongfully set on said relishing machine, and while he, as he was by defendant directed, was with his left hand sweeping away the shavings accumulating on said table, near said knives, without any fault or negligence on his part, and solely by reason of the carelessness and negligence of defendant, the fingers of his said left hand were, by said powerful suction, drawn towards and under said knives, revolving with great speed as aforesaid, and the three last fingers of his left hand and about one-half of the balance of his said left hand were then and there and thereby wholly cut off, and his left hand and the bones, muscles, tissues and nerves of the said left hand then and there terribly cut, fractured, bruised, and lacerated;" and that, by reason of the premises, he was damaged in the sum of \$10,000.

The defendant, by its answer, denied any knowledge of the manner in which the accident happened, and any negligence on its part, and alleged that the plaintiff was fully aware of all the risks and dangers of the relishing machine, and that the injury resulted from his own carelessness.

There was an irreconcilable conflict of testimony over the question whether or not the rapidly revolving knives created any suction that would draw articles towards the place where they were revolving. Eight witnesses testified upon this question. Plaintiff's witnesses testified that such a suction was created, defendant's that it was not, but that the effect of the revolving knives was to create currents of air that blew articles away from the knives. The plaintiff testified that the knives were two inches long, that he knew they went around and cut out the wood, and so he was careful when he was cleaning and when he was cutting so as not to get his hands near there, but that he did not know of any draw or any suction there, and that while he was brushing away the shavings his hand was sucked and drawn into the knives. He testified in another place that his coat was first caught and drew his hand in.

The defendant requested the court to charge the jury as follows: "The plaintiff claims that the defendant did wrong and was negligent in not telling him, the plaintiff, that the knives might suck his hands into them, whereby he might get cut. He admits by his own evidence that he knew the knives would cut him if he got in their way. So if you find by the evidence that there was no suction at all about this machine, which would draw the hand of the plaintiff into the knives, then the defendant was not negligent, and the plaintiff cannot recover."

The court refused to give this instruction, and delivered a general charge, which occupies seven pages and a half of the printed transcript, in which the issue over the existence of this suction, the latent danger from it, and the effect of the jury's finding upon that issue, is nowhere referred to. The refusal to give this request is one of the errors assigned.

Charles G. Lawrence, (Harris Richardson, on the brief,) for plaintiff in error.

John W. Arctander, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, (after stating the facts.) It is the general rule that a servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care. He does not assume latent dangers known to the master that are actually unknown to him, and that one of his capacity and experience would not have known by the use of ordinary care. It is the duty of the master to notify the servant of such dangers. Obviously the line between dangers apparent and latent varies with the varying experience and capacity of the servants employed. Risks and dangers that are apparent to the man of long experience, and of a high order of intelligence, may be unknown to the inexperienced and ignorant; hence, if the youth, inexperience, and incapacity of a minor who is employed in a hazardous occupation are such that a master of ordinary intelligence and prudence would know that he is not aware of or does not appreciate the ordinary risks of his employment, it is his duty to notify him of them, and instruct him how to avoid them. This notice and instruction should be graduated to the age, intelligence, and experience of the servant. They should be such as a master of ordinary prudence and sagacity would give under like circumstances, for the purpose of enabling the minor not only to know the dangerous nature of his work, but also to understand and appreciate its risks and avoid its dangers. They should be governed, after all, more by the experience and capacity of the servant than by his age, because the intelligence and experience of men measure their knowledge and appreciation of the dangers about them far more accurately than their years. *Pressed Brick Co. v. Reinneiger*, (Ill. Sup.) 29 N. E. Rep. 1106, 1107; *Dowling v. Allen*, 74 Mo. 13, 16; *Railway Co. v. Valirius*, 56 Ind. 511, 518; *Buckley v. Gutta Percha Co.*, (N. Y. App.) 21 N. E. Rep. 717; *Railway Co. v. Frawley*, (Ind. Sup.) 9 N. E. Rep. 595, 598.

On the other hand, no duty rests upon the master to notify the minor of the ordinary dangers of his occupation that are so open and apparent that one of his age, experience, and capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate them. No duty rests upon him to notify the minor of the ordinary dangers of his employment that the latter actually knows and appreciates. As to these dangers and risks that he actually knows and appreciates, and as to those that are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate them, the minor is governed by the same rules as the adult. He assumes these risks by entering upon or continuing in the employment, and no negligence can be charged to the master, and no liability can be fastened upon him, because he fails to give futile notices and warnings of these dangers, which the minor knows and appreciates, or ought to know and appreciate. *Engine Works v.*

Randall, 100 Ind. 293, 298, 300; *Berger v. Railway Co.*, 39 Minn. 78, 38 N. W. Rep. 814; *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Fones v. Phillips*, 39 Ark. 17, 38.

Thus, if a master employs a boy of ordinary intelligence, 15 years of age, to work upon the roof of a building, and he steps off and falls to the ground, the master cannot be charged with negligence because he did not notify him that his body would be forcibly drawn to the earth if he stepped off into space. If a blacksmith employs such a boy to assist him about his forge, and he places his hand in the fire and burns it, the master is not chargeable with negligence because he did not notify the boy that the fire would burn his flesh. These dangers are patent, and no boy 15 years of age, of ordinary capacity, would fail to appreciate them. And if, in the case at bar, the plaintiff, after entering upon his work at the relishing machine weeks before, after repeatedly seeing the revolving knives cut the wooden rails, permitted his hand or his coat to come under those knives, uninfluenced by the latent danger from the suction of which he was not aware, the defendant cannot be charged with negligence, and made liable here, because it did not notify him that those knives would cut his fingers, and tear and draw his clothes, if he placed them within their reach. These dangers were apparent. A boy of his age and intelligence, with the experience he had after working in that factory four months, and at this machine at frequent intervals for several weeks, must have known and appreciated them. It did not require a knowledge of the English language for him to see that the revolving knives cut the wood, and to know and appreciate the dangers of allowing his hands or clothes beneath them. Fortunately the lessons taught and warnings given through the eye are not limited to the language of any nation. At intervals for some weeks, and for three full days in the aggregate, before his injury, he pushed the wooden rails against these knives, and saw them cut the shavings from them. No words in any language could have added to the knowledge or appreciation of the danger of permitting his hands or clothes to come under these revolving knives which this visible demonstration of the power of this machine must have given him. Nor are we left to presumption here. The record discloses the fact that he did know and fully appreciate these dangers, and that he knew how to avoid them. He testifies that he knew the knives went around and cut out the wood, and so he was careful when he was cleaning and when he was cutting, so as not to get his hands near them. If, then, there were no dangers causing the injury but these, which were so apparent, and so well appreciated by the plaintiff, the defendant was not liable for it. But if, on the other hand, these revolving knives created a strong suction, which was liable to draw articles to them, and this was known to the defendant and unknown to the plaintiff, here was a latent danger that it was the duty of the defendant to inform the plaintiff of; and if it did not do so, and the injury resulted from this hidden risk, it was the natural result of the defendant's negligence, and it was liable for the resulting damage. The record disclosed no other danger connected with this work

which the plaintiff did not appreciate, and thus the vital issue in the case became whether or not such a suction was created by the revolving knives, for, if there was no suction, there was no latent danger, and could be no recovery. The existence of this suction cannot be relegated to the rank of one of many circumstances in this case tending to prove negligence, others of which were the direction to the plaintiff to work at the relishing machine, and the example set by him by brushing away the shavings from the revolving knives, because whether or not this direction and this example were negligent depended upon this very issue whether or not the dangerous suction existed unknown to the plaintiff. Neither the direction nor the example would entitle the plaintiff to recover if the injury was the result of dangers that were apparent to and appreciated by him, especially since he entered upon and continued in the employment without objection from four to eight weeks after he was directed to work at the relishing machine. *Anderson v. Morrison*, 22 Minn. 274, 276. According to his own testimony, all the dangers of his occupation were apparent and appreciated by him, except that from this suction; hence, before a recovery could be had, on account of this direction or example, the existence of the suction and its latent danger must be established. That the plaintiff and his counsel appreciated the importance of this issue at the commencement of this action, and based the plaintiff's right to recover upon it, is demonstrated by the complaint. His counsel understood that his client could not recover on account of risks and dangers that he was aware of and appreciated, and that he could only recover in case his injury was the result of some danger of which he was not apprised. He also knew that, as his client was the only person who saw the injury inflicted, it was his duty to disclose in his pleading the latent danger that caused it. This he did, with admirable clearness and certainty. After alleging the age, inexperience, and employment of the plaintiff, and making some general allegations of the duty of the defendant, and its negligence in placing him at work at the relishing machine, and in instructing him to clear off the shavings from about the revolving knives with his hands, he averred that it was dangerous to do so, because "the rapid revolution of the knives created a strong suction towards the place where the knives were revolving by which the hand of any person placed within the force of said suction was liable to be drawn into and under said knives with such force and violence that it would be extremely difficult, if not impossible, to withdraw the same before the hand had been cut and lacerated by said knives;" that the defendant was aware of this suction and its danger, and the plaintiff was ignorant of it; and that when the injury was inflicted "the fingers of his said left hand were, by said powerful suction, drawn towards and under said knives," and he was thus injured. The existence of such a suction was denied by the defendant, and this issue was spiritedly contested at the trial. The plaintiff's testimony sustained the above allegations of his complaint. He said he did not know of this suction before the accident; that his hand was sucked and drawn into the knives; that his coat first caught, and drew his hand in.

Under this pleading and evidence it is plain that the only real issue left for the determination of the jury at the close of the trial was whether or not there was a suction towards the place of the revolving knives when this machine was in operation which caused the plaintiff's injury. This question should have been clearly and sharply presented to the jury for their determination by the court below. This the defendant requested the court to do. It asked that the following instruction should be given:

"The plaintiff claims that the defendant did wrong and was negligent in not telling him that the knives might suck his hands into them, whereby he might get cut. He admits by his own evidence that he knew the knives would cut him, if he got in their way. So, if you find by the evidence that there was no suction at all about the machine which would draw the hand of the plaintiff into the knives, then the defendant was not negligent, and the plaintiff cannot recover."

The court refused to give the instruction, and did not mention this issue at all in its charge. This was error. This request of the defendant should have been given. This record discloses, as we have shown, that this danger from the alleged suction was the only peril pleaded or proved connected with his employment which was not patent to and fully appreciated by the plaintiff before the injury. This was the only latent danger on which a recovery could have been based. If, however, there was no suction, there could have been no latent danger from it, and therefore no recovery. The jury should have been so instructed.

The judgment below is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

CHICAGO, ST. P., M. & O. RY. CO. v. ELLIOTT.

(Circuit Court of Appeals, Eighth Circuit. May 15, 1893.)

No. 191.

1. NEGLIGENCE—ACTION FOR INJURY.

An injury that is the natural and probable consequence of an act of negligence is actionable.

2. SAME—REMOTE CAUSE.

An injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable.

3. SAME—NATURAL CONSEQUENCE OF ACT.

An injury that is not the natural consequence of an act of negligence, and that would not have resulted from it but for the interposition of a new and independent cause, is not actionable.

4. SAME.

An injury that is the result of many fortuitous circumstances, no one of which can be fairly said to have been its proximate cause, is an accident, and is not actionable.

5. SAME.

If the plaintiff fails to show that the negligence with which he charges the defendant was the proximate cause of the injury he cannot recover.

6. SAME—PROXIMATE CAUSE.

Plaintiff was in charge of certain stock shipped by rail, and was riding in the caboose. Before reaching a certain station, where he knew it was usual to change cabooses, he asked the conductor if a change would

be made there, and was answered in the negative, and told that the train would only stop a few moments, and he would have no time to examine his stock. On reaching the station, however, he got off, walked forward, and examined several cars of the stock, and then turned back, but, the train having already started, he feared he would be unable to board the caboose, and therefore climbed upon a stock car, and walked backward along the top of the train. Before he reached the caboose the train had stopped, and was backing for the purpose of changing the caboose, and it was kicked off from the train just as he was stepping upon it, causing him to fall to the track, where his foot was crushed by a wheel. *Held*, that the statement of the conductor that the caboose would not be changed was not the proximate cause of the injury, and it was error to allow evidence thereof to go to the jury.

In Error to the Circuit Court of the United States for the District of Minnesota. Reversed.

Thomas Wilson, (S. L. Perrin, on the brief,) for plaintiff in error.
Frank F. Davis, (Henry M. Farnam, on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The Chicago, St. Paul, Minneapolis & Omaha Railway Company brings this writ of error to reverse a judgment of \$5,000 recovered by Fred. P. Elliott, the defendant in error, who was the plaintiff below, for personal injuries which he alleges resulted to him from the negligence of the company. The railway company had made a contract with J. B. Sutphin & Co., a copartnership, to transport 13 car loads of sheep from West Superior, Wis., to Chicago, Ill., and to carry the plaintiff, who was their foreman in charge of the sheep, free. Spooner is a station on the defendant's railroad between West Superior and Chicago, about 60 miles south of West Superior. It is the head of a division. There is a railroad yard at this point, and the custom of the company is to change the crews, engines, and cabooses of freight trains at this station. Altoona is a station on the defendant's railroad about 100 miles south of Spooner. The train which carried the sheep left West Superior at 11 o'clock in the forenoon on January 28, 1891. It then consisted of the engine, the 13 cars of sheep, and a caboose. At a station about 25 miles south of West Superior two cars of dead freight were put into the train, three cars from the engine. The train arrived at Spooner at 3 o'clock in the afternoon.

The plaintiff, Elliott, boarded this train at East Superior, a station a few miles southeast of West Superior, and rode free, under the contract with Sutphin & Co., in the caboose, from East Superior to Spooner. He was familiar with the railroad, the location of Spooner, and its railroad yards; knew that it was the custom of the company to change crews and cabooses at that station; had made at least three trips over this road before, and knew how the train was made up. When the train stopped at Spooner he alighted, and commenced, at the car next to the caboose, to examine and

care for the sheep. He walked forward along the train for at least ten minutes, and had examined all of the sheep but the two carloads next to the engine, when the conductor of the train brought him his lunch. He took this, and started back alongside of the train to carry it to the caboose, when the train started south, and when he was about seven cars from its rear it was moving so rapidly that he thought he could not board the caboose, and thereupon he grasped the ladder upon one of the stock cars, ascended it, and commenced to walk back, upon the top of the cars, towards the caboose. The employes of the company were then switching the train for the purpose of changing the caboose. For this purpose they drew it south past a switch, so that they could send the caboose in on another track, uncoupled it, backed the train up sufficiently to send the caboose in upon this second track, and then pulled the balance of the train forward, leaving the caboose. When the train had passed south of the switch, and commenced to back, the plaintiff was three or four cars from the caboose. He knew the train was backing north, and could not go to Chicago in that direction, but he still walked on towards the caboose; and, just as he was stepping from the last stock car to it, the latter was kicked off from the train, and he fell to the ground, where his foot was crushed by one of the wheels of the rear stock car, which was still moving back very slowly.

In the movement and handling of the train at Spooner there was no negligence on the part of the defendant, unless it arose from the following facts, which were proved over the defendant's objection: The plaintiff, while riding in the caboose between West Superior and Spooner, asked the conductor if he would change cabooses at Spooner, and the latter replied that he would not, that there was no extra crew at Spooner, and that he would run through to Altoona. Shortly after the conductor asked him if he would want anything to eat at Spooner. He replied that he would like to get dinner, and look over the sheep, if he had time, and the conductor said: "You won't have time for that. We won't stay there over five minutes,—just long enough to change engines. The caboose and crew will go to Altoona." The plaintiff knew that the conductor was running the train under orders from superior officers, and that his orders were liable to be changed at any time; but in ascending the car, walking back towards, and attempting to step upon, the caboose, he relied upon the assurance of the conductor that that car would not be changed, and when he climbed upon the stock car he supposed that the train was going out for Chicago. The admission of the evidence of these conversations, and of plaintiff's reliance upon them, is the principal error assigned, and the ground of the error is that these were not the proximate cause of the injury.

The rule of law which governs this case is not difficult of statement, but, like many other rules, the difficulty is solely in its application. "*Causa proxima non remota spectatur.*" An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence

is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause, that could not have been anticipated. Obviously, the relations of causes to their effects differ so widely, and are so various, that no fixed line can be drawn, that will in each case divide the proximate from the remote cause. The best that can be done is to carefully apply the rule of law to the circumstances of each case, as it arises. The effect sometimes follows immediately upon its moving and proximate cause, and, again, that cause works out its effect with unerring accuracy after a long period of time. A brakeman carelessly jostles a passenger from a moving train, and the effect follows at once. A tenant carelessly sows thistles in his landlord's field, and the effect follows months later, but not less surely. Again, an effect is sometimes the result of many fortuitous circumstances, no one of which can be fairly said to have been its proximate or moving cause; in other words, it is an accident,—a result that no one knowing the circumstances before the catastrophe could have reasonably anticipated. If an injury is the result of such an accident, or if the plaintiff fails to show that the negligence with which he charges the defendant was the proximate cause of the injury, there can be no recovery in his favor.

In *Railway Co. v. Kellogg*, 94 U. S. 469, 475, Mr. Justice Strong, speaking for the supreme court, said:

"It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that the negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances."

In *Hoag v. Railroad Co.*, 85 Pa. St. 293, 298, 299, the supreme court of Pennsylvania said:

"The true rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer, as likely to flow from the act."

The question in this case, then, is, was it the natural and probable consequence of the statement made by the conductor, that he would not change cabooses, and would not stop more than five minutes, at Spooner,—was it reasonably to be anticipated from this statement that the plaintiff, after the train had stopped at that station ten minutes, would climb upon the top of the cars, and be in the act of stepping from the rear stock car to the caboose at the very instant that the latter was kicked off the train?

A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. Was there one chance in a hundred that this drover, in reliance on such a statement, would climb upon this train, and so time his movements as to step off the rear stock car at the very instant the caboose parted from it? We think not. If he had alighted from the caboose, or climbed the car, or made any of his movements, after the train stopped at Spooner, 30 seconds earlier or later than

he **did**, he would not have been injured. If, at the end of the five minutes he was told that the train was to remain at Spooner, he had returned to the caboose; if he had not climbed upon the train; if, when he knew the train was backing up the other track, he had stopped to learn what was being done with it; indeed, if he had done anything but that which he did do, or if he had done that at any other instant of time than that at which he did do it,—he would not have been injured.

The natural consequence of an act is the consequence which ordinarily follows from it,—the result which may reasonably be anticipated from it. Perhaps the conductor might reasonably have anticipated that this drover would leave his personal baggage in the caboose, possibly he might have anticipated that he would remain there himself in reliance upon the assurance that the caboose would not be changed at Spooner, and if he had done either of these acts the defendant might be liable for any resulting injury; but who could anticipate that he would climb upon the cars, and put one foot on the rear stock car, and the other in the air, ready to descend upon the caboose, after the train had remained in the yard 10 minutes, and was backing up another track, and at the very instant when the caboose was being separated from it? No one, in our opinion, could have anticipated such an effect from so remote a cause. It was far from such a result as might or ought to have been foreseen by the conductor as likely to flow from his act, and it was error, in our opinion, to submit the evidence relating to these conversations to the consideration of the jury.

The authorities to which we are referred by counsel for defendant in error do not lead to a different conclusion. The three cases upon which he chiefly relies are *Railroad Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. Rep. 356; *Pitcher v. Railroad Co.*, (Sup.) 16 N. Y. Supp. 62; and *Olson v. Railway Co.*, 45 Minn. 536, 48 N. W. Rep. 445. In the first case the passenger, Winter, informed the ticket agent when he bought his ticket that he wished to stop over at the intermediate station of Olean, and was told to speak to the conductor. He informed the conductor, who punched his ticket, and was told by him that the punched ticket entitled him to stop over, and to ride upon a later train. He stopped at Olean, took a later train for his destination, presented his punched ticket, and the conductor of the train refused to accept it, and ejected him. In the second case the conductor of a freight train informed Pitcher, a drover in charge of a car load of horses, that the caboose in which he was riding would go no further than the next station; that from that station he would have to ride in the car with his horses; that the train would stand 45 minutes at the place where it would be left on its arrival at that station; and that he could go to the hotel, and get his supper. He did so, and in about 30 minutes after the train had arrived he returned, and was in the act of climbing into the car where his horses were, when the train, which had been placed on another track, was started with a sudden jerk, without warning, and he was injured. In the third case the plaintiff, Olson, who was a drover in charge of a car load of horses, informed the conductor that one of his horses was loose

in the car, and asked him if it would be safe for him to go in, and tie him. The conductor said: "Yes; you are perfectly safe, for the train is not going to stir before the passenger comes up." Immediately, and before the passenger came up, Olson went between the cars, climbed up over the couplings, slid back the door in the end of the car, which was the only means of ingress to it, and was in the act of entering when the train started with a sudden jerk, and injured him. These are the strongest cases cited for the defendant in error, and they certainly bear no analogy to the case at bar. In Winter's Case, the natural effect of the assurances of the ticket agent and conductor was that he would rely on his punched ticket, and try to ride on it, after he stopped at Olean; and his ejection, and the injury resulting from it, were the natural consequences of these representations, and the act of the conductor who refused to accept his ticket. In Pitcher's Case, after the conductor had informed him that the train would stand still for 45 minutes, and directed him to get into the car with his horses, that conductor could have anticipated, and ought to have anticipated, that this drover would climb into his car during that 45 minutes, and that if the train was started without warning during that time he might be injured. In Olson's Case, after the conductor was expressly told that he was about to climb into the car, he might and ought to have foreseen that the natural and probable consequence of his assurance that the train would not stir, and its sudden start without warning, as Olson climbed between the cars in reliance upon his statement, would be his fall and injury.

In each of these cases the plaintiffs followed courses of action that they would naturally be expected to pursue. They placed themselves in the positions they had fairly notified the conductors they intended to take, and the injuries were the natural and probable consequences of the acts of the employes of the railroad companies. If the plaintiff here had informed the conductor that he intended to walk from the rear stock car to the caboose, or to stand with one foot on each while the train remained at Spooner, and then had asked him if he intended to change cabooses, and if it would be safe for him to so walk or stand, the conductor might reasonably have anticipated the unfortunate result, but nothing less would have warned him of so improbable an event.

If authorities are wanted in support of our views, they are: *Railroad Co. v. Reeves*, 10 Wall. 176; *Scheffer v. Railroad Co.*, 105 U. S. 249, 252; *Jenks v. Inhabitants of Wilbraham*, 11 Gray, 142; *Durham v. Musselman*, 2 Blackf. 96; *Morrison v. Davis*, 20 Pa. St. 171; *Denny v. Railroad Co.*, 13 Gray, 481; *Dubuque Wood & Coal Ass'n v. City and County of Dubuque*, 30 Iowa, 176; *Hoag v. Railroad Co.*, 85 Pa. St. 293, 298, 299; *West Mahanoy Tp. v. Watson*, 112 Pa. St. 574, 3 Atl. Rep. 866; *Read v. Nichols*, 118 N. Y. 224, 23 N. E. Rep. 468; *Railway v. Mutch*, (Ala.) 11 South. Rep. 894.

In *Durham v. Musselman*, *supra*, the defendant girdled a large tree, and then set a fire around it, and left it burning, so that the tree was liable to fall at any time. The plaintiffs' mare and colt wandered under the tree, and it fell upon and killed them, but the

supreme court of Indiana said, "the destruction of the cattle of others is not the natural and probable consequence of such a practice," and refused to permit the plaintiff to recover. In *Jencks v. Inhabitants of Wilbraham*, supra, the plaintiff wrenched the wheel and axle of his wagon in a bad hole in the road, but he pulled it out, got off his load, and examined it, then drew his loaded wagon over a muddy road for some distance, until, as he was riding on his load along a plain and level road, the axle broke, precipitated him to the ground, and injured his spine. The supreme judicial court of Massachusetts held that the defendant was liable for the damage to the wagon as it was when he hauled it from the hole to the place where he examined it, but that it was not liable for his personal injuries, because his subsequent proceedings constituted an independent, intervening cause, and the defect in the road was too remote a cause to charge with these injuries. In *Railroad Co. v. Reeves*, supra, the Memphis & Charleston Railroad Company received tobacco at Chattanooga, Tenn., on March 5, 1867, to be transported to Memphis. The agent of the railroad company assured the plaintiff's agent on that day that the tobacco should go forward at 6 o'clock that afternoon, and if it had been forwarded at that time it would not have been injured. In reliance upon this statement the plaintiff's agent left Chattanooga that afternoon, so that he could not subsequently look after the tobacco. The railroad company did not send it out until the next morning, when the train that carried it was stopped by landslides and wash-outs that had occurred during the night, and compelled to return to Chattanooga, where a disastrous flood damaged the tobacco. But the supreme court held that the delay was too remote a cause of the damage to be actionable; that the flood was a new, intervening cause, that could not have been foreseen,—and declared that even if the agent of the railroad company had absolutely agreed to forward the tobacco the night before the flood, and if it would have entirely escaped injury if it had been so forwarded, the delay in performing the contract would not have been more than the remote cause of the loss.

In the same way, in the case at bar, the acts of the plaintiff in failing to return to the caboose at the end of the five minutes he was told the train would remain at Spooner, in climbing upon the cars, and walking back on their tops to the rear of the last stock car, so that he arrived there at the very instant when the caboose was to be changed, were independent, intervening causes, that prevented the natural and probable consequences of the conductor's assurances, and the movement of the train, and brought about an unnatural and improbable result, that no human foresight could have anticipated,—an accident that resulted from a strange combination of fortuitous circumstances, few of which seem to have been more remote, or less likely to have produced the surprising consequence, than the conversations and acts of the conductor.

The view we have taken of this assignment of error makes it unnecessary to consider others. The judgment below is reversed, with costs, and the cause remanded, with directions to grant a new trial.

BENNETT et al. v. GLENN.

(Circuit Court of Appeals, Fourth Circuit. May 24, 1893.)

No. 38.

CORPORATIONS—STOCKHOLDERS—UNPAID SUBSCRIPTIONS—DEFENSES.

In an action against a stockholder to recover an assessment for unpaid subscriptions, it is no defense that the liability of certain other stockholders on their subscriptions had previously been compromised by the creditors for less than the amounts due, when it appears that the entire unpaid subscriptions of all the stockholders had to be exhausted in order to satisfy the creditors' claims.

In Error to the Circuit Court of the United States for the District of West Virginia. Affirmed.

Statement by FULLER, Circuit Justice:

This was an action of assumpsit, brought by John Glenn, trustee, against J. W. Bennett, to recover an assessment on 50 shares of the capital stock of the National Express & Transportation Company. After the action was commenced, Bennett died, and the case was revived against his executors. The declaration averred that in November, 1865, Bennett subscribed for 50 shares of the stock of the express company, and became a stockholder therein. That in 1866 the company assigned all its assets to Hoge and other trustees for the benefit of creditors. That in a suit in the chancery court of Richmond, in which creditors of the company were complainants, and the company, the trustees, and others were defendants, a decree was rendered December 14, 1880, which ascertained the company's indebtedness; found 80 per cent. of the stock subscription was unpaid; made a call and assessment of 30 per cent.; appointed Glenn trustee in place of the original trustees, and directed him to collect the assessment. That in 1884 the trustee brought suit upon this assessment against Bennett, and recovered judgment for \$1,328.33, which was paid in full. That on March 26, 1886, an additional assessment of 50 per cent. was made, making \$2,500 on Bennett's stock, for the recovery of which, with interest, this action was commenced.

The executors filed pleas of non assumpsit, statute of limitation of ten years and of five years, and a fourth plea as follows: "And the defendants, for further plea in this behalf, say the plaintiff his action aforesaid thereof against them ought not to have, because they say, if their testator, Jonathan M. Bennett, in his lifetime, subscribed for _____ shares of the capital stock of the joint-stock company and corporation known and called the National Express and Transportation Company, as the plaintiff in his declaration hath averred, that a certain Michael C. Garber subscribed for 100 shares of the capital stock of said company, of the par value of \$10,000; that Thomas Opie subscribed for 60 shares of the capital stock of said company, of the par value of \$6,000; that Hugh W. Sheffey subscribed for 150 shares of the capital stock of said company, of the par value of \$15,000; that W. H. Crank subscribed for 20 shares of the capital stock of said company, of the par value of \$2,000; that Green Peyton subscribed for 100 shares of the capital stock of said company, of the par value of \$10,000; that L. W. Lepop subscribed for 100 shares of the capital stock of said company, of the par value of \$10,000; that Sterling and Lepop subscribed for 25 shares of the capital stock of said company, of the par value of \$2,500; that L. R. Snead subscribed for 20 shares of the capital stock of said company, of the par value of \$2,000; and that William D. Hart subscribed for 50 shares of the capital stock of said company, of the par value of \$5,000. And the defendants further aver that after the said several subscriptions to the capital stock of said company a certain suit in equity was instituted in the chancery court of the city of Richmond, in the state of Virginia, in which John W. Wright, sheriff of the city of Richmond, and, as such, administrator of W. W. Glenn, deceased, and other persons, creditors of the National Express and Trans-

portation Company, were complainants, and the said National Express and Transportation Company and John Blair Hoge and John F. Kelly, trustees, and certain other persons, were defendants, and in and to which said chancery cause the creditors of said company were and became parties thereto, and by consent of said creditors and by the adjudication and decrees of the court therein there was paid and accepted in full discharge, acquittance, satisfaction, and release of subscription of stock of the said Michael C. Garber, to wit, on the 18th of December, 1883, \$1,250, and no more; of the subscription of the stock of Thomas Opie, to wit, on the 18th of March, 1884, \$500, and no more; of the subscription of the stock of Hugh W. Sheffey, to wit, on the 18th of March, 1884, \$1,000, and no more; of the subscription of the stock of W. H. Crank, to wit, on the 18th of March, 1884, \$600, and no more; of the subscription of the stock of L. W. Lepop, and the subscription of the stock of Sterling and Lepop together, to wit, on the 18th of March, 1884, the sum of \$650, and no more; and of the subscription of the stock of William D. Hart, to wit, on the 18th March, 1884, \$950, and no more. And these defendants further aver their testate, J. M. Bennett, before the institution of this suit aforesaid, paid to the plaintiff on his subscription of stock to the National Express & Transportation Company \$1,328.30, with interest from 25th June, 1886. And the said defendants say that by reason of such full discharge, acquittance, liquidation, satisfaction, and release of said subscribers, and of said subscriptions of stock to said capital stock other than to the testator of the defendants, released, acquitted, and discharged the testator of the defendants from his said subscription to the capital stock of said company, and this the defendants are ready to verify. Wherefore they pray judgment," etc.

This fourth plea was held insufficient, and struck out, and the defendants excepted. Issue was joined on the other pleas, and trial had, and upon the evidence a verdict was returned in favor of Glenn, trustee, for \$3,441.66, with interest from July 6, 1892. Judgment was entered on the verdict, and the cause brought to this court on writ of error.

John Brannon, for plaintiffs in error.

B. M. Ambler, for defendant in error.

Before FULLER, Circuit Justice, and DICK and HUGHES, District Judges.

FULLER, Circuit Justice, (after stating the facts.) The sole question for determination is whether the circuit court erred in striking out the fourth plea. It is well settled that decrees against a corporation of the character of those referred to in the pleadings necessarily bind the stockholders in the absence of fraud, and cannot be reviewed or impeached in collateral suits on assessments thereby made. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. Rep. 867. The decrees of December 14, 1880, and of March 26, 1886, determined that the entire unpaid balance of the stock subscription was necessary in order to pay the indebtedness of the corporation. The judgment recovered against Bennett in 1884, and paid by him, determined his liability as a holder of 50 shares of stock, and defendants were, to that extent at least, concluded in this second suit. *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. Rep. 746. But it is said that because certain stockholders, under the orders of the court, and with the consent of creditors, were allowed to compromise the claims against them on paying less than the full amount of their subscription, this operated to discharge

Bennett, upon the theory that the unpaid subscriptions constituted a trust fund for the payment of creditors, and a part of the subscribers could not be released to the prejudice of the others, and the latter be held liable. It will be observed that these compromises were all made, according to the plea, prior to April, 1884, and that the decree of March 26, 1886, was not resisted, so far as the record shows, upon the ground that such compromises affected the liability of those who had not settled; and by no averment in the plea were the compromises attacked as having been otherwise made than fairly and in good faith. Nor did the pleader attempt to show that the defendants were in any manner prejudiced.

In any view, Bennett was not concerned with the question whether other subscribers were discharged or not, unless his liability was improperly thereby increased; and the plea did not state that if the entire amount subscribed for by the stockholders alleged to have been discharged had been paid in full, the second assessment, as made, would not have been necessary. On the contrary, so far as appears, the entire liability of every stockholder had to be exhausted in order to pay the outstanding debts, and such is the conclusion to be drawn from the decrees. There could, therefore, be no equities to be adjusted between the company and individual subscribers, since each subscriber was compelled, in any event, to contribute to the full extent in order to satisfy creditors. The plea does not pretend to make a case of partial loss to be equitably apportioned, and, if any such aspect of affairs existed, it devolved upon the subscribers to develop it in the chancery court before the decree of March 26, 1886, was entered.

At all events, the question suggested cannot be raised in the action upon the call. It must be borne in mind that this was an assessment on an unpaid subscription, and not in enforcement of a statutory liability. The liability of the subscribers was several, and not joint. By the subscription each became a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. *Hatch v. Dana*, 101 U. S. 205. The impossibility of collection as to some subscribers, or collection in part under compromises made in good faith, could not furnish a defense at law to the liability of others on their contract of subscription; and the consent of the creditors to the particular compromises approved by the court prior to the decree of March 26, 1886, did not operate to render the binding effect of the latter any the less conclusive.

In holding the plea insufficient the circuit court was right, and the judgment is affirmed.

UNITED STATES v. OLLINGER.¹

(District Court, S. D. Alabama. May 10, 1893.)

1. EIGHT-HOUR LAW—WHO AMENABLE.

To render one amenable to the "eight-hour law" (Act Cong. Aug. 1, 1892) he must be an officer or agent of the United States, or a contractor or subcontractor whose duty it is to employ, direct, or control laborers or mechanics upon some of the public works of the United States, and he must have intentionally required or permitted such laborers or mechanics to work more than eight hours in any calendar day.

2. SAME—BUILDING BARGE TO SELL TO UNITED STATES.

The "eight-hour law" does not apply to the case of a man who, entirely at his own risk and cost, although under government inspection, builds barges which United States engineers agreed to purchase on completion for government use if found to conform to certain prescribed specifications.

At Law. On information against William Ollinger, brought under act of congress of August 1, 1892, for working employes over eight hours per day on stone barges built under the specifications of United States engineers. Defendant discharged.

M. D. Wickersham, U. S. Dist. Atty.

Guy C. Sibley, for defendant.

TOULMIN, District Judge. This case is submitted on an agreed statement of facts, and will be decided on its merits as shown by the facts. The act of congress on which this prosecution is founded provides as follows:

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States government, or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics, to require or permit any such laborer or mechanic to work more than eight hours in any calendar day, except in case of extraordinary emergency."

Sec. 2. "That any officer of the United States government or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia, who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed one thousand dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof."

To render the defendant amenable to this law he must have been an officer or agent of the government of the United States, or a contractor or subcontractor whose duty it was to employ, direct, or control laborers or mechanics employed upon some of the public works of the United States. He must have intentionally violated the provisions of this act by requiring or permitting such laborers

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

or mechanics to work more than eight hours in any calender day. It is not claimed that he is an officer or agent of the government of the United States, but the contention is that he is a contractor employed upon public work of the United States, having under his employment, direction, and control laborers and mechanics engaged in said public work, and who were by him required or permitted to work more than eight hours in any one day.

Assuming that this is intended as a charge that defendant was a contractor upon the public works of the United States, whose duty it was to employ, direct, or control laborers and mechanics employed upon said public works, I will consider it as such. The facts of the case are that Capt. Philip M. Price, of the corps of engineers of the United States, and on behalf of the government of the United States, invited the defendant to bid for the building of two stone barges, which, upon certain conditions, were subject to the acceptance or rejection of the government authorities; that the defendant, on the 2d of March, 1893, proposed to furnish to the government of the United States the two stone barges complete for the sum of \$2,470, and to deliver them at Mobile, Ala., within 40 days after receipt of order for them; and agreed to execute the work according to specifications and drawings to be furnished him. This proposal was made to Capt. Philip M. Price on the 13th of March, 1893. He accepted it in writing, and in his letter of acceptance says, if the barges be built according to specifications furnished, and are delivered at Mobile, Ala., within 40 days after the receipt of his (Price's) letter, they will be purchased from defendant at price stated, viz. \$2,470. In his letter Capt. Price says: "During the building of the barges proper facilities must, of course, be afforded my agent for inspecting material and workmanship." Under this agreement defendant commenced work on the barges on March 20, 1893, and for several days worked his men nine hours per day, instead of eight hours per day. A short time thereafter this prosecution was commenced, and the case now comes before the court for its decision on an agreed statement of facts, as herein above set forth.

In my opinion, a statement of the facts is alone sufficient to show that the act of congress under which this prosecution is sought to be maintained has no application to the case. It is doubtful whether the defendant could ever be considered a contractor. If a contractor, he was a contractor to furnish to the government of the United States two barges, to be delivered within 40 days from the making of the contract, which, if built according to certain specifications furnished him, were to be purchased by the government from him. The barges were his, and were to be his until the government purchased them. They might or might not become the property of the government. The transfer of title to them depended upon conditions which could not be determined until the barges were completed. It is clear to me that the building of the barges was in no sense a part of the public works; no more so than the mining of coal contracted to be fur-

nished to the navy and marine service of the United States according to specifications as to quantity and quality, or the furnishing under contract with the government of the United States of lumber and brick to be used in building quarters at Mt. Vernon barracks for officers or soldiers or any other public use, according to specifications as to kind, quality, and quantity. It would hardly be contended that the mining of such coal, the sawing of the lumber, or making the bricks, would be public works in contemplation of the act of congress, or that the laborers engaged in the work of mining and in making the lumber and bricks were the laborers whose services and employment congress has undertaken to regulate and limit. I fail to see any difference in principle in the cases mentioned and that under consideration.

Furthermore, the act of congress provides that it shall be unlawful for any such contractor—not a contractor to do work for the United States, but a contractor upon any of the public works of the United States—whose duty it shall be to employ, direct, or control the services of such laborers or mechanics, to require or permit them to work more than eight hours in any calendar day; manifestly referring to laborers and mechanics employed upon such public works of the United States. There was no duty expressly or impliedly imposed on the defendant by his contract to employ, direct, or control any laborer or mechanic on the work of building the barges. It does not appear that the defendant employed any laborers or mechanics on the work. It appears that he had men who worked, but whether as employees or subcontractors does not clearly appear. If he employed them as laborers and mechanics, he did so for his own benefit, and not because of any duty on him arising out of his contract with the government. It is clear, I think, that the defendant was not a contractor within the purview of the act of congress. In view of the previous legislation on the subject by congress, in view of the limited power of congress to legislate on the subject, which power can only be exercised as applying to laborers and mechanics who may be employed by or on behalf of the government of the United States, I am satisfied that it never was the legislative understanding and intent that the act should apply to a case like the one at bar.

The defendant should be discharged, and it is so ordered.

THOMAS v. BLYTHE.

(Circuit Court of Appeals, Fourth Circuit. May 23, 1893.)

No. 39.

BANKRUPTCY—LIMITATION OF ACTIONS.

Rev. St. § 5057, which bars suits between an assignee in bankruptcy and any person claiming an adverse interest in property transferable to or vested in the assignee, does not apply to a proceeding by the assignee against the bankrupt himself, to secure a fund withheld by him, and omitted from his schedules, in fraud of the assignee's rights. 43 Fed. Rep. 784, affirmed.

v.55F.no.9—61

Appeal from the District Court of the United States for the District of South Carolina.

In Bankruptcy.

For report of the decision of the court below, see 45 Fed. Rep. 784.

J. P. K. Bryan, for appellant.

William E. Earle, for appellee.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and DICK, District Judge.

GOFF, Circuit Judge. William M. Thomas was on February 3, 1871, on his own petition, adjudged a bankrupt in the district court of the United States for the district of South Carolina. He has not, as yet, been discharged as such. At the time he was so adjudicated, a suit was pending in the court of common pleas, Greenville county, S. C., in his name, as plaintiff, against Mary Raymond, defendant, the object of which was to foreclose a mortgage on a lot of land in Greenville, executed by the said Mary Raymond to secure the payment of a note given by her to William M. Thomas for \$7,000, dated August 25, 1863. Such proceedings were had in that cause that, after the crediting of the proceeds of the sale of the mortgaged property, there was still due said Thomas on such claim the sum of \$3,421.04, for which a judgment was rendered on the 17th day of November, 1873. On the 28th day of July, 1871, an order was entered in the case, reciting the bankruptcy of William M. Thomas, and authorizing his assignee to continue the prosecution of the suit. The judgment rendered in Greenville county was transferred and recorded in Charleston county, where property of the judgment debtor was situated, and the clerk of the court was notified by Blythe, assignee, in writing, (of which record was made,) that he, as such representative of the bankrupt, was the owner of such judgment. On the 19th of January, 1876, John D. Warren instituted a suit against Henry M. Raymond (the heir at law of Mary Raymond, then deceased) and other parties, creditors of her estate, the object of which was to ascertain the debts and their priorities of said Mary and Henry M. Raymond, and satisfy the same by sale of the property held by the said Mary at the time of her death. William M. Thomas, bankrupt, and Absalom Blythe, his assignee, were parties defendant to that suit. The former, in his answer, repudiated the claim of his assignee to any interest in the Raymond judgment, while the latter, by his answer, insisted that the proceeds of the same were due him, and were the subject-matter of an issue pending in the United States district court for the district of South Carolina. This controversy the state court did not decide, but it ordered that, from the proceeds of the property sold, the full amount due on the judgment should be paid into the registry of the said district court to the credit of the bankruptcy proceedings mentioned, which was done on the 29th day of June, 1882. The assignee in bankruptcy then filed his petition

in the district court, praying that the fund be decreed to be a part of the estate of the bankrupt, and subject to distribution among his creditors. The contention of the assignee was that at the time of the adjudication of the bankruptcy of Thomas the said bankrupt was the owner of the Raymond claim, while, on the other hand, Thomas insisted that he had, previous to his bankruptcy, assigned the same for a valuable consideration to one Peter Thomas. The matter was referred by the court to a master, and a number of witnesses were examined, the said William M. Thomas among them. It appears that the Raymond claim had been assigned by William M. Thomas on several occasions to different persons, and the assignments afterwards canceled. Considerable feeling has been engendered during the progress of this suit, which has been earnestly prosecuted, and determinedly defended. The evidence is conflicting. We do not deem it necessary to set out the testimony of the different witnesses. It is voluminous, and, to say the least, it discloses a peculiar state of affairs, relative to the assets of the bankrupt estate. The assignee claimed that the evidence demonstrated that an effort had been made by the bankrupt to prevent the application of the fund realized from the Raymond judgment to the benefit of his creditors. The court below, in effect, so found. In this finding of the district court that William M. Thomas was, at the time he was adjudged a bankrupt, the owner of the Raymond judgment, and that title to it passed to his assignee, we concur. Sustaining, as we do, the court below in this conclusion, which in fact disposes of the entire controversy, we necessarily thereby disagree with the appellant in all his exceptions to the decree appealed from, save the one relating to the statute of limitations. Appellant contends that the district court erred in not holding that the proceeding by the assignee, asking the court to decree the proceeds of the Raymond judgment to be assets of the bankrupt's estate, was barred by the statute, because the petition having that object in view was not filed within two years after the adjudication of bankruptcy. The litigation in the state court in connection with this claim was not adverse to the assignee down to the time that William M. Thomas filed his answer in the Warren suit, in which he denied that his assignee had any right or interest in the same. From that time to the 29th of June, 1882, when the fund was transferred to the district court, this controversy was continued between the bankrupt and his assignee; and certainly it cannot be maintained that the statute was running against the latter when the litigation concerning the claim was so pending. When the transfer was made to the district court, the formal petition of the assignee was tendered, asking that the distribution of the fund be made, and the decree entered in connection therewith is the one appealed from, now under consideration. The appellant relies on section 5057 of the Revised Statutes of the United States, which reads as follows:

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest,

touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee; and this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

We hold that this provision of the bankrupt law does not apply to funds recovered in litigation to which the assignee, as well as the adversary claimant, were parties, and where the court holds the same for years pending proceedings to ascertain its proper disposition. The supreme court of the United States has held that this section of the Revised Statutes relates to suits by or against the assignee with respect to parties other than the bankrupt. *Phelps v. McDonald*, 99 U. S. 298. It has no application to a case like this, where the proceeding is against the bankrupt himself, and the object is to secure to his creditors certain funds withheld by him, and omitted from his schedules, in fraud of the rights of his assignee. The bankrupt cannot plead the statute of limitations against his assignee.

The only remaining exception is one relating to certain allowances made by the district court for fees and expenses. The court in which services are rendered and expenses incurred, where all the circumstances transpire, where the parties are known and the record is made, is, as a general rule, better qualified to determine such matters than is the appellate court. With the action of the court below in the matter of the allowances complained of we find no error. The decree appealed from is affirmed.

LYON et al. v. MARINE, Collector of Customs.

(Circuit Court of Appeals, Fourth Circuit. May 23, 1893.)

No. 43.

1. EVIDENCE—JUDICIAL NOTICE—FACTS OF NATURAL HISTORY—CUSTOMS DUTIES.

In customs duties cases the court will take judicial notice of the general facts of natural history, including the fact that the unimproved native sheep of all countries produce fleeces whose value is depreciated more or less by the undue quantity of hair growing on the belly, flanks, and parts of the thighs and arms of the animals.

2. CUSTOMS DUTIES—CLASSIFICATION—EVIDENCE—APPEAL.

Certain bales of merchandise purporting to be the fleeces of the unimproved North China sheep were imported from Shanghai, the papers being regular, and free from all question of fraud. The goods consisted of very low grade wool, containing a large mixture of coarse, short hair, and cost three cents a pound in Shanghai, and were worth but nine cents in Baltimore. The importer testified that he had lived in China, and had dealt in the fleeces of the China sheep, and that the importation consisted of such fleeces. A customhouse expert, however, testified that the hair in the fleeces was goat's hair, and on this evidence the collector and board of appraisers placed the importation in class 2, par. 377, Act Oct. 1, 1890, and assessed a duty of 12 cents a pound, and this conclusion was sustained by the circuit court. *Held*, that an appellate court, taking judicial notice of the fact that a large proportion of hair grows on the bodies of unimproved sheep, would find that the whole importation consisted of the fleece of the sheep, and therefore belonged to class 3, (paragraph 378,) and was dutiable at 32 per cent. ad valorem.

Appeal from the Circuit Court of the United States for the District of Maryland.

This is an appeal from a decision of the board of general appraisers at the port of New York upon an appeal to them from the classification by the collector of the port of Baltimore, and from the rate of duty imposed by him upon certain merchandise imported by Lyon, Hall & Co., from Shanghai, China, by way of London, per steamship *British Crown*, September 26, 1891. Reversed.

John F. Preston, for appellants.

John T. Ensor, U. S. Atty., for appellee.

Before GOFF, Circuit Judge, and DICK and HUGHES, District Judges.

HUGHES, District Judge. Under the existing tariff act imported wools and hairs are divided into three classes. 26 Stat. 594. In the first class are placed the wools of the merino and of the various downs sheep of English breed, and wools from Australia and other countries, named in the clause. These are all wools of fine fiber. Upon these wools a duty of 11 cents per pound is levied. This class of fine wools does not come under consideration in the case at bar. See paragraphs 376, 384. In the second class are placed the wools of improved sheep, including long combing wools, and the hairs of higher breeds of camels, of the alpaca, and the better breeds of goats, and of other animals producing the better grades of hair. On these a duty of 12 cents per pound is imposed. See paragraphs 377, 384. In the third class are placed the coarse fleeces of the unimproved sheep of certain South American states, Smyrna, and Russian camel's hair, and such coarse wools as have been usually imported from Turkey, Greece, Egypt, Syria, and elsewhere, excepting improved wools. The duty imposed on these inferior and cheap substances is 32 per cent. ad valorem. See clauses 378, 385.

The appellants, Lyon, Hall & Co., of Baltimore, importers of wools and merchandise, received in that city on the 26th of September, 1891, from Shanghai, China, by the steamship *British Crown*, an invoice of various goods, embracing eight bales of the fleeces of North China unimproved sheep, composed of both wool and hair. The shipping papers relating to those bales, the bill of lading, invoice, declaration, and shipping certificate were regular, and free from all question of fraud, and those from Shanghai were authenticated by the deputy consul general of the United States at that port.

The testimony of J. Crawford Lyon, one of the appellants, was that he was a dealer in the products of North China; that he had been so for two years; that he had been a resident of China, and had had experience there as a dealer in the fleeces of China sheep; that the cost at Shanghai of the contents of the eight bales that have been named was three cents a pound; that the stuff was worth not more than nine cents in Baltimore; that it was

ordered from and shipped by one of the most responsible firms in Shanghai; that it was taken from the pelts of China sheep, and the hair embraced in the fleeces was of the lowest possible value, being assimilated with the hair of slaughterhouses and tanyards.

The question of what duty should be required on these bales was referred by the collector at Baltimore to a board of appraisers. Under the influence of the testimony of an expert employed in and sent from the customhouse in New York, the board of appraisers at Baltimore decided that the duty on the cheap, inferior, and offensive stuff contained in these bales should be the same as on the highest grade of improved wools and hairs described in class 2, par. 378, of the tariff act of 1890; that duty being 12 cents per pound. The value of the stuff being not more than 9 cents a pound, this duty would be 133 per cent. ad valorem, instead of the 32 per cent. imposed by the act on inferior wools and hairs, and would be prohibitive. Appeal was taken from this ruling of the board of appraisers to the circuit court of the United States for the district of Maryland, which affirmed the decision of the appraisers. The case is here by appeal of the importing house from the decision of the circuit court of the Maryland district.

The United States attorney, who represents the appellee, avers that "the question in the case is—First, whether this merchandise is goat hair, or hair of other like animals, or is the hair of the North China sheep, which, the appellants claim, is not an animal like the goat; and, second, whether the packages contain goat hair mixed with the product of the China sheep." The honorable counsel then contends on behalf of the appellee that the sheep is an animal like a goat, and that the hair of the North China sheep is to be subjected, not only to the same tax as the hair of goats, but as that imposed upon the hair of the alpaca and superior species of goats contemplated by paragraph 377 of the act of 1890, class 2. The experts on whose testimony the decision below was based seem to assume that the fleeces of sheep do not contain hair. The writers on sheep, on the contrary, treat the hair which grows upon the bodies of unimproved sheep as the principal object to be removed by crosses with improved breeds. The native sheep of the United States, the native sheep of all countries, produce fleeces whose value is depreciated more or less by the undue quantity of hair contained in them, sneared from the belly, flanks, and parts of the thighs and arms of the animal. One of the aims in improving native sheep by judicious crossing is to reduce the percentage of this deleterious product. The native sheep of the United States and of all the countries named in paragraph 378, page 594, (class 3,) of the tariff act of 1890 have a moderate percentage of hair in their fleeces. This is common knowledge, taught by all text-books on sheep, and within the judicial cognizance of the courts. The general facts of natural history are also within the judicial cognizance.

The theory on which the experts testified in this case—a theory derived wholly from their own surmises and preconceptions—is

that unimproved sheep do not produce hair, and that, if hair is found in their fleeces, it is necessarily goats' hair; and, in this case, not only goat's hair, but goat's hair of the high grades contemplated by paragraph 377. Counsel for appellee insists that, though this may be a mistake, and though the hair in the packages under consideration be the hair of sheep, yet, inasmuch as the sheep is a "like animal" to a goat, therefore the hair of the North China sheep is subject to the high tax imposed upon the high-grade hair of the Arabian camel, and the alpaca, and their like.

But the sheep, in respect to its fleece, is not a "like animal" to the goat. In respect to its fleece, the sheep is almost *sui generis*. In that respect it differs wholly from the goat, and from almost every other known animal. In respect to their coats, the horse, the ox, the hog, the dog, the cat, the deer, the fox, the donkey, and the monkey are each and all more like the goat than the sheep. When experts undertake to assimilate the fleeces of sheep to the all-hair coatings of the goat, they abandon fact, and resort to mere surmise. The substance which is the subject of this suit is the lowest grade of sheep's fleeces, combined of mean wool and coarse, short sheep's hair; and yet the experts whose theories induced the decision of the board of appraisers appealed from have persuaded them that this wretched substance is liable to be taxed at the same rate with the highest qualities of the wools of improved sheep, and of combing wools, and of the fine hairs of the Asiatic camel, and of the alpaca and the finely coated goats. Such a decision is contrary to the reason of the law and the justice of the case. The policy of congress was as simple as obvious. The finest grades of wool of short fiber, represented by the fleeces of the merino sheep and the sheep bred originally on the several downs of England, and the sheep of the other countries named in paragraph 376, are taxed 11 cents a pound. Wools of long fiber, from improved Cotswolds and like highly-bred sheep, and the fine hairs of camels, alpacas, and goats of high breed, most of them exceeding in value the fine wools of the merino class, are subjected to the higher duty of 12 cents. Finally, wools and hairs from the sheep described in paragraph 378, all more or less inferior in value to those of classes 1 and 2, most of them known commercially to be almost as cheap in value and inferior in quality as the repulsive stuff filed as exhibits in this case, are subjected to an *ad valorem* duty equal to one-third their market value, whatever that may be. In accordance with this obvious policy of the tariff act of 1890, we are of opinion that the cheap stuff which is the subject of this litigation is not liable to the tax imposed upon the most valuable wools and hairs known to commerce; but is liable to the duty of 32 per cent. *ad valorem* imposed upon all inferior wools and hairs sold in the markets at the lowest range of prices.

A decree will be entered to that effect, and reversing the decree below.

ERHARDT, Collector, v. BALLIN et al.

(Circuit Court of Appeals, Second Circuit. May 23, 1893.)

1. CUSTOMS DUTIES—CLASSIFICATION—EXPERTS—COMPETENCY.

In an action to recover duties illegally exacted, where the issue was whether certain articles were within the commercial designation "hemmed handkerchiefs," defendant offered a witness who for many years had been engaged in the manufacture of cotton handkerchiefs and articles similar to those in question, but who had never bought or sold imported handkerchiefs, or been present when they were bought or sold. *Held*, that he was nevertheless competent to testify by what name the imported articles in question were known at the time the tariff act was passed, for his want of personal experience in handling the imported goods only affects the weight of his testimony.

2. SAME.

Though one of the witnesses was at the time of the trial engaged in the handkerchief business, and had been prior to 1881, it was proper to exclude the question what was included in the term "hemmed handkerchiefs" in 1883, where it was shown that from 1881 to 1885 he was wholly engaged in a different business.

In Error to the Circuit Court of the United States for the Southern District of New York.

At Law. Action by William Ballin and others against Joel Erhardt, as collector of the port of New York, to recover duties paid under protest. There was judgment for plaintiffs, and defendant brought error. Reversed.

Chas. D. Baker, Asst. U. S. Atty., for plaintiff in error.

Everit Brown, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges, and WHEELER, District Judge.

WALLACE, Circuit Judge. The plaintiff in error was defendant in the court below. The suit was brought against him to recover duties alleged to have been illegally exacted by him, as collector of the port of New York, upon the importation by the plaintiffs, during the year 1889, of certain cotton goods, which goods he classified as "hemmed handkerchiefs," dutiable at 40 per cent. ad valorem, under one of the clauses of Schedule I of the tariff act of March 3, 1883. The plaintiffs insisted that the importations were articles which at the date of the passage of the act were commercially known as "mufflers," and not "handkerchiefs," and as such should have been classified under another clause of the same schedule, as "manufactures of cotton not specially enumerated," and subjected to duty at only 35 per cent. ad valorem. The issue litigated upon the trial was whether the imported articles were "hemmed handkerchiefs," according to the commercial understanding of the term prevailing in this country at the time of the passage of the tariff act. The plaintiffs gave testimony to show that they were not, but that they were always bought and sold as "mufflers," and that they were used for neckwear only, and that in commercial signification the term "handkerchief" did not include

articles other than those designed for use in wiping the face or hands. To controvert this testimony the defendant offered to prove by witnesses that articles like the importations were bought and sold as hemmed handkerchiefs, and that the trade meaning of the term "handkerchief" was identical with the definition of the lexicographers, and included "a cloth to be worn about the neck; a neckerchief." The testimony thus offered by the defendant was excluded by the trial judge upon the objection of the plaintiffs that the witnesses had not been shown competent to testify to the matter, and he thereafter directed a verdict for the plaintiffs. The exceptions to these rulings present the questions for consideration upon this writ of error.

We think the testimony offered by the witness Hermann was erroneously excluded. He had been a manufacturer and seller at wholesale of handkerchiefs, including every variety of cotton handkerchiefs, and articles similar to those in controversy, for 25 years, at the city of New York. He was asked the question: "By what name were the articles before you [specimens of the importations of the plaintiffs] known in trade and commerce in this country in 1883?" Being cross-examined to test his competency to answer the question, he stated that he had never bought or sold any imported handkerchiefs, or been present when any were bought or sold, and that all the handkerchiefs he had sold had been, with a few exceptions, his own manufacture. Thereupon the judge sustained the objection to the competency of the witness. It is insisted that as the witness had shown that he did not know what name was given to the articles by importers, and was not familiar with the import trade in the article, he was not competent to testify.

It was said in *Elliott v. Swartwout*, 10 Pet. 137, that the laws imposing duties on the importations of goods are intended for practical use and application by men engaged in commerce, and hence it had become a settled rule, in the interpretation of statutes of this description, to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used. The court observed that congress applied its attention to the description of articles as they derived their appellations in our own markets, "in our domestic as well as our foreign traffic." Since that adjudication it has frequently been said by the courts that the commercial designation of an article "among traders and importers," when clearly established, fixes its character for the purposes of the tariff laws. But we are not aware of any adjudication in which it has ever been declared that the commercial meaning is to be ascertained by a resort solely to the understanding of importers. Tariff laws are addressed, not to importers exclusively, but to the whole commercial community; to the manufacturer, the jobber, the retail merchant, the trader of every description, as well as the importer. The manufacturer, who sells only to the jobber, has a narrower opportunity than the jobber to become generally familiar with the commercial designation of the articles; but so, also, has the impor-

ter. The jobber or wholesale merchant who buys of the manufacturer and the importer, and sells to the retailer, is engaged in trade with all the more prominent classes of the commercial community. In the case of *Dieckerhoff v. Robertson*, 44 Fed. Rep. 160, it was said:

"In the case of a manufacturer who has a factory and makes goods for himself, and puts his own name upon them, and advertises them, his experience is one-sided, because any one who goes to his factory goes to buy the goods which he himself has made; but a man who is a buyer, and goes to different importers and different manufacturers, and buys from them, necessarily, in the transaction of that business, acquires a knowledge of general trade designation."

The same observations apply measurably to the importer. The witness Hermann, who had dealt with jobbers for 25 years, presumably must have known what was the commercial designation among them of the articles he had sold them. It may be reasonably assumed that the name by which they were known among this large class of traders was the name by which they were generally designated by traders in this country. If the witness did not know the commercial designation prevailing among importers, that circumstance only went to the value of his testimony, and to the weight to be given to it by the jury.

Whether a witness is shown to be qualified to testify to any matter of opinion is always a preliminary question for the judge presiding at the trial, and his decision thereon is conclusive, unless it appears to have been based upon some erroneous fact of legal principles, or not justified by the state of the evidence at the time; but, if it fairly appears upon the facts shown that the witness is competent to give an opinion, it is not for the judge to pass upon its value, but is for the jury to determine how much weight is to be given to it. *Nunes v. Perry*, 113 Mass. 274; *Bedell v. Railroad Co.*, 44 N. Y. 367; *Spring Co. v. Edgar*, 99 U. S. 645; *Slocovich v. Insurance Co.*, 108 N. Y. 62, 14 N. E. Rep. 802. The witness had a degree of special familiarity with the subject of the inquiry addressed to him, acquired by observation and experience, which entitled him to speak as an expert.

The witness Leibermann had been a wholesale dealer in handkerchiefs in this country for about 20 years, but between the years 1881 and 1885 had gone out of the handkerchief business, and was engaged in that of selling ladies' neckwear. He was asked, in substance, whether the term "handkerchiefs," in the sense in which it was used in trade and commerce in this country in 1883, included neckerchiefs, or articles other than those intended for use in wiping the face or hands. His testimony was excluded upon the observation by the trial judge that, although he was competent to testify as to the trade meaning of the term in 1881, he could not know how the trade name may have changed between then and 1883. It is undoubtedly the rule that the commercial designation of an article obtaining at the time of the passage of the tariff act is the designation which congress is presumed to have had in mind; but this rule is not a rule of evidence by which the proof of commercial designation is required to be confined to the precise date of the act. A commer-

cial designation prevailing shortly before and shortly after the date of the passage of a tariff act will be presumed to have been the designation prevailing at the time. The witness was sufficiently informed to testify as to the trade meaning of the terms in question during a period of several years prior and subsequent to the date of the act. If he had been asked to give his opinion as to its meaning at those times, we entertain no doubt that he would have been entitled to do so. But this was not the question asked him. He was asked to state what the meaning was at a specific time, when, as he had already stated, he did not know what its meaning was at that time. In the form in which the question was put, we think it was objectionable, and the ruling of the trial judge was correct.

It is apparent that the court directed a verdict for the plaintiffs because there was no evidence to controvert the testimony introduced by them showing that the importations were commercially known in this country, at the date of the tariff act, as "mufflers," and not as "hemmed handkerchiefs." Thus, the exclusion of the evidence offered by the defendant, which, if it had been received, would have met the evidence introduced by the plaintiffs, and presented a question of fact for the jury, was fatal to the defense. As the exclusion was erroneous, the ruling must lead to a reversal of the judgment. The judgment is reversed.

SAYRE v. SCOTT.

(Circuit Court of Appeals, Third Circuit. May 23, 1893.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—FRUIT PARERS.

In letters patent No. 232,371, granted September 21, 1880, to Robert P. Scott, for an improvement in fruit parers, the first claim was for "the rotating dish-shaped knife, H, having a continuous cutting edge, in combination with mechanism for operating the same." *Held*, that "a continuous cutting edge" herein means an edge continuous in action, or which continuously cuts; and hence a device, otherwise an infringement, is not saved from infringement by the fact that its cutting edge has in it a nick or notch.

2. SAME—VALIDITY—PRIOR STATE OF ART.

This patent, which covers a device wherein the plane of the cutting edge of the knife is perpendicular to the spherical surface of the fruit to be pared, and which in consequence completely and satisfactorily pares the fruit in all parts, and of whatever shape, is not anticipated by patent No. 114,867, issued May 16, 1871, to the same party, for a device in which the knife was a disk, with the plane of its cutting edge tangent to the surface of the fruit, which was imperfect in its operation, and the result accomplished.

Appeal from the Circuit Court of the United States for the District of New Jersey.

In Equity. Suit by Robert P. Scott against Louis A. Sayre for the alleged infringement of complainant's patent. There was a decree for complainant, and defendant appeals. Affirmed.

A. Q. Keasbey and J. C. Clayton, for appellant.
Wm. G. Henderson, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and WALES,
District Judges.

ACHESON, Circuit Judge. This was a suit in equity brought by Robert P. Scott against Louis A. Sayre, the appellant here, for the infringement of letters patent No. 232,371, dated September 21, 1880, granted to the plaintiff upon an application filed December 2, 1878, for an improvement in fruit-paring machines. In his specification the inventor states:

"The object of my invention is to produce a rotary-knife fruit parer, more practical for general use, and more easily made, than that described in my former patent, of May 16, 1871,—No. 114,867."

The specification then further states:

"The invention consists in a new form of knife, being dish- or cone-shaped; the manner of transmitting motion to the knife from the driving wheel; the position of the knife against the fruit; a new arrangement of the fork, being a new form for the tines, and manner of holding them together on a spindle, with which they revolve; the manner of connecting the frame of the machine to the standard which supports the same. Finally, it consists in the general arrangement of the gearing, in manner of transmitting motion to all the parts from the driving wheel, particularly those parts required in addition to other paring machines, on account of my giving a new movement to the knife, not used in other parers previous to mine, the present plan differing entirely from that in my former machine. * * * The revolving knife, H, is of a form, and operated in a manner, claimed as new. It has the shape of an inverted frustrum of a cone, and is fast to, and revolves with, the shaft, w. This form gives the proper slant to the knife towards the fruit without the small bevel gears, as required in my former patent. It also presents several other advantages in the practical working of the machine. In the old device, uneven fruit would not come in contact with the knife at the center or highest point, in which case it did not work satisfactorily."

The patent has two claims, namely:

"(1) The rotating, dish-shaped knife, H, having a continuous cutting edge, in combination with mechanism for operating the same, and the revolving fork, O, substantially as and for the purpose described.

"(2) The combination, in a paring machine, of a knife, H, fork, O, pinion, D, driving wheel, B, idle wheel, E, pinion, F, spur wheel, G, knife pinion, v, table pinion, n, table wheel, C, frame, A, support, I, and latch, z, the whole being applied together so as to operate in the manner described."

Upon the branch of this case involving the right of the plaintiff to maintain his bill, the defenses here urged are noninfringement, and the invalidity of the patent, for lack of patentable novelty. The issue raised by the first of these defenses is the one chiefly discussed and insisted on in the appellant's brief, and to it we will now address ourselves.

The dish-shaped knife in the defendant's parer is made with a slight nick or slit in the cutting edge, which his expert describes as "a notch which forms a right-angled corner at a certain point in the periphery of the cutter." The defendant's machines were manufactured under two patents granted to Herbert Cottrell,—

the first dated September 11, 1883, on an application filed July 28, 1883, the other dated April 27, 1886, on an application filed September 21, 1885. The earlier of these patents, in the specification, states:

"The invention consists in the combination, with a cylindrical or circular cutter head, of an annular cutter, having an opening across the circumference to allow of its being sprung onto the head, and to contract and hold itself thereon by its elasticity."

This description indicates the character of the small notch in the cutting edge of the defendant's fruit parers, upon which he bases his defense of noninfringement. The function there mentioned is the only one ascribed to the opening by that patent. The specification of Cottrell's later patent, however, states that the two ends of the circular strip are kept sufficiently apart on the cutter head to enable the sharp angle of one end to come in contact with the fruit as the cutter revolves, thus avoiding the tendency to scrape the skin without cutting. We are not at all convinced by the proofs that any advantage is thus secured; but, if it be an improvement, these subsequent patents afford no ground of defense, as against the plaintiff in this bill. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. Rep. 970.

It is, however, strenuously insisted that by the claims of his patent the plaintiff is limited to a rotary, dish-shaped knife, with a cutting edge free from any nick or notch whatsoever therein. Is this the true construction of the patent? What do the words, "the rotary, dish-shaped knife, H, having a continuous cutting edge," fairly import? This language is to be read with reference to the purpose to be accomplished. The phrase, a "continuous cutting edge," applied to a fruit parer, means, we think, a cutting edge continuous in action,—an edge which continuously cuts. This is the reasonable construction, regard being had to the particular art. It is also the natural meaning of the words employed. Nor do we find anything in the contents of the file wrapper, or in the references therein contained, which requires us to impose upon the unambiguous terms of the claims a narrow and forced construction which practically would defeat the patent. Indeed, the closing correspondence between the office and the applicant indicates that it was the understanding of both that the word "continuous" covered a cutting edge, whether plain or serrated. But the patentee is not seeking, constructively, to expand his claims. He is resisting a very narrow interpretation of them, which would render his patent valueless. Now, under the proofs, it is perfectly clear that the defendant's cutting edge is continuous in action. Its substantial continuity remains, notwithstanding the nick or cut. When the machine is in operation the nick is imperceptible, and it is immaterial to the required work. For every practical purpose the defendant's rotating, dish-shaped knife has a "continuous cutting edge." The plaintiff's cutting edge and the defendant's cutting edge perform the same function, in substantially the same way, and accomplish the same result. Therefore,

in the sense of the patent law, they are the same thing. *Machine Co. v. Murphy*, 97 U. S. 120. This record, in our judgment, shows clear infringement by the appellant.

In considering the question of patentable novelty we naturally turn, in the first instance, to the earlier Scott patent, of 1871. Upon it the defense lays special stress. Now, the fruit-paring machine therein described undoubtedly has features found in the machine made in accordance with the patent in suit. In particular, it has a rotary knife. But that knife is a flat disk, and the highest point is the only proper cutting part. Consequently, that machine worked satisfactorily only when the fruit came against the highest point of the knife, and the paring was imperfect when it came against the one or other side of the knife at a lower point. This change in position was constantly occurring. It is true that peaches could be pared by the machine of 1871, when worked by a skillful hand, if the fruit was regular in shape, and of uniform size. But for common and practical use the machine was a complete failure. Now, a practical machine for paring peaches was much desired and sought after, yet the remedy for the serious defects of the 1871 parer, for a long time, was undiscovered. The changes the plaintiff ultimately made, which turned failure into success, were not obvious to ordinary mechanical skill. They were the result of much study, and persistent experiments, extending over a period of about two years, by one possessed of special knowledge and experience. All this, we think, is distinctly proved. The most important improvement which the plaintiff devised was the dish-shaped knife. This was a radical change. In the rotary knife of the earlier patent the plane of the cutting edge was tangent to the surface of the fruit, but in the machine of the 1880 patent the plane of the cutting edge is perpendicular, and substantially normal, to the spherical surface of the fruit. Thus the old difficulty, arising from the fruit getting down on the side of the knife, was entirely obviated. The cutting edge of the dish-shaped knife always bears the same relation to the fruit, no matter what its shape or size may be, and it pares every part of the fruit with equal facility.

We do not feel called on to discuss with particularity the numerous other prior patents put in evidence to sustain this branch of the defense. None of them is anticipatory of the plaintiff's improvement. Nor do we find in them anything suggestive thereof.

The plaintiff's fruit-paring machine of 1880, here involved, was devised with special reference to paring peaches, and it is proved that it was the first machine which successfully did that work. Before it was put upon the market, peaches were pared by hand. Its undoubted utility was quickly perceived by the trade, and immediately it went into extensive public use. This last-mentioned fact, of itself, it is well settled, is evidence of patentable novelty, and in a doubtful case will turn the scale in favor of the patentee. *Smith v. Vulcanite Co.*, 93 U. S. 486; *Magowan v. Belting Co.*, 141 U. S. 332, 343, 12 Sup. Ct. Rep. 71; *Topliff v.*

Topliff, 145 U. S. 156, 12 Sup. Ct. Rep. 825. In *Loom Co. v. Higgins*, 105 U. S. 580, 591, it is said:

"It may be laid down as a general rule—though, perhaps, not an invariable one—that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention."

There the new and useful result upon which the patent was sustained was the greatly increased effectiveness of a loom in production.

In *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 179, 5 Sup. Ct. Rep. 513, in which the patent sued on was adjudged to be valid, we find this language, which is apposite here:

"Richardson's invention brought to success what prior inventions had essayed, and partly accomplished. He used some things which had been used before, but he added just that which was necessary to make the whole a practically valuable and economical apparatus. The facts that the known valves were not used, and the speedy and extensive adoption of Richardson's valve, are facts in harmony with the evidence that his valve contains just what the prior valves lack, and go to support the conclusion at which we have arrived on the question of novelty."

In the *Barbed-Wire Patent*, 143 U. S. 275, 283, 12 Sup. Ct. Rep. 443, 446, it is said:

"In the law of patents it is the last step that wins. It may seem strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the diamond-shaped prong, but evidently it did not; and, to the man to whom it did, ought not to be denied the quality of invention."

In *Gandy v. Belting Co.*, 143 U. S. 587, 594, 12 Sup. Ct. Rep. 598, it is said:

"In view of the fact that previous attempts—of which there appear to have several—to make a practical canvas belt had been failures, and that Gandy had been experimenting with the subject for several years before he discovered that a change was necessary in the structure of the canvas itself, we do not think his improvement is a change in degree, only, or such a one as would have occurred to an ordinary mechanic, and our opinion is that it does involve an exercise of the inventive faculty."

These decisions fully justify the conclusion we have reached, upon a careful consideration of the proofs, that the patent in suit discloses patentable novelty, and is valid.

The master's report was based altogether upon the profits actually realized by the defendant from his sales of infringing machines. The defendant was charged with the amount received by him from sales, as stated by himself. We are not convinced that the master erred in his finding of the cost of manufacture. In the accounting, besides a credit for the cost of manufacture, as found by the master, and a credit for advertising, the defendant was allowed for freight and cartage, and discounts to purchasers. We think the master was right in disallowing the lumping sum which the defendant claimed for "clerk hire, selling expenses, rent, and insurance." That was a mere estimate, unsupported by evidence. There was no way of testing its accuracy, and for this the defendant was responsible. He kept no separate account,

connected with this particular branch of his business, of those items. The claim rested altogether upon an arbitrary apportionment of the expenses connected with his general business. We do not see upon what principle the defendant is entitled to an allowance for the sum he paid for the Cottrell patents, and the cost of his patterns. They remain his property. These credits were properly disallowed. *Crosby Steam Gage & Valve Co. v. Consolidated Safety Valve Co.*, 141 U. S. 441, 12 Sup. Ct. Rep. 49. If, in the manufacture of the infringing parers, any advantage resulted from the use of the Cottrell patents, the burden was upon the defendant to show it. *Elizabeth v. Pavement Co.*, 97 U. S. 126. But there was no satisfactory evidence of such advantage. We think the evidence fully warrants the conclusion that the entire value of the infringing machines made and sold by the defendant was due to the invention covered by the patent in suit, and therefore the plaintiff was entitled to the whole profits realized. *Elizabeth v. Pavement Co.*, *supra*; *Crosby Steam Gage & Valve Co. v. Consolidated Safety-Valve Co.*, *supra*. The account, as stated by the master and confirmed by the court, seems to us to be substantially correct in all particulars.

The decree of the circuit court is affirmed.

MERRITT v. MIDDLETON et al

(Circuit Court, S. D. New York. May 13, 1893.)

1. PATENTS FOR INVENTIONS—VALIDITY—COMBINATION—EYEGGLASS HOLDERS.

The claim of letters patent No. 175,821, granted April 11, 1876, to I. N. Clawson, for improvements in eyeglass holders, was as follows: "The inwardly closing hook, B, bottom bend, C, and bar, E, with the contact point closing the upper space of the bend, in combination with the single laterally extending open eye, D, and with the coil, F, and pin, G, all constructed and arranged to form an improvement in eyeglass holders." *Held*, that this is merely an aggregation of old elements, and not a combination, within the meaning of the patent laws.

2. SAME—ANTICIPATION.

This patent is anticipated by British letters patent No. 1,788, granted to Montleart & Tent in 1863, for an improved hook, ordinarily used to attach fabrics to a support; for this device, when inverted, is identical with that of Clawson's patent, save that the hook of the latter is bent inward, while the former bends outward.

3. SAME—INFRINGEMENT—ESTOPPEL.

Where an applicant for a patent has acquiesced in the decision of the patent office that a certain feature of his invention is anticipated by a patent referred to, he is estopped to claim an infringement of that feature of his patent thereafter.

In Equity. Suit by Samuel F. Merritt against John D. and Reuben S. Middleton and others for infringement of a patent. Bill dismissed.

Philip J. O'Reilly, for complainant.
Fowler & Fowler, for respondents.

TOWNSEND, District Judge. This is a suit for alleged infringement of letters patent No. 175,821, for "improvements in eyeglass holders," granted to I. N. Clawson, April 11, 1876, and subsequently assigned to complainant. An application for a preliminary injunction was denied. The defenses alleged are noninfringement, anticipation, want of patentable novelty in view of the state of the art, and that the patented article is not a combination, but is a mere aggregation.

In support of these defenses, defendants introduced in evidence a copy of the file wrapper and contents of complainant's patent. From this it appeared that the original description of the invention was no broader than that contained in the patent as issued. But the patentee originally presented three claims, as follows:

"(1) The inwardly closing hook, B, bearing against the length, E, to its full extent, whereby there is formed a closed point, a, at the upper portion of the space of the bottom bend, C, substantially as and for the purpose set forth. (2) The open eye, D, formed of a single bend, in combination with the bottom bend, C, and hook, B, substantially as and for the purpose set forth. (3) The inwardly closing hook, B, bottom bend, C, and bar, E, with the contact point, a, closing the upper space of the bend, in combination with the single laterally extending open eye, D, and with the coil, F, and pin, G, all constructed and arranged to form an improvement in eyeglass holders, as set forth, and operate as specified."

Upon citation of anticipations the patentee canceled the first two claims for certain elements of the combination, leaving only the third and narrowest claim for all the elements combined, as therein described. The effect of such action on the part of the patentee is to confine him strictly to the limited scope of the invention as a combination, as described in the specification and stated in the claim. Having acquiesced in the construction placed upon his claims by the patent office, he is estopped to thereafter attempt to enlarge the scope of his invention beyond the precise terms of the grant. *McCormick v. Talcott*, 20 How. 402; *Key-stone Bridge v. Phoenix Iron Co.*, 95 U. S. 274; *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. Rep. 72; *Roemer v. Peddie*, 132 U. S. 317, 10 Sup. Ct. Rep. 98; *Williams v. Shoe Co.*, 49 Fed. Rep. 245. After acquiescing in the rejection of claims original 1 and 2, which were broader than original 3, the one in the patent, the claim of the patent must be construed strictly against the patentee. Each of the several elements of the claim are thus made essential parts of the combination, and each specified limitation of each element so claimed is also an essential part of the device. *J. L. Mott Iron Works v. Standard Manuf'g Co.*, 51 Fed. Rep. 81, and cases cited.

Defendants further introduced 11 patents and certain models in support of the various defenses alleged in the answer. These exhibits illustrated the state of the art, and showed that every element of the combination claimed in the patent in suit was old. I have not considered them in detail, because all the evidence, taken together, shows that the patentee was not in any sense a pioneer in the field; that the scope for invention therein was very limited; that the combination claimed by the patentee had been described in a printed publication before his invention; that,

even if not so described, the changes made by the patentee did not involve invention, but were such as would be obvious to any person skilled in the art; and, finally, because the patented article consists of a mere aggregation of parts, and is not a combination, in the sense of the patent law.

The English patent No. 1,788, granted to Montleart & Tent in 1863, for an improved hook, with its accompanying drawings, shows, when inverted, an anticipation of the invention claimed in the patent in suit. This patent is for a hook for suspending dresses or fabrics, in which the hook is ordinarily used to attach the fabric to a support, while the fastening pin is used to hold the fabric. But the inventor says: "It may also be used beneficially with either end uppermost, according to the use to which for the time it may be applied," and "by reversing the fastening, and inserting the pin in any fixed fabric, the hook will project, and be ready to receive any light articles which may be suspended therefrom." It consists of a piece of metal so bent as to form the pin, G, the coil, F, the laterally extending open eye, D, and the bottom bend, C, of complainant's patent. The only difference between Fig. 4 of the English patent and the drawings of complainant's patent is that in the former the hook is open, while in the latter it is closed. To be sure, the two pieces are soldered together in Fig. 4, but in Fig. 1 the complete holder is made of a single piece of metal. This printed description and drawings, which show all the elements of complainant's invention in practically the same combination, establish the defense of nonpatentability. That the hook in the English patent is bent open, so as to more easily receive articles to be placed upon it, while in complainant's patent it is closed, is not material. The first thing that any one would do if he wished to use one of the English hooks would be to bend it out or in, according to the use to be made of it. It does not require the knowledge of the mechanic skilled in the art to so change the article as to adapt it to a new purpose. The ordinary individual, finding one of these articles on his dressing table, would readily recognize its utility, when inverted, as is suggested by the patentee, to suspend light articles, such as eyeglasses.

Complainant alleges that defendants' hook impinges against the adjoining bar at a point above the bend of the holder, and therefore is an infringement of the inwardly closing hook, bearing against the length of the bar, and forming a closed point at the upper portion of the bottom bend, claimed in his alleged combination. This inwardly closing hook is the only element of complainant's holder which is not identical with the Montleart & Tent hook. But complainant is estopped to make this claim by his acquiescence in the decision of the patent office that the claim for such hook was anticipated by patent No. 122,629, granted to him January 9, 1872. Furthermore, such hook is found in other patents introduced by the defendants. The patented device consists merely of an aggregation of the claims rejected by the patent office, and certain old elements, without the production of any new and useful result. It is not a combination. Counsel

for defendants have illustrated this point by adopting the language of Judge Coxe in *Bunching Co. v. Williams Co.*, 44 Fed. Rep. 190, substituting the terms of the patent in suit, as follows:

"What reciprocity can there be between the hook, B, at one end of the eyeglass holder, and the pin, G, and the coil, F, at the other end of the holder? In what way does the pin, G, and coil, F, act upon the hook, B, or the hook, B, upon the pin, G, and coil, F? Remove either, and the other will perform its function unimpaired. The hook, B, is simply a convenient device for holding the eyeglass. There is no combination between the pin, G, and coil, F, which act to secure the holder upon a garment, and the hook, B, for holding the eyeglass at the other end."

Let a decree be entered dismissing the bill.

SAWYER SPINDLE CO. et al. v. TURNER.

ATWOOD et al. v. SAME.

(Circuit Court, D. Connecticut. May 13, 1893.)

Nos. 749 and 750.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where the validity of a patent has been sustained by the courts on final hearing, the only question that will be considered on motion for preliminary injunction in a subsequent suit for infringement by other parties is whether defendants infringe.

2. SAME—CESSATION OF INFRINGEMENT.

Where it is admitted that defendant has once infringed the patent in suit, but has ceased to do so, and declares that he has no intention of so doing in the future, it is still within the discretion of the court to grant a preliminary injunction.

In Equity. Suits by the Sawyer Spindle Company, John E. Atwood, and Eugene Atwood against Arthur G. Turner, and by the two last-named complainants against the same defendant, for the infringement of certain patents. Decree for preliminary injunction against defendant.

Fish, Richardson & Storow, for complainants.

C. H. Burdett, for defendant.

TOWNSEND, District Judge. These are two motions for preliminary injunctions to restrain the alleged infringement of certain claims of letters patent No. 253,572, granted to Messrs. Draper & Jenks, February 14, 1882, for an improvement in supports for spindles for spinning machines, and of letters patent No. 296,377, granted to complainants, April 8, 1884, for improvements in spinning frames. As the decision of the motions depends upon the disposition of certain questions, which are substantially the same in each case, they may be considered together.

The validity of each of the patents has been sustained after protracted litigation. The opinions of Judge Shipman, which cover all the questions raised on final hearing, will be found in *Sawyer Spindle Co. v. W. G. & A. R. Morrison Co.*, 52 Fed. Rep.

590, and *Atwood v. W. G. & A. R. Morrison Co.*, Id. 475. The claims now in suit having been thus sustained on final hearing, this court will, upon this motion, consider only the question of infringement. *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.*, 54 Fed. Rep. 678; *Brush Electric Co. v. Accumulator Co.*, 50 Fed. Rep. 833.

The defendant is not a manufacturer of spinning machines, but a silk manufacturer, using spindles and spinning frames in his factory. It appears from the numerous affidavits introduced by him that he was not at the date of the suit, and is not now, using either spindles or spinning frames which infringe the claims in issue under the patents in suit. This would, in itself, be sufficient ground for refusing the injunction, unless there were other circumstances indicating a danger of future infringement. Such danger may be presumed from past infringement. Whether such infringement has been shown is the chief question in these cases. The complainants introduced but one affidavit—that of William A. Gilbert, one of their employes—to prove the fact of infringement. So far as said affidavit purports to state what the affiant saw in the mills of defendant, it is wholly insufficient to show infringement of patent No. 253,572, for supports for spindles. The affiant states that he satisfied himself that many of the frames had spindles of the Morrison make, and were the same as had been enjoined, without stating the facts on which such opinion was based. As to patent No. 296,377, for spinning frames, the affiant describes the arrangement of the cylinders, and the banding method, which he saw, sufficiently to enable the court, assuming the affidavit to be true, to determine whether they were infringements or not. But it further appears from said affidavit, and from the papers annexed thereto, that defendant had bought said machinery from the Morrison Company, the makers of the infringing machines, prior to the granting of the injunctions in the suits already referred to. It further appeared that on January 13, 1893, the Atwood Machine Company sent to defendants a circular letter, inclosing copies of the opinions of Judge Shipman in said suits, calling attention thereto, and asking defendant for a statement of the number of spindles of the Morrison make, and of spindles in frames supplied with the infringing banding. Defendant replied, stating the number of each in use in his factory. In March, affiant had a conversation with defendant in regard to complainants' claim for royalties, in which defendant did not deny the use of the infringing machines. Defendant has made an affidavit in each case in which he denies that he was using any infringing devices at the date of the suit, but does not deny that he previously used them in his factory. In regard to patent No. 253,572, he alleges that he was misled by the language of the circular.

Apart from the infirmities in complainants' proof, already referred to, and admitting that defendant may have misunderstood complainants' circular, his failure, in his affidavit, to deny previous infringement, in view of his original admissions, would seem to be

sufficient to make out complainants' prima facie case. He knew that complainants had examined the spindle machinery in his factory, and claimed that it was an infringement of their patent. When he made the alleged admissions of infringement upon which complainants now rely, he had before him the opinions of Judge Shipman, which discussed fully and clearly the patented machines, and explained in what the infringements consisted. It is natural to presume that, if he could have explained these former admissions, and shown noninfringement, he would have done so in his affidavit. The irresistible conclusion to be drawn from his silence is that the allegations of past infringement are true.

A number of cases were cited on the hearing, as to whether the court should grant a preliminary injunction when the defendant has stopped infringement, and denies that he intends to thereafter infringe. While this is one of the questions which must necessarily rest in the discretion of the court, the preponderance of authority is to the effect that such a state of facts furnishes no reason for withholding the writ. The rule is well stated in *Robinson on Patents*, § 1191, approved in *Electrical Works v. Henzel*, 48 Fed. Rep. 377. Judge Robinson says:

"The intention of the defendant to practice the invention in violation of the plaintiff's rights may be shown from his past acts of infringement in reference to the same invention. * * * When the defendant has once knowingly invaded the exclusive domain of the plaintiff, there is a strong presumption that the wrong will be repeated, although he may have since desisted, and promised to refrain, or even sworn that it is his purpose no further to infringe. This presumption arises, whatever may have been the extent of the infringement, or the damage thence resulting to the plaintiff."

The facts in the case of *Kane v. Candy Co.*, 44 Fed. Rep. 287, cited by defendant, only show that the question is one which rests in the sound discretion of the court. As against one of the respondent corporations, the court refused the writ because it was satisfied that said corporation, three months before the filing of the bill, had sold out its plant, and retired from business. The complainants have shown past infringement by defendant. "Nothing but a mere promise stands in the way of its doing so again. * * * If the defendant intends, in good faith, to keep its promise, the injunction will not harm it; otherwise, it will be a security for the plaintiff that its rights will not again be invaded." Judge Wales, in *Celluloid Manuf'g Co. v. Arlington Manuf'g Co.*, 34 Fed. Rep. 324; *White v. Walbridge*, 46 Fed. Rep. 526; *Facer v. Midvale Co.*, 38 Fed. Rep. 231; *Chemical Works v. Vice*, 14 Blatchf. 179; *Walk. Pat.* §§ 676, 701. The application for a preliminary injunction is granted in both cases.

WATERMAN v. SHIPMAN et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

1. PATENTS—MORTGAGE—TRANSFER OF TITLE.

A mortgage by a patentee vests in the mortgagee the whole title to the patent rights, subject only to be defeated by performance of the condition, or by redemption by bill in equity within a reasonable time after default, and the right of possession to the incorporeal property is, in legal effect, delivered to the mortgagee at the time of the recording of the mortgage at the patent office.

2. SAME—RECITAL OF LICENSE—NOTICE TO PURCHASER.

The recital in a mortgage of patent rights of the existence of a license is notice to the mortgagee and purchasers of the patent rights under the mortgage of all the terms and conditions of the license.

3. SAME—ASSIGNMENT OF LICENSE—SUPPLEMENTARY PROCEEDINGS IN AID OF EXECUTION.

In the absence of words showing that it was intended that the license might be assigned, a license conferring the exclusive right to manufacture and sell patented articles is not assignable, and does not vest in a receiver of the property of the licensee, appointed in proceedings supplementary to execution under the New York Code of Civil Procedure.

4. SAME—INFRINGEMENT—SUIT BY EXCLUSIVE LICENSEE AGAINST OWNER OF PATENT.

A licensee who has the exclusive right to manufacture and sell a patented article can maintain a suit in equity against the patentee, if the latter is guilty of an infringement by making and selling himself, to redress the wrong occasioned thereby, and such suit arises under the patent laws of the United States.

5. SAME—INFRINGEMENT—SUIT BY LICENSEE—COMBINATION BETWEEN OWNER AND CODEFENDANTS.

If the bill of the licensee who has the exclusive right to manufacture and sell a patented article alleges a combination between the owner of the patent and other persons, who are made parties defendant with the owner, to deprive the complainant of the benefits and advantages of his license, and the evidence shows that a license granted by the owner of the patent to his codefendants was granted by him, and procured by them, for the paramount purpose of preventing the complainant from enjoying the monopoly conferred by his license, the defendants are joint infringers of the complainant's rights, and he is entitled to relief against all the parties defendant.

6. SAME—VALIDITY—WANT OF NOVELTY—EVIDENCE.

If defendants in a suit for infringing letters patent plead want of novelty, and set up in their answer, and offer in evidence, a large number of patents prior in date to those of the complainant, the court will not examine these patents, in the absence of expert testimony to explain them, or to indicate what they contain to negative the novelty of the complainant's patents, unless the character of the invention has so little complexity that expert testimony is not required for that purpose.

7. SAME—WANT OF NOVELTY—EVIDENCE.

In a suit for the infringement of letters patent, defendants introduced in evidence a pamphlet of about 25 pages, published two years after the patents were issued, entitled "An Expose of the Assumptions and Business Methods of a Dealer and Reputed Inventor," which was prepared and published by a rival manufacturer apparently for the purpose of discrediting the inventions of the complainant, and his personal character and business methods. The greater part of the pamphlet was scandalous matter, irrelevant to the issues. The author testified that, so far as it referred to the patents he had studied, the pamphlet correctly expressed his views respecting the same. *Held*, that the contents of the pamphlet could not be considered competent evidence upon the issue of novelty, and that complainant's counsel was justified in refusing to cross-examine the author.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Bill by Lewis E. Waterman against Asa L. Shipman (who died before final hearing, and whose executor has been substituted) and James D. Shipman and Edward L. Shipman, his sons, copartners by the firm name of Asa L. Shipman's Sons, alleging the infringement of certain letters patent. The circuit court dismissed the bill. Complainant appeals. Reversed.

Salter S. Clark, for appellant.

A. v. Briesen, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a bill in equity, alleging the infringement of two patents for fountain pens,—No. 293,545, dated February 12, 1884, and No. 307,735, dated November 4, 1884,—each granted to Lewis E. Waterman, as inventor. The defendants were originally Asa L. Shipman (who died before final hearing, and whose executor has been substituted) and James D. Shipman and Edward L. Shipman, his sons, who were copartners by the firm name of Asa L. Shipman's Sons. The questions which have been principally litigated are those in respect of the title to the patents; it being insisted for the defendants that the title at the time of the commencement of the suit was in Asa L. Shipman, and consequently that the complainant could not maintain the bill. The facts bearing upon this branch of the case are these: Prior to November 20, 1884, the title to the patents had been assigned by the complainant to Sarah E. Waterman, his wife, and on November 20, 1884, she granted to him an exclusive license to manufacture and sell the patented improvements throughout the United States. By the terms of the license he agreed to make full returns on the first day of every month of all fountain pens containing the patented improvements, manufactured by him, and to pay to her the sum of 25 cents as a license fee for every pen so manufactured on or before the 5th day of every month, for the pens manufactured during the preceding months. The license provided that "upon a failure of the licensee to make returns after thirty days, or to make payment of the license fees after ninety days from the time when such returns and payments are due, then the said Sarah E. may terminate this license by serving a written notice upon the said licensee; but that will not discharge him from any liability for any license fees due when such notice was given." November 25, 1884, Mrs. Waterman executed to Asa L. Shipman's Sons a mortgage of the two patents as collateral security for the payment of a note of \$6,500 made by her and the complainant, payable in three years. By this instrument, Mrs. Waterman assigned to the mortgagees all her right, title, and interest in the inventions and the patents upon the express condition that the assignment should be null and void if she and her husband, or either of them, should pay the note at maturity. It contained also a recital that the interest conveyed was free from all incumbrances except a license to this complainant to manufac-

ture and sell pens under both patents. The mortgage was duly recorded in the patent office December 29, 1884; and from the time of its execution until November 25, 1887, the complainant continued to manufacture and sell the patented improvements, making returns to Mrs. Waterman, and paying royalties to her, under his license, until the 16th day of April, 1886, when she executed to him an assignment of all her right, title, and interest in the patents. The note given to secure the mortgage became due November 28, 1887, and was not paid, and shortly thereafter Asa L. Shipman granted to the firm of Asa L. Shipman's Sons an exclusive license to manufacture and sell the patented pens. He also brought suit upon the note in the supreme court of the state of New York, and on the 22d day of December, 1887, duly obtained judgment thereon against the complainant and Mrs. Waterman for the full amount, with interest. After the execution of the license to the firm of Asa L. Shipman's Sons, and about April 1, 1888, they began to manufacture and sell as the patented pens an article identical with those which the complainant had made and sold under his license. They were manufacturing these pens when the present bill was filed, and continued to do so until May 10, 1888. The judgment obtained against the complainant and his wife not having been paid, supplementary proceedings, pursuant to the Code of Civil Procedure of the state of New York, were instituted, which resulted in the appointment of a receiver, who on the 10th day of April, 1888, duly qualified, and became vested, under the provisions of the Code, with all the property, legal and equitable, belonging to the complainant. On January 9, 1888, Asa L. Shipman sent the complainant a letter giving him notice "that the license given you by Mrs. Waterman is revoked, and suit will be brought against you for infringement of said patents." On April 26, 1888, he sent the complainant another letter, stating "that, in addition to the notice already handed to you, the license agreement executed by Sarah E. Waterman to you, dated November 18th, 1884, is hereby revoked, on account of your failure to make due returns thereunder on the first day of January, 1888, and also on February 1st, 1888, and also for your failure to pay the royalties under said agreement which became due to me on December 5th, 1887; also, on January 5th, 1888."

On April 27, 1888, the complainant made a tender to the attorney of Asa L. Shipman of the full amount of the judgment obtained upon the note, together with the costs of the suit; but this tender did not include anything for the fees of the receiver in the supplementary proceedings. On the 5th day of May the present suit was brought. The circuit court dismissed the bill, without a written opinion, apparently upon the ground that the legal title to the patent was in Asa L. Shipman at the time of the commencement of the suit.

It is entirely clear, upon the authority of *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334, that by virtue of the mortgage the whole title to the patents at the time of the execution of the instrument became vested in the mortgagees, subject only to be defeated by performance of the condition or by re-

demption of the bill in equity within a reasonable time, and that the right of possession to the incorporeal property was in legal effect delivered to the mortgagees at the time of the recording of the mortgage in the patent office. We do not consider it necessary to determine whether a tender of the mortgage debt, made after the day of payment, entitled the complainant, as the assignee of the mortgagor, to a reconveyance of the patents. Nor do we deem it necessary to determine whether the tender made by him April 27th was a sufficient one, or whether it should have included a sum sufficient to cover the fees of the receiver in the supplementary proceedings. We regard it as entirely immaterial, for the purposes of the present suit, whether the legal title to the patents was or was not in the complainant at the time of the commencement of the suit. The mortgage of Asa L. Shipman was subject to the license which had previously been granted to the complainant, and could in no manner operate to restrict or curtail the exclusive right of the complainant to make and sell the patented improvements, so long as the license should remain unrevoked. The recital in the mortgage of the existence of this license was notice of all its terms and conditions. It is familiar doctrine that a purchaser will have constructive notice of everything appearing in any part of the deed or instrument constituting the title purchased, which is of such a nature that, if brought directly to his knowledge, it would amount to actual notice; for the right of a purchaser can in no case go beyond his own title, and whatever appears on the face of the title papers forms an integral part of the title itself. Such notice, therefore, is of the most conclusive nature, and is insusceptible of being explained away or rebutted.

The bill of complaint alleges that the license granted to the complainant was in full force at the time of the commencement of the suit. This averment is not denied by the answer; and the answer makes no issue setting up the invalidity of the license, or any revocation by reason of failure to make returns, or pay royalties, or for any other reason. There is evidence in the record, however, which has been referred to, of letters sent by Asa L. Shipman to the complainant,—one of the date of January 9, 1887, and one of the date of April 26, 1888,—giving notice of the revocation of the license. Under the issues made by the pleadings, we ought not to notice this evidence. It is proper, however, to say that the letter of January 9th did not assign any reasons for revoking the license, and the letter of April 26, 1888, assigned grounds for revoking it which do not appear to have been correct in fact. The complainant was not in default for failure to make returns on the 1st day of January, 1888, or on the 1st day of February, 1888, or for not paying royalties on the 5th of December, 1887, or on January 5, 1888. He did not manufacture at all in the months of December or January, and, if any royalties became due on December 5th or on January 5th, the fact does not appear.

Even if it were open to the defendants, under their answer, to assert that at the time when the suit was commenced the complainant's interest in the patent had vested in the receiver in supplemen-

tary proceedings, the contention would be untenable. The license was not assignable. No license is assignable by the licensee to another unless it contains words which show that it was intended to be assignable. *Factory v. Corning*, 14 How. 193; *Rubber Co. v. Goodyear*, 9 Wall. 788; *Adams v. Howard*, 23 Blatchf. 27, 22 Fed. Rep. 656; *Baldwin v. Sibley*, 1 Cliff. 150. The present license contained no such words, and was purely a personal license to the complainant. Consequently the receiver could not acquire it.

If the owner of the legal title to the patent had not been made a party to the suit, undoubtedly the bill by the complainant could not be sustained against the other defendants. A mere licensee cannot sue strangers who infringe. In such a case redress is obtained through or in the name of the owner of the patent. But there is no reason or authority for the proposition that a licensee who has the exclusive right to manufacture and sell a patented article cannot maintain a suit in equity against the owner of the patent, if the latter is guilty of an infringement by making or selling himself, to redress the wrong occasioned thereby, or that such a suit does not arise under the patent laws of the United States. The case of *Littlefield v. Perry*, 21 Wall. 205, 223, is a direct authority in favor of the right of the licensee to maintain such an action. In that case the supreme court said:

"A court of equity looks to substance, rather than form. When it has jurisdiction of the parties, it grants the appropriate relief, without regard to whether they come as plaintiff or defendant. In this case the person who should have protected the defendant against all infringements has become himself the infringer. He held the legal title to the patent in trust for his licensees. He has been faithless to his trust, and courts of equity are always open for the redress of such a wrong. This wrong is an infringement. Its redress involves a suit, therefore, arising under the patent laws; and of that suit the circuit court has jurisdiction."

If the licensees' rights have been infringed by the owner, and third persons confederating with the owner, there is no reason why all the infringers should not be joined as defendants. *Perry v. Littlefield*, 17 Blatchf. 272, 285. In such a case it is quite immaterial to the other defendants whether the owner, when made a party to the suit, is a complainant or a defendant. It suffices, so far as they are concerned, that all the parties are present who have any interest in the controversy, and that a decree will definitely determine their rights as between themselves and the owner of the patent, as well as between themselves and the complainant.

The bill in this case alleges a combination between the defendants to deprive the complainant of the benefits and advantages of his license; and the evidence shows that the license granted by Asa L. Shipman to his sons, the other defendants, was granted by him, and procured by them, for the paramount purpose of preventing the complainant from enjoying the monopoly conferred by his license. The defendants, therefore, are joint infringers. We conclude that there is no impediment, arising from the fact that the complainant is merely a licensee, to preclude him from obtaining the relief sought by his bill.

The proof of infringement of the patents is very meager, and we find no evidence in the record that the pens made by the defendants infringe any of the claims of either patent, except the first claim of patent No. 307,735. Undoubtedly the defendants, in manufacturing their pens, intended to copy the pens made by the complainant; but the record does not show whether the pens made by the complainant embodied any of the inventions of the other claims.

To sustain the defense of want of novelty the defendants have set up in their answer, and offered in evidence, a large number of patents prior in date to those of the complainant. In the absence of any expert testimony to explain these patents, or indicate what they contain tending to negative the novelty of the complainant's patents, we do not feel called upon to examine them. There may be cases in which the character of the invention has so little complexity that such expert testimony is not necessary to aid the court in understanding whether one patent, or several patents considered together, describe the devices or combination of devices which are the subject-matter of a subsequent patent; but this is not one of them.

The defendants also introduced in evidence a pamphlet entitled "An Expose of the Assumptions and Business Methods of a Dealer and Reputed Inventor," consisting of some 25 printed pages, published in 1886. This pamphlet was prepared and published by a rival pen manufacturer apparently for the purpose of discrediting the inventions of the complainant, and his personal character and business methods. The author was called as a witness for the defendants, and asked this question: "Does this pamphlet, so far as it refers to the patents which you have studied, correctly express your views respecting the same?" The witness answered: "In so far as it goes, I suppose it does. It was so intended." The pamphlet was then offered in evidence, and made an exhibit in the cause, against the objections of the complainant. The statements contained in this pamphlet are relied upon by the defendants as evidence upon the issue of novelty. We decline to consider anything contained in it as competent evidence upon this issue. The counsel for the complainant was justified in refusing, as he did, to cross-examine the witness in regard to its contents. The greater part of it was scandalous matter, entirely irrelevant to the present controversy; and he was under no obligation to undertake to read and analyze its contents to see whether it contained anything bearing upon the issue worthy of a cross-examination.

As to the defense resting upon the prior invention of Fisher, it suffices to say that no such defense is set up in the answer; and, if all that is asserted in respect to the defense is true, only the third claim of patent No. 307,735 would be defeated by it.

We conclude that the complainant is entitled to a decree for an accounting and an injunction. The decree of the circuit court is reversed, with costs, and the cause remanded to that court with directions to enter a decree for the complainant in conformity with this opinion.

DELAWARE METAL REFINERY v. WOODFALL et al.

(Circuit Court, E. D. Pennsylvania. May 23, 1893.)

No. 20.

1. PATENTS FOR INVENTIONS—VALIDITY—PROCESS OF REFINING ZINC.

Letters patent No. 448,802, issued March 24, 1891, to Joseph W. Richards, cover the process of refining zinc by "diffusing metallic aluminium throughout the bath of metallic zinc, permitting said composite bath to stand in a melted condition, for the subsidence of the impurities, and finally removing the stratum of refined zinc." *Held*, that there was nothing in the prior state of the art to invalidate the patent.

2. SAME—INFRINGEMENT.

In a suit for infringement of this patent it appeared that defendants, after melting the zinc, cleaned it in the ordinary manner, by skimming impurities from the top, and raking out what fell to the bottom, then added a small quantity of aluminium, stirred the mixture thoroughly, and then dipped from the caldron, without waiting for the subsidence of impurities, and without leaving any residue in the vessel. It appeared, however, that about an hour was used in thus emptying the caldron, and that the mixture was stirred two or three times during that period. *Held* that, as the refining in such case takes place very rapidly, defendants secured the benefits of the patent in respect to nearly all of the zinc dipped out, and that their process constituted an infringement, notwithstanding differences.

In Equity. Suit by the Delaware Metal Refinery against Woodfall Bros. for infringement of a patent. Decree for complainant.

Jos. C. Fraley, for complainant.

Thomas D. Moulds, for respondents.

DALLAS, Circuit Judge. This is a suit brought for the infringement of letters patent No. 448,802, dated March 24, 1891, and issued to Joseph William Richards, who assigned to the complainant. The patent was granted for a process of refining zinc, and contains but one claim, which reads as follows:

"The hereinbefore described process of refining zinc, which consists in diffusing metallic aluminium throughout a bath of melted zinc, permitting said composite bath to stand in a melted condition, for the subsidence of the impurities, and finally removing the stratum of refined zinc, substantially as set forth."

The defenses relied upon by the defendants are: (1) Noninfringement; (2) that the letters patent are invalid because, in view of the prior art, they do not disclose any patentable invention.

There is no occasion for construction of this claim. It is plainly for a process for refining zinc, for the practice of which it is requisite (1) that metallic aluminium shall be diffused throughout a bath of melted zinc; and (2) that this composite bath shall be permitted to stand in a melted condition, for the subsidence of the impurities, and the stratum of refined zinc be removed. The defendants admit that the first of these features is comprised in the process employed by them, but they deny that they either permit the bath to stand for subsidence of impurities, or that they remove refined zinc. They refer to a communication which was addressed by the

solicitor of the patentee to the commissioner of patents, as so defining the discovery for which the patent was asked as to make both of these last-mentioned steps in the process essential elements thereof. This communication however, does not, in fact or in law, qualify the claim. The process claimed was solely for refining zinc, and not for forming an alloy; and by its use an alloy is not, in any practical sense, even incidentally produced. The letter to the commissioner was written for the purpose of enforcing this distinction, as the alloy of zinc and aluminium was, admittedly, old. Nothing was said of the invention which the claim does not plainly import; and the true and only question upon this branch of the case is whether the denial of the defendants that they permit the bath to stand for the subsidence of impurities, and remove therefrom the stratum of refined zinc, is or is not refuted by the proofs. They allege in the brief submitted on their behalf that they use aluminium only in the manner now to be stated, and, in connection with that statement, I propose to consider the case in some detail. They say:

"(1) When treating scrap zinc, the metal is melted down in a pot or caldron in the usual way. It is then cleaned, in the ordinary manner, from all the impurities that can be gotten out of it by means of skimming off the top, and raking out what falls to the bottom, such as pieces of iron, etc. After the metal has thus been treated a small quantity of aluminium is added, and the mixture stirred up so as to alloy the aluminium thoroughly with the zinc. After being thus thoroughly mixed, the whole of the metal in the pot or caldron is dipped therefrom, leaving no residue in the vessel. The two metals are prevented from separating by frequent stirrings, and as a result the whole mass dipped from the pot is homogeneous. Any impurities that have not been removed by the old and well-known process still remain in the metal, and are poured out into the mold along with the good material."

The preliminary cleaning by the old and unsatisfactory mechanical mode is of no consequence if thereafter the patented method be pursued; and the addition of a small quantity of aluminium to the bath, and the attainment of its thorough infusion by stirring the mixture, is obviously incident to the process of the complainants. It is not the fact that—as is intimated, rather than asserted—the defendants form a substantial or commercial alloy, or that it is their object to do so. One of the defendants has himself testified that their product is sold in the market simply as zinc. It is true that the defendants dip the whole of the metal from the pot or caldron, and leave no residue in the vessel; but it is not the fact that this is done only while the two metals are thoroughly mixed, either by the first stirring, or by any subsequent stirrings, so that, as a result, the whole mass dipped from the pot is homogeneous. I am not entirely satisfied that the defendants always begin to remove the metal from the caldron so promptly upon the infusion of the aluminium as to at all anticipate its refining influence. But, conceding to the defendants the benefit of any doubt upon this point, the fact remains that at least an hour is required to empty a caldron, and, while a few of the slabs first made would, in consequence of the metal composing them having been too immediately dipped out, contain some impurities, yet, as purification takes place

very rapidly, the remainder, and much the larger portion, of the zinc would be refined. As to that portion there would be ample time for "permitting said composite bath to stand in a melted condition, for the subsidence of impurities," and the allegation that subsidence is prevented by subsequent frequent stirrings has been disproved. During the period of at least one hour, which is occupied in emptying a pot, these additional stirrings do not occur more frequently than (as one of the defendants has testified) "two or three times," whereas, to prevent the settling of the impurities, it would be necessary to agitate the mass almost continuously. Therefore, with respect to the later stirrings, as well as to the first one, the refinement of the greater part of the metal takes place after the disturbance caused by the stirring has ceased, and while the bath does "stand" sufficiently long to permit the subsidence of impurities. The defendants do, as I have said, remove the whole of the metal from the pot, and leave no residue, and in this consists the most striking difference between their procedure and that of the complainant; but upon investigation it becomes manifest that, by this variance from the best manner of practicing the patented invention, they do not wholly avoid its use. The claim of the patent in suit does not state that the dross is to be removed from the caldron after each operation, and before beginning another in the same vessel, but it was not necessary to mention it. It would, of course, be understood that this should be done. Therefore, in the mere fact that no residue is left by the defendants there is no difference between their practice and the patented process; and as it has been shown that the defendants do not distribute the impurities so that "the whole mass dipped from the pot is homogeneous," but incorporate them in only some of their slabs, it again appears that many, and the greater number, of them are composed wholly of refined zinc. It makes no difference that the defendants, who thus refine much of their zinc, also, instead of entirely rejecting the impurities, combine them with other of their zinc, and of that combination compose some slabs of inferior quality.

The contention of defendants with regard to their treatment of "scrap zinc" has thus far been the subject of consideration. Their treatment of "zinc dross" they assert to be as follows:

"When the defendants treat zinc dross, this material is manipulated in the manner described in the patent granted to Anthony Pierce, Jr., September 6, 1864, (No. 44,112,) and poured out into slabs. If any of these slabs, after pouring, show a blue cast, or do not have a bright appearance, those particular slabs are remelted, and a small quantity of aluminium added thereto, for the purpose of brightening the surface. After the aluminium is mixed with the zinc the whole mass thus treated is dipped out of the pot, and poured into molds, being frequently stirred during the time of pouring to prevent any separation, and to make the whole mass of metal as near alike as possible."

The Anthony Pierce patent does not relate to the use of aluminium. If the defendants confined themselves to the manipulation described in that patent, this complainant would have no ground

for objection; but, when that process is found not to be satisfactory, resort is had to the aluminium treatment, which is conducted in the same manner as when operating with scrap zinc. Therefore, nothing need be added with especial reference to this part of the defense. I have, upon the whole case, arrived at the conclusion that the method used by the defendants is substantially the same as that described and claimed in the patent in suit, and that they thereby accomplish a result which is substantially the same as that attained by the patented process, and that, therefore, infringement has been established.

The averment that this patent is invalid because, in view of the prior state of the art, it does not disclose any patentable invention, is absolutely without support. The patent granted to Anthony Pierce, Jr., upon September 6, 1864, is for treating impure zinc, but in a manner wholly different from that claimed by, and secured to, Richards, the grantor of the complainant; and the argument based upon the assumption that the product of the Richards process is but the old and well-known alloy of zinc and aluminium is fallacious, because, under the evidence, that assumption is clearly inadmissible.

A decree in favor of the plaintiff, for injunction and account, in the usual form, may be prepared and submitted.

GRISWOLD MANUF'G CO. v. HARKER et al.

(Circuit Court, D. Minnesota, Fourth Division. June 5, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—WAFFLE IRONS.

The claims of letters patent No. 229,280, granted June 29, 1880, to Selden and Griswold, for an improvement in waffle irons, were as follows: "(1) In a waffle iron, the hinge upon which the pan opens provided with one of the journals or pivots on which the pan is rotated; (2) the journals or pivots on which the pan rotates, formed upon or connected, one with the hinge upon which the pan opens, and the other on the handle for rotating said pan." *Held*, that this is not infringed by letters patent No. 277,422, issued May 8, 1883, to Harker and Wilkins, in which one of the journals upon which the pan rotates is formed by elongated ears or lugs upon each section of the pan, through which a pin passes to hinge them together, and the divided handle on the side opposite forms the other journal upon which the pan rotates.

In Equity. Suit by the Griswold Manufacturing Company against John B. Harker & Co. for the infringement of a patent. Bill dismissed.

Barr & Catlin and J. C. Sturgeon, for complainant.
Paul & Hawley, for defendants.

NELSON, District Judge. This is a suit brought by the complainant for an accounting and injunction by reason of an alleged infringement of letters patent No. 229,280, granted to Selden and Griswold, June 29, 1880, for improvements in waffle irons. It is charged that the defendants infringe the first and second claims

of the patent. The complainant company has by assignment all of the rights granted under the patent to Selden and Griswold. The claims charged to be infringed are:

"(1) In a waffle iron, the hinge upon which the pan opens provided with one of the journals or pivots on which the pan is rotated.

"(2) The journals or pivots on which the pan rotates, formed upon or connected, one with the hinge upon which the pan opens, and the other on the handle for rotating and opening said pan."

The specification of the patentee states that—

"In waffle irons, as ordinarily constructed, the hinge connecting the two parts of the pan has been made separate from the pivot on which the pan rotates, and been located at one side of the pan relatively to said pivot."

And then follows a description of the invention:

"Our improvement consists of a novel construction of the hinge connecting the two parts of the divided pan, whereby one of the pivots or journals upon which the pan rotates is made to form a part of said hinge, the hinge and pivot being thus brought together, while the opposite pivot or journal on which the pan rotates is formed on the divided handle, by means of which, also, either portion of the pan which, for the time being, is uppermost, is lifted for opening the pan. It further consists in a novel construction and arrangement of the socket in the rim or supporting ring for the reception of the hinge and pivot, whereby the tilting or dumping of the pan is prevented when the cover is raised, and in a novel manner of attaching the wooden handles. * * *

Then the details of the invention and its operation are described. If I understand the description, the hinge is formed by a combination of one of the journals on which the pan is rotated, and the usual lugs and ears upon each part of the divided pan, through which a pin passes for hinging the parts together. In order that this journal shall form a part of the hinge, a space is left between the inner adjacent ears for the insertion of a wedge-shaped, perforated block, D, called a "pivot block," conforming in size to the shape of the ears, and terminating between two lips on the parts of the divided pan, and through this block, also, the pin passes, thus uniting the pivot or journal block to the divided pan, and making it form a part of the hinge. A divided handle on the side opposite the pivot block when the parts are brought together forms the other journal upon which the pan is rotated. The supporting frame or ring is in the usual form, except it has an angular projection forming a bearing socket for the reception of the hinge.

The defendants make a waffle iron under letters patent No. 277,422, dated May 8, 1883, issued to Harker and Williams. One of the journals upon which the waffle iron rotates is formed by elongated ears or lugs upon each section of the pan, through which a pin passes to hinge them together, and the divided handle on the side opposite forms the other journal upon which the pan rotates. The only resemblance between the two waffle irons in this particular is that they both open in a plane parallel with the axis upon which they turn. The defendants use no such novel construction of hinge described in the complainant's patent. The patentee of complainant's waffle iron was not the first inventor of double or divided revolving cooking pans, griddles, or gridirons, to be placed

over the hole in the top of a cooking range. Utensils of this kind were in use long before his invention, and the state of the art shows that many of them opened in a plane parallel to the axis upon which they turned. Some of them have a hook on the end of one part of the divided journal, formed by a nob and a notch, to receive a corresponding hook to fasten them together, and to allow them to move when the two parts were opened. One was reversible, not revolving, but was provided with a square-heeled hinge on the side opposite the handle, so that the halves could be opened. All of them have a hinge joint, a device on which the divided parts turn, but not joined together.

The complainant's expert says the purpose of the invention involving the first and second claims was to construct a waffle iron that should open in a plane parallel with the axis on which the pan turns, and he says this was new and valuable; and he further says that the essence of the invention—the substantive feature—was bringing the hinge and the pivot or axis of the pan into a given line. He admits that bivalvous gridirons, revolving in their bearings by an arrangement similar to a waffle iron, were old, but that they were not hinged together, and were not waffle irons, except E. J. Smith's patent for cakes. These old divided griddles certainly opened in a plane parallel to the axis upon which the pan revolves, and, unless the complainant is entitled to claim all sorts of hinges joining the two parts of the griddle, under the invention of a novel construction of a hinge described in the specification, the defendants do not infringe. In view of the state of the art, and looking at the specification of the patent, the complainant is only entitled, in my opinion, to claim the peculiar combination and construction of a hinge formed with the journal and novel construction and arrangement of the socket described therein. The defendants do not use such novel construction of the hinge and socket described in the complainant's patent, and therefore do not infringe the claims as charged.

Decree dismissing the bill, with costs, is ordered.

THE DANUBE.

UNITED STATES v. THE DANUBE et al.

(District Court, D. Oregon. May 12, 1893.)

No. 3,306.

SHIPPING—EMIGRANT PASSENGERS—CONTIGUOUS TERRITORY.

Under the act of congress of August 2, 1882, prohibiting the carrying of "emigrant passengers" from any port or place in a foreign country, except ports and places "in foreign territory contiguous to the United States," unless the spaces and accommodations therein mentioned be provided, Van ouver's island, B. C., is territory contiguous to the United States, and the transportation of passengers therefrom to Astoria, Or., is within the exception.

In Admiralty. Action by the United States against the steamship Danube and William Meyers, her master, for penalties for a
v.55f.no.9—63

violation of the act of congress to regulate the carriage of passengers by sea. On exceptions to the libel. Exceptions allowed.

Franklin P. Mays, for libellant.

Cyrus A. Dolph and E. C. Hughes, for claimant.

BELLINGER, District Judge. This is an action by the United States for penalties aggregating \$19,660 for a violation of the provisions of the act of August 2, 1882, to regulate the carriage of passengers by sea. Chapter 374, Supp. Rev. St. The libel alleges:

"That on the — day of March, 1893, the steamship The Empress of Japan left Hong Kong, China, with, among other passengers, about 630 Chinese, destined for Portland, Oregon. That said vessel, about the — day of May, 1893, arrived at Vancouver's island, B. C., and there said Chinese passengers were ordered and placed in quarantine on said island, and so remained in quarantine for twenty-one days, at the end of which time 612 of said Chinese were placed upon the steamship Danube, one of the defendants above named, and of which the other defendant above named, William Meyers, was the master. That, after said Chinamen were so placed on said steamship Danube, the said master proceeded at once with said vessel, by way of Astoria, Oregon, to Portland, Oregon, where said vessel was seized as aforesaid. That all of said 612 Chinamen were so carried on said steamship Danube from said Vancouver's island into the United States by way of Astoria, Oregon, and that none of said 612 Chinamen were cabin passengers. That the entire space upon said vessel which was subject to be or could be used for and by said 612 Chinamen, was 32,588 cubic feet, of which 14,617 cubic feet was on the first deck below the main deck, and 17,471 cubic feet was on the second deck below the main deck; in which aggregate space was also placed a large amount of baggage of said Chinamen. That all of said Chinamen were above the age of twelve years. That by reason of all and singular the premises aforesaid, and by force of the statute in such case made and provided, the said vessel on the said trip carried 312 Chinamen in excess of the number which she was entitled to carry, and the said master and vessel became and are each liable to a penalty of \$50 for each of said 312 persons, and said steamship Danube thereby became and was and is holden for such aggregate penalty of \$15,600."

The libel alleges as further violations of the provisions of the act in question that such steamship was without berths for use by such passengers; that it did not have adequate provisions for affording light and air to such passengers; that the master provided neither tables nor seats for their use; and that there were no hospital compartments or surgeon or medical practitioner provided during such trip from Vancouver's island to Astoria.

To this libel William Meyers, claimant, excepts, upon the ground that it affirmatively appears that the passengers taken on the steamer Danube were so taken at a foreign port or territory contiguous to the United States, and that the case is therefore within the provision that excepts transportation of passengers from such ports from the operation of the act. The language of the act is:

"That it shall not be lawful for the master of a steamship or other vessel whereon emigrant passengers, or passengers other than cabin passengers, have been taken at any port or place in a foreign country or dominion, (ports and places in foreign territory contiguous to the United States excepted,) to bring such vessels and passengers to any port or place in the United States unless the compartments, spaces, and accommodations hereinafter mentioned have been provided," etc.

The question, therefore, is whether Vancouver's Island is territory contiguous to the United States. The word "territory," as generally used, describes a jurisdiction,—a district of country. Thus we speak of the territories of the United States, of the Northwest territory, of the territory of Alaska. The word refers to a jurisdiction. It is not limited, when speaking of any particular district as "territory," to the line of high-water mark along the shores of navigable rivers or bays or straits. The territory of a jurisdiction or country extends to its boundaries. It describes the possessions of a country. The straits of Rosario, the waters of Puget sound, are American territory. The treaty of 1846 between Great Britain and the United States, and the protocol of a conference of the representatives of the two governments held on March 10, 1873, define a precise boundary line between the possessions of the two governments in respect to the point in question. There had, prior to this conference, been disagreement as to whether the boundary ran through the Rosario straits, as claimed by Great Britain, or to the west through the Canal de Haro, as claimed by the United States. The dispute having been submitted to the arbitrament of the emperor of Germany, and his award being favorable to the latter claim, the line was laid down accordingly in the protocol referred to. By this agreement Rosario straits became American "territory," the line of which was located substantially in the middle of the channel of the Canal de Haro and the Straits of Fuca. The word "territory," when used to define the possessions of the two countries, must be understood as extending to this boundary, and these possessions as contiguous territory, within the meaning of the law. The reason for this legislation is obvious. It was to guard against the mischief of overcrowding emigrant passengers. The act is restricted to "emigrant passengers," or, what amounts to the same thing, "passengers other than cabin passengers." It is common knowledge that the great bulk of emigrant travel from foreign territory is transatlantic. The conditions of this travel are such that emigrant passengers are exposed to the danger of overcrowding,—a danger that is aggravated by the length of the voyage, but that does not exist with reference to short and coastwise lines of travel. Section 12 extends the provisions of the act to vessels whereon passengers are taken on board at any port or place "of the United States on the Atlantic ocean or its tributaries for conveyance to a port or place on the Pacific ocean or its tributaries, or vice versa, and whether the voyage of said vessel is to be continuous from port to port, or such passengers are to be conveyed from port to port in part by way of any overland route through Mexico or Central America." Under this provision protection is afforded to passengers by water routes between American ports on the Atlantic and Pacific oceans. So the question of jurisdiction was not a controlling consideration with the framers of this law. It is not important that ventilation and bunks and hospital stores and medical practitioners be provided

for the voyage of 10 miles from Victoria to Port Angeles or Port Townsend, but these are important provisions for passengers sailing from New York for San Francisco or Portland via the isthmus or otherwise. This is a carriage of passengers to this port from a foreign territory contiguous to the United States, and belongs to the class of cases excepted from the statute.

The exceptions to the libel are allowed.

HINE et al. v. PERKINS et al.

(Circuit Court of Appeals, Second Circuit. May 23, 1893.)

1. SHIPPING—DEMURRAGE—PROVIDING BERTH.

A chartered vessel reached the port of New York, and proceeded to the designated pier, at 8 A. M., December 10th, but finding the berth occupied, she sought an anchorage. The charterers were notified by 11 A. M. that she would be ready to unload at 7 A. M. the next day. Early in the morning, December 11th, she proceeded to the pier, and, finding the berth still occupied, she went back to her anchorage. The berth was ready for her by 11 A. M., but she did not return until evening, and commenced to unload on the 12th. *Held* that, as the charterers provided a berth within 24 hours after notice of arrival, they were not liable for the delay. 50 Fed. Rep. 434, affirmed.

2. SAME—WANT OF DISPATCH IN UNLOADING.

A charter party provided that the vessel should "discharge as fast as she can deliver in ordinary working hours; any lighterage at port of discharge to be at charterers' risk and expense; vessel to provide sufficient steam to run all cargo winches at one and the same time." The vessel had four hatches from which she could discharge, but was sent to piers where she could use but three, at most. *Held*, that she was entitled to discharge from all four, and the charterers were liable for the delay caused by discharging from fewer. The *Glenfinlas*, 1 C. C. A. 85, 48 Fed. Rep. 758, distinguished. 50 Fed. Rep. 434, reversed.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. This was a libel by Wilfred Hine and another against James D. Perkins and another, which was dismissed, in part, by the lower court, and a decree entered in favor of the libelants as to the residue. Libelants appeal. Reversed.

J. P. Kirlin, for appellants.

Chas. E. Souther, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The libel was filed by the owners of the British steamship *Netherholme* to recover damages for breach of a charter party made at New York October 7, 1890. The breach complained of was a failure to provide facilities for discharging, whereby demurrage was incurred, and certain expenses were entailed. The libel, as amended at the trial, claimed, upon both causes of action, \$1,547.70. A decree was entered in favor of the libelants for the extra expense, amounting to \$191.64, and as to the claim for demurrage the libel was dismissed.

The vessel brought a cargo of 2,267 tons of coal from Cape Breton to the port of New York. The charter party, among other things, provided that when loaded she should "proceed to New York, * * * and deliver the same, (lying always afloat.) * * * Five working days, Sundays excepted, are allowed the charterers for loading, and discharge as fast as she can deliver in ordinary working hours. * * * Any lighterage at port of discharge to be at charterers' risk and expense. * * * Vessel to discharge at one safe berth in New York harbor as ordered by charterers; any subsequent move to be at charterers' expense. * * * Vessel to work at night when required by charterers; any extra expense thereby incurred to be borne by the charterers." By a further clause the vessel was required "to provide sufficient steam to run all cargo winches at one and the same time." Demurrage was fixed at £40, British sterling, per day.

The vessel sailed from Cape Breton on December 3, 1890. On December 2d the defendants, Perkins & Co., wrote to the libelants' agents, announcing the date of departure, and concluding: "Upon arrival please have the steamer go to Eighteenth street, North river, to discharge her cargo, and report to Thomas Cunningham, the gas company's stevedore, who will discharge her at the customary rate." The vessel arrived December 10th, and reached the designated wharf about 8 A. M. The berth was then occupied by the barge Kingston. The vessel came to the outer end of the pier, and asked for Thomas Cunningham, but he was not there; and learning from persons on the pier that there would be no berth till the following morning, and there being no place to make fast alongside, the captain took her to an anchorage at Weehawken. The captain then went down town, reporting the situation to his agents, and served a notice upon the defendants that his steamer was arrived, and would be ready to discharge at 7 A. M. on December 11th, and that lay days would commence at that time. At what time this notice was served on the defendants does not appear, but it could hardly have been before 11 A. M., and by that hour on December 11th there was a berth ready for her at Eighteenth street, the Kingston having moved away. We concur with the district judge in his opinion upon this branch of the case, holding that, having provided a berth within 24 hours after notice of arrival, the charterers fulfilled their obligations in that regard, and are not to blame for the circumstance that coming to the wharf early in the morning of December 11th, and finding the Kingston still there, the Netherholme returned to anchorage, and did not finally berth till nearly 6 P. M. The lay days, therefore, commenced on December 12th.

Through the nonattendance of the customhouse officer, discharge did not commence during the forenoon of that day, and, owing to incumbrances on the dock, the discharge during the afternoon was further delayed; the consignees not being prepared to receive more than half of what the ship was prepared to deliver from two hatches. On December 13th the respondents availed

themselves of their privilege under the charter party to order the vessel to a second berth, at the pier, foot of Forty-Second street, North river. There was a loss of half a day here, through delay in furnishing the transfer permit. The 14th was Sunday; the 17th, unfit to work by reason of rain, and discharge was completed Saturday, the 20th, at 1:30 P. M. The vessel had four hatches, with winches and proper appliances at each for discharging cargo. Only two were used at Eighteenth street, the obstructions on the pier preventing the respondents from taking even as much as was discharged from them. At Forty-Second street only two hatches could be worked in the regular way, owing to the size and shape of the pier. A third hatch, the forward one, was also made serviceable by the afternoon of the 16th; a platform 60 feet long being erected, over which the coal could be rolled from the hatch to one of the derricks on the pier. No effort was made to discharge from any hatch into lighters. In order to expedite the discharge the respondents worked the ship on the nights of the 18th and 19th. At this season, "ordinary working hours," as regulated by the customhouse officers in this port, closed at sunset, i. e. about 4:30 P. M. As stated above, the discharge was completed at 1:30 P. M. on Saturday, December 20th.

The libelants contend that the ship was not given the dispatch her charter called for, in that respondents failed to provide facilities, either at the wharf or by lighter, to allow her to discharge from all four hatches at once. During the entire time of discharge, all her winches were in good condition. She had steam to work all four of them, as the charter required, and was able to discharge from all, if facilities for the receipt of cargo had been provided. The charter provides that the ship should discharge "as fast as she can deliver in ordinary working hours." This language is perfectly plain and unambiguous. It contemplates a delivery by every ordinary means at her disposal. That she was to run all her cargo winches at one and the same time was also, manifestly, within the contemplation of the parties, for it is expressly stipulated that she shall provide sufficient steam to so run them all. We are therefore of the opinion that she was entitled to insist on discharge as fast as she could from all of them. We do not agree with the district judge that by such a construction there is read into the contract more than its language imports. On the contrary, to qualify the provision by restricting it to one or two or three of her hatches would be to read into the charter a clause which the parties did not insert, and which we have no reason to suppose they intended to insert. In fact the provisions about lighters, and the supplying of steam for all the winches, are persuasive to the conclusion that the parties meant precisely what they said.

The case of *The Glenfinlas*, 1 C. C. A. 85, 48 Fed. Rep. 758, is referred to as sustaining the contention of the respondents that the ship was entitled to discharge from two hatches only. In that case the provision of the charter party was, as in this case, that the vessel should "be discharged as fast as she can deliver." It

was held that evidence of a practice of the port, as respects the delivery of cargoes of chalk, (with which the *Glenfinlas* was loaded,) "could not control the plain intent of the charter to provide for a rapid discharge during working hours." In the opinion in that case it was stated that "vessels of her size use at least two hatches, and under the charter the *Glenfinlas* was entitled to do so, despite the evidence of a contrary practice, having reference to smaller vessels, and smaller cargoes." But in that case, although the *Glenfinlas* had four hatches, her owners made no claim to work more than two, and for aught that appeared in the case she was not equipped to work more than that number. Deciding only the precise point raised in that case, we held that if the ship was prepared to work two hatches, and claimed the right to do so, she was entitled to discharge therefrom, under such a charter party, during ordinary working hours, and on ordinary working days, despite any custom. In the case at bar, where the ship was equipped with proper winches and steam, and ready to work four hatches, we hold, in like manner, that she was entitled to discharge therefrom, such discharge being in strict conformity to the agreement of the parties, as expressed in the charter party. We are satisfied from the evidence that the ship demanded more rapid discharge than she received, and was entitled to demurrage for any detention subsequent to the lay days necessary to effect her discharge from four hatches.

As to her rate of discharge from four hatches the testimony is somewhat contradictory. The master and another witness put it at 200 tons per hatch, but they were evidently estimating on a day of 10 hours, and the ordinary hours at that season, in this port, are only 8½. It appears that on December 15th the ship discharged all day from two hatches,—Nos. 2 and 3. We do not find that there was any particular obstruction or delay incident to this discharge, and she landed 235 tons. This would make the rate from four hatches 470 tons per day, and it would require five days to complete the discharge of the 2,267 tons. The lay days began on December 12th. Therefore, had she been given such discharge as she was entitled to, they would have covered December 12th, December 13th, (Saturday,) December 15th, December 16th, and December 18th, (December 17th being unfit to work, by reason of rain,) and the ship is entitled to two days' demurrage, viz. December 19th and 20th. We concur with the district judge as to respondents' liability for the extra expense caused by working the ship at night, and for the towage.

Decree of district court reversed, and cause remanded, with instructions to decree in accordance with the views expressed in this opinion; costs of both courts to libelants.

WILSON v. PILOTS' ASS'N et al.

(District Court, E. D. South Carolina. May 16, 1893.)

PILOTAGE—NEGLIGENCE—PLEADING.

In a libel for negligent pilotage, it is a sufficient allegation of negligence to aver that the vessel was grounded by the "negligence of the said pilot in the business and calling of the pilotage" of the harbor in question, for, from the nature of the case, the particulars of the negligence cannot usually be known to the libellant, and he must judge only from the result.

In Admiralty. Libel by Samuel P. Wilson, master of the schooner Kate V. Aitken, against the Pilots' Association and others, to recover damages resulting from negligent pilotage. On exceptions to the libel. Overruled.

Bryan & Bryan, for libellant.
Smythe & Lee, for respondents.

SIMONTON, District Judge. The libel is brought by the master of the schooner Aitken against a number of persons, members of an unincorporated association doing business of the pilotage of the bar and harbor of Charleston, and also against the owners of the tug Relief. The allegation is that the persons belonging to said association were copartners together, engaged in and conducting the business of pilotage on that bar and in that harbor, under articles of agreement contained in an exhibit. That the schooner, in February last, arrived off the port of Charleston, and was piloted into that port, and paid the inward pilotage to said association. That, the schooner being ready for sea, and loaded and in every way fitted for the voyage, the association appointed one of its members, S. G. Bringlee, to carry said vessel to sea, and undertook safely to convey said schooner to sea over the bar of Charleston, in consideration of the lawful fees for said pilotage; and that the tug Relief, in consideration of \$20 to be paid therefor, contracted to tow the vessel to sea. Then comes the allegation which is excepted to:

"That thereupon, in pursuance of such agreement and undertaking of towage and pilotage, the said pilot S. G. Bringlee took charge of the said schooner about 9 A. M. on 9th March, 1893, in the harbor of Charleston, and at the same time and place the said steam tug Relief, George Ames, master, took the said schooner in tow by hawser leading ahead, and proceeded down the harbor of Charleston, and out by Swash channel, between North and South jetty; and while so proceeding to sea, by the negligence of the said Charleston Pilots' Association and of the said pilot 'in the business and calling of the pilotage of the bar and harbor of Charleston,' and also by the contributory negligence of the owners, master, and crew of the said tug Relief, and by reason also of the insufficiency of the said tug for such service of towage, and not being staunch and strong, and every way fitted and equipped for such undertaking of towage of such vessel to sea, laden, over Charleston bar, the said vessel was grounded on the north side of the said Swash channel, near the entrance to, and inside, the bar of Charleston, and driven on the shoals, and, pounding thereon, sprung a leak, and was imbedded in the sands in sinking, and was wrecked on the shoals and breakers to the north of said Swash channel, where she now lies a total wreck."

To the libel, respondents members of the Pilots' Association file this exception:

"That the only allegations of negligence as to them in the said libel are in the sixth and seventh paragraphs thereof, which charge that the Kate V. Aitken was grounded, while proceeding to sea, by the negligence of the Pilots' Association and of the said S. G. Bringloe, and that the said grounding and sinking was caused by the said pilot; but that these defendants except, because no specific facts or acts of negligence are set out or charged to support the aforesaid allegations, which are mere conclusions of law."

This libel is for a breach of contract. The Pilots' Association is composed of skilled seamen, charged exclusively with the duty of bringing and carrying vessels into and out of the bay and harbor of Charleston. The essence of their contract is that they will do this safely. As breach of this contract, libelant alleges that his vessel grounded on the north side of the channel, near the entrance to, and inside of, the bar of Charleston. This is the cause of action. As an aggravation of damages, and to exclude the idea of any contributing negligence, the libel charges that this was done by the negligence of the Pilot's Association and the pilot "in the business and calling of the pilotage of the bar and harbor of Charleston," and also by the contributing negligence of the tug, and by reason of her inefficiency. The respondent asks that libelant be more specific, and that he state wherein the negligence consisted. The pilot is a man possessed of peculiar knowledge and of exceptional skill. He must not only be fully acquainted with all the channels and their obstructions, but he must be able, in his mind's eye, to know where they are located, precisely. He must also be a skillful navigator, directing the course and controlling the sailing of the vessel. For the time he is, in this respect, in absolute control, and is so identified with the vessel that she is responsible in rem for his acts. *The China*, 7 Wall. 58. When an accident of the kind charged in this libel occurs, therefore, no one can tell whether it arises from forgetfulness, or want of knowledge, or want of attention, or want of skill. All these causes are concealed in his breast. The cause cannot be ascertained with certainty. To require its allegation in the pleadings would be to require an impossibility. When, then, the libel states the facts, first, of the engagement, then of its acceptance, then of its inception, then of its interruption, and that this was by the negligence of the pilot in his business and calling, the tug contributing, the issue is tendered to the former, and he can meet it. Whether the burden is thrown on him of disproving negligence; whether libelant must prove negligence; whether the burden may be shifted after a certain amount of evidence has been introduced; whether the fact itself speaks,—all these are questions, not of pleading, but of evidence, and are to be made at the trial. The charge that in failing to perform his contract the respondent showed negligence as a pilot, or even that the cause of its non-performance was his negligence as a pilot, must be sufficient for respondent. He was in the performance of a sworn duty. He knows—no one else can know—whether he fully complied with it.

All that libelant can judge from is the result. He made a contract to be carried to sea safely. In being carried to sea he got aground. He alleges that it was through the negligence of the pilot, aided by the negligence of the tug; that is to say, that these caused it, and he did not. This seems to be enough for the purposes of pleading. *The Quickstep*, 9 Wall. 670. The mere charge of negligence does not put on respondent the burden of proof. That will be developed as the case goes on. See *The Webb*, 14 Wall. 414.

DONKIN et al. v. HERBST et al.

HERBST et al. v. DONKIN et al.

(Circuit Court of Appeals, Second Circuit. May 23, 1893.)

1. CHARTER PARTY—VESSEL OUTSIDE CHARTER LIMITS—MASTER, CHARTERERS' AGENT—HEALTH LAWS—CHARTERERS' DUTY TO PROCURE CLEAN BILL OF HEALTH.

The charterer of a vessel running under a time charter from the river Platte to the United States or the United Kingdom or Europe made a subcharter, which provided that the ship should go outside her charter limits, and take a cargo from Progreso, Mexico. The charter provided that the master, though appointed by the owner, should be under the orders of the charterer. The ship went from Buenos Ayres, an infected port, to Progreso, where the health officer refused her admittance. The ship then went to Key West, where the master telegraphed the charterer that he could not return to Progreso without a clean bill of health from some other place. The vessel on the same day was put in quarantine at Key West for 30 days. After some further telegrams, the charterer ordered the ship to return to Progreso immediately. After the vessel was ready for sea, with steam up, and anchor chain short, the charterer telegraphed to have the papers vised by the Spanish consul, to which the master replied, "Too late," and went to Progreso, where he was again refused admittance, and, after much consequent delay, the charter was terminated. The charterers declined to pay the charter hire, averring that they had suffered damage by reason of the master's failure to obtain the vise, and, on being sued for the charter money, brought a cross suit to recover such damages. *Held*, that the owners were under no obligation to obtain clean health papers for Progreso, since they never authorized the ship to go there; that the master was the charterers' agent in respect thereto; and that the master's defaults, if any, did not become the faults of the owners. 49 Fed. Rep. 379, affirmed.

2. SAME.

It appearing also that the final refusal to permit the ship to enter at Progreso was not due to the lack of the vise, but because she came from an infected port, and without a clean bill of health, for which the owners were not responsible, the charterers' claim of damages must be dismissed, and the ship recover her charter money. 49 Fed. Rep. 379, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by Richard S. Donkin and others against Robert Herbst and others to recover the charter hire of the steamer *Shadwan*, and a cross libel by respondents to recover damages for a failure of the master to obey the charterers' orders. There was a decree for libelants in the court below. See 49 Fed.

Rep. 379, for the opinion of Judge Brown, which is practically adopted by this court. Affirmed.

Ed. L. Owen, for appellants.

Mr. Mynderse, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the opinion of Judge Brown in these causes, and affirm the decree in each, with costs to the appellee.

NINE THOUSAND BUNCHES OF BANANAS.

THE CURLEW.

HENRY et al. v. BOWRING et al.

BOWRING et al. v. HENRY et al.

(Circuit Court of Appeals, Fourth Circuit. May 23, 1893.)

No. 35.

1. SHIPPING—CHARTER PARTY—EXCEPTED PERILS—BREAKING OF MACHINERY.

The breaking of a junk ring on a steamship engine cylinder must be held an "accident of the sea and of the machinery," within the meaning of a charter party exempting the ship from liability for losses to cargo caused by such dangers, when such ring performed its function without jar or fault prior to the breakdown, and no flaw was disclosed by an examination of the broken pieces. 51 Fed. Rep. 246, affirmed.

2. SAME—DELAY—DAMAGE TO CARGO—SHIPPER'S FAULT.

The charterers of a steamship, immediately on her departure from Baltimore, ordered by telegraph that a cargo of bananas should be cut and placed at the landing in Jamaica by the time at which the steamer would arrive in due course. The ship, however, was delayed about three days by an accident to her machinery, and the bananas, having been promptly cut, greatly deteriorated in the mean time. It was the custom of the trade to order bananas in advance, but in no other known instance had bananas been ordered cut before the arrival of the ship in the immediate vicinity. *Held*, that the proximate cause of the loss was a premature cutting of the bananas, and the ship was not liable in damages.

Appeal from the District Court of the United States for the District of Maryland. Affirmed.

Robert H. Smith and John H. Thomas, for Henry Bros. & Co.

T. Wallis Blackistone, for The Curlew.

Before GOFF, Circuit Judge, and DICK and HUGHES, District Judges.

HUGHES, District Judge. In this case there is a libel by Bowring and others, representatives of the steamship Curlew, for the freight due on a cargo of bananas brought by her from Jamaica to Baltimore in July, 1890, amounting to \$3,854.77; and there is a counterlibel by the owners of the bananas, Henry Bros. & Co., claiming damages to the amount of \$4,000, resulting from the bananas brought to Baltimore on July 14, 1890, having become de-

cayed by reason of a delay of three days in loading them at Jamaica. The libels are heard together.

At the time of this voyage in which the Curlew sailed from Baltimore on the 24th of June, and returned on the 14th of July, 1890, the steamer was under charter practically to Henry Bros. & Co., who were importers of bananas from Jamaica into Baltimore, the charter party providing that the steamer should be exempt from liability for losses to cargo from "all dangers and accidents of the seas, machinery, boilers, and steam navigations."

The Curlew set out from Baltimore on the 24th of June, and proceeded on her voyage to Jamaica until the 1st of July without serious accident. On that day, after encountering some roughness of sea, the junk ring of her high-pressure cylinder broke, and the engines had to be stopped until the machinery connected with that cylinder could be detached, and the broken parts taken out, after which she proceeded under one engine, making very nearly her usual speed. In consequence of this accident the steamer was delayed several hours in arriving at Montego, one of her places for taking on cargo in Jamaica, which place she reached on the evening of July 2d. One day was lost after her arrival at that place in a search for a piece of iron suitable for replacing the broken junk ring. The whole time lost after the accident, before the cargo of bananas was fully loaded at Montego, St. Lucea, and St. Ann's Bay, the places to which they had been brought for shipment, was about three days. The evidence in the case shows that on the same day, (the 24th of June,) when the Curlew set out from Baltimore on this voyage, Henry Bros. & Co. sent orders by telegraph to their agents in Jamaica to have the bananas intended for the Curlew already cut and brought to the landing places for shipment by the time (about the 2d of July) when the steamer would in due course arrive. It also shows that this order was punctually obeyed, and that the bananas were cut and piled up at the landing places by and before the 2d of July awaiting the steamer, and protected from the sun of that hot season and climate only by canvas. It shows that because of this exposure at the landing places before being put on board the Curlew, which left Jamaica for Baltimore on the 5th day of July, the fruit had so ripened by the time of reaching Baltimore as to be incapable of being sent off from there to distant places of consumption, and, except about \$2,000 worth, which was sold to local dealers, soon rotted, and had to be taken off and dumped into the outer bay. It is for the damages thus sustained by Henry Bros. & Co. that they bring their cross libel.

The great preponderance of evidence shows that the breaking of the junk ring in one of the cylinders of the engine of the Curlew was an accident that could not be foreseen; that there was no flaw in the ring that could be detected in examining its broken pieces after the accident; that, from its having performed its function without jar or fault for six days of the voyage anterior to the accident, the inference is reasonable that its breaking was from some cause exterior to itself, and not from any defect of its own; and

therefore this breakage was one of those accidents of the sea and of the machinery of the ship from the consequences of which the charter party exempted the ship.

The evidence shows that while the custom of this banana trade was universal to order the bananas in Jamaica in advance of the arrival of steamers sent for them, yet that in no known instance, except in the case now before us, were bananas ordered to be actually cut off and brought to the places of shipment before the steamer which was intended to receive them was positively known to have arrived at or in the immediate vicinity of the places where they were to be received. Captain Manuel, master of the *Curlew*, testified that he had commanded that steamer in that trade for more than a year; that the custom was to cut the fruit after the ship had arrived at Jamaica; and that he knew of but a single instance in which it had been cut before such arrival, and that was the instance of the cargo under consideration. Diligent endeavor was made by counsel for the owners of the cargo to prove that orders to cut in advance of arrival had been given, but without success. The conclusion is irresistible from the evidence that the order to cut before arrival, given by Henry Bros. & Co. on the 24th of June, for this cargo, was contrary to the custom of the trade, extremely hazardous in the hot season, was the cause of the premature ripening of the fruit by the time it reached the port of Baltimore, and of the loss sustained by its owners.

We are of opinion, from all the evidence shown in the voluminous record in this case, that the breaking of the junk ring of the *Curlew*, which produced the delay of three days to which she was subjected, was an accident of the sea and machinery, from which she was exempt from liability by the charter party.

We are further of opinion that the order of the 24th of June, sent by appellees to Jamaica, that the bananas should be cut and brought to the places of shipment in advance of the steamer's actual arrival, was imprudent, contrary to the custom of the trade, and was the real cause of the premature decay of the fruit, and of the loss which resulted to them, for which loss the steamer is in no manner responsible.

The decree below is affirmed.

ANGEL et al. v. CUNARD STEAMSHIP CO.

(District Court, E. D. New York. June 2, 1893.)

SHIPPING—DAMAGE TO CARGO — BILL OF LADING — STIPULATIONS — NOTICE OF DAMAGE.

Where a case of feathers showed signs of damage on being landed from respondent's steamer, and the bill of lading provided that "the shipowner is not liable for any claim of which notice is not given before removal of the goods," but libellant gave no notice until four or five days after the case had been removed from the warehouse, it was *held* that the provision in the bill of lading was reasonable, and under it libellant could not recover.

In Admiralty. Libel by Emanuel M. Angel and others against the Cunard Steamship Company for damage to cargo. Dismissed.

Julian B. Shope, for libelants.

Larned, Warren & Knapp, for claimant.

BENEDICT, District Judge. This is an action to recover for damage to a case of feathers, which, when landed in New York, were found to be damaged by water. The case was one of a shipment of 23 cases, made in Liverpool, under a bill of lading containing many exceptions, several of which are relied on by the claimant. One only of these exceptions need be noticed on this occasion, namely, the provision as follows: "The shipowner is not liable * * * for any claim of which notice is not given before the removal of the goods." This provision seems to be a reasonable provision in a bill of lading. The validity of such a provision has been upheld by the courts of England. *Moore v. Harris*, 34 Law T. (N. S.) 519. Under it the steamship is exempted from liability for the claim in question. It is proven that the case was hot on the outside when it was landed, and the libelants gave no notice of the claim of damage on that account until four or five days after the case had been removed to the warehouse. The libel must be dismissed, and with costs.

THE BATTLER.

SCHRADER v. THE BATTLER.

(District Court, E. D. Pennsylvania. June 2, 1893.)

1. TOWAGE—NEGLIGENCE—ANCHORAGES—CUSTOM AND USAGE.

A tug with two barges in tow left Philadelphia on a voyage to Boston, but when near the ocean the indications of bad weather were such that she deemed it unwise to proceed to sea, and anchored her tow near Brown shoal, in Delaware bay. She left them there on Thursday evening, and, engaging in other towage services, did not return until Saturday. At this time the signs of bad weather had increased, so that the tug left the barges for other towage services, and never returned to them, for the wind increased to an unusually violent gale, and on Tuesday they sank. *Held*, that though the tug followed an established custom in anchoring her tow to await a change of weather, and engaging in other towing, it was her duty to provide a safe anchorage, and to keep such watch over the tow as to enable her to render whatever assistance it might need.

2. SAME—NEGLIGENCE—EVIDENCE.

Several experienced mariners testified that Brown shoal, owing to its exposure to the ocean swell, was not a proper place for a vessel to ride out a gale at anchor, and that it was never resorted to for that purpose. It was shown that there were several safe anchorages further up the bay, where vessels had ridden out the gale in question; and there was evidence that the tug might have moved the barges thither before they were lost, had she not been otherwise engaged. *Held*, that she was guilty of negligence that rendered her liable for the loss of the barges.

In Admiralty. Libel by John Schrader, owner of the barges Tonawanda and Wallace, against the steam tug Battler (Clarence

L. Tingle, master) for the loss of the barges by the alleged negligence of the respondents. Decree for libellant.

Edwd. F. Pugh and Henry Flanders, for libellant.

J. Rodman Paul and Morton P. Henry, for respondent.

BUTLER, District Judge. On September 4, 1889, the tug Battler took the barges Tonawanda and Wallace, loaded with coal, in tow at Philadelphia, in pursuance of a previous contract, to convey them to Boston, and proceeded down the Delaware river and bay until near the sea. Deeming it unsafe to go further, in view of the weather prevailing there, she anchored the barges in the mouth of the bay at Brown shoal, about 4 o'clock of the same day. Leaving them immediately thereafter, she engaged her services to the bark Hickman (just arrived from sea) for a voyage to Philadelphia; from which place she returned on Saturday morning. By this time the indications of bad weather had materially increased. The tug rendered no further service to the barges, but employed her time in assisting others, who hired her aid. The wind continued to increase; on Monday it was very high and threatening, and on Tuesday had become an unusually violent gale. On the latter day both barges sank, and were lost—the crews being saved by another tug while the Battler was still absent.

Stopping here a very plain and very gross case of carelessness would be made out against the tug. In explanation of her conduct, however, she avers and produces evidence to prove that in towing on this voyage it is customary, on reaching the mouth of the bay and encountering an easterly wind, with indications of bad weather at sea, to anchor the tow there, as the Battler did; and, while awaiting change of weather, for the tug to engage in such other service as may offer; that the anchorage ground selected was proper for the occasion, and as good as any in the vicinity.

I find that it is customary to anchor and await change of weather, under such circumstances; and that tugs engaged in this service do in the mean while generally accept other employment. I also find that the condition of the weather justified the Battler in declining to proceed further on Thursday evening. There were such indications of bad weather as might have rendered her responsible for any loss sustained by going to sea at that time. The testimony on both sides sustains this view; and the fifth article of the libel virtually admits its correctness. Whether the voyage might have been resumed with propriety the next morning is not clear. I incline to believe that its resumption at that time would have been unwise.

The inquiry is thus reduced to the question: Did the tug select an anchorage suitable for the occasion, and exercise proper care for her tow thereafter? It was her duty to select a place suitable to ride out the anticipated storm. She could not foresee a tempest such as came. It was very extraordinary. But she

was bound to anticipate a storm of more or less violence, and to leave the tow in a place of comparative safety during its continuance. She was furthermore bound to keep watch over it—not constantly, but occasionally and seasonably—to ascertain whether assistance was needed. A custom at variance with the exercise of such care would be unreasonable and should be condemned. Such tows are virtually helpless in bad weather; and their loss involves not only property, but human life as well.

Was the place at which the tow was left throughout the storm proper for the occasion? If none better could be found within reach it was. A few miles higher up are several other anchorage grounds, among which are Fourteen-Foot bank, Miah Maule, and Middle anchorage. A careful examination of the testimony has satisfied me that either of these places, and especially Fourteen-Foot bank, affords a much safer place for such an occasion than the one below; and that the latter is very unsafe during the prevalence of severe storms. The evidence is conflicting and irreconcilable; but its weight sustains the view expressed. A discussion of the subject would amount to little more than arraying the testimony on one side and the other, and this would be of no value. The situation, customary use, and relative safety of the several places named are in my judgment correctly described by Capt. Albertson, apparently a very intelligent man, who for 20 years was master of Reading Railroad coal steamers and had much experience of the waters in this locality. He says:

"I do not know of any good anchorage whatever at Brown shoal. I never considered that place a harbor. It is too bleak, and is open to the full sweep of the ocean. There is a general cross current there that makes it very rough with the wind blowing, and vessels lay very badly. * * * Between the currents a great deal of water will come aboard. As soon as you get below the Brandywine shoal (which is between Brown shoal and Fourteen-Foot bank) you begin to take the sea that comes in there, and it boards the vessel at a fearful rate. I have gone down when it has been quite smooth until I got to the lower end of Brandywine shoal, where the sea has boarded us so that it has not been safe to go around on deck. The water has a great sweep from the ocean down there, but before it gets up to Brandywine shoal it meets with a great deal to break it off. It has such a roll from the ocean down there and produces such a heavy undertow that it is hard for vessels to lay there. I have never seen vessels anchored at the Brown shoal, south of the Brandywine, for harbor in heavy weather. I have seen vessels there temporarily. I never anchored there for harbor, nor saw a vessel anchored there for harbor. Vessels anchored there temporarily, when 'tide nipped,' or in fog, but never in heavy weather outside. Of choice I would rather take the open sea to ride out a gale than an anchorage at Brown shoal. Miah Maule we always considered a good safe harbor."

He further testifies that vessels of all sizes and descriptions and in all kinds of weather, anchor there, and at Fourteen-Foot bank. The same in substance is the testimony of Henry C. Burge, an old experienced shipmaster, Capt. Smith, Capt. Hatch, Capt. Naylor, Capt. Willits Miller and many others. It is a significant fact that the Tonawanda's master, when starting upon the voyage, requested the tug's captain not to take him below Fourteen-Foot bank, if the

weather should prove unfit for going to sea. That the request was made I have no doubt whatever. Both the master and his mate testify to it. While the tug's master remembers conversation on the subject he does not remember that it referred to this shoal. The request leaves no doubt in the mind that the captain of the Tonawanda, who was familiar with the locality, believed that it was unsafe to anchor lower down. There is no doubt whatever that many vessels anchor at Brown shoal, but the weight of the evidence fully justifies a conclusion that such anchorage is for short periods, to meet such emergencies as Capt. Albertson speaks of; and that it is not resorted to as a refuge from storms, when points higher up can be reached. Directly in the mouth of the bay, it feels every motion of the sea, and naturally would be avoided by vessels seeking harbor.

The tug was therefore clearly wrong in leaving the barges where she did. It was a mistake to anchor there even for a single night, under the circumstances; but it was wholly inexcusable to leave them there during the continuance of the storm, until they were lost. Up to Monday they could have been removed with safety; and I believe they would have been removed if the tug had felt as much care for their protection as she felt for obtaining money by other employment. I attribute her conduct entirely to her greed. Going off on Thursday evening and remaining away until Saturday morning, under the circumstances, was inexcusable; and her failure to tow the barges higher up or attempt anything for their safety afterwards, was gross negligence. But for the friendly assistance of others the crews would have been lost, as well as the vessels. To say nothing could have been done—that to have moved the barges higher up would not have saved them—is simply to speculate about what cannot be known, and does not even tend to excuse the fault. The barges were entitled to her efforts for their protection; and having failed to make any such efforts her answer that nothing available could have been done is entitled to no consideration. I scarcely doubt that they would have been saved if they had been taken to one of the anchorages above. They were at least entitled to the chance of safety there. Other vessels rode out the storm without damage at Fourteen-Foot bank. It is of no consequence if some anchored there did not; the barges might have been as fortunate as those that did. I am not satisfied however that any vessel was lost there. I think the evidence justifies a conclusion that none was. For these reasons the libel must be sustained; and a decree may be prepared accordingly.

THE E. D. HOLTON, THE ALICE M. CAMPBELL, and THE ANNIE O. HANSEN.

BANKS v. THE E. D. HOLTON AND THE ALICE M. CAMPBELL.
PENFOLD v. THE E. D. HOLTON AND THE ANNIE O. HANSEN.

(District Court, W. D. Michigan, S. D. May 2, 1893.)

1. TUGS AND TOWS—RIVAL TUGS—NEGLIGENCE—LIABILITY.

A schooner, coming into harbor, signaled for a tug. Rival tugs, the H. and the C., started on a race to secure the job. There was some wind, and the sea was rough, but navigation was not perilous or difficult. The services of the H. were accepted, and she made three unsuccessful attempts to throw her heaving line to the schooner, occupying 20 minutes, during which the schooner was drifting on a lee shore. To prevent grounding, the schooner's captain ordered the H. off, and called on the C. The C. responded, but the H. backed up in her way, obliging her to stop and reverse to avoid collision. The C. again tried to approach, when the H. a second time backed into her course. At the third attempt the C. got the towing line aboard, the schooner secured it to her bow, and attempted to back out. Meantime the schooner had grounded. The tow line was about 100 feet in length, too short for the C. to turn about with. In backing, the C., on reaching the end of the tow line, was brought up suddenly, and was thrown to port and grounded by the motion of her screw. Both the schooner and the C. sustained damage. *Held*, that the C. was not at fault, and that the libel of the schooner against her must be dismissed.

2. SAME—TOWLINE—NEGLIGENCE—DEGREE OF CARE IN PRESENCE OF PERIL.

The schooner had two toelines. The longer one was used only in stormy weather, when the strain was severe, and at other times was stowed below. The shorter line was the one usually used in taking her into harbor. It also appeared that, if the H. had not obstructed the C., the latter would have swung around, quartering to the schooner's bow, and thence out into safe water, thus presenting her stern for the toeline, which would then have been long enough. On a libel by the owner of the C. against the schooner, it was claimed that the damage to the C. was caused by the use of the short line. *Held*, that the libel must be dismissed, the master of the schooner having no reason to suppose that the long line would be required, and parties in peril not being held to so strict a rule of conduct as when in a situation for calculation and forethought.

3. SAME—WANTONLY OBSTRUCTING RIVAL TUG—LIABILITY.

The C. was justified in continuing her attempts to reach the schooner, notwithstanding the obstruction of the H., and the proximate cause of the damage to the C. was the wanton conduct of the H., and not voluntarily going into a perilous situation. The H. was therefore liable for the damage sustained by the C.

In Admiralty. Libel by Albert E. Banks, owner of the schooner Annie O. Hansen, against the steam tugs E. D. Holton and Alice M. Campbell. The claim of the libelant against the E. D. Holton was settled out of court before hearing. Cross libel by Jonathan Penfold, owner of the tug Alice M. Campbell, against the Hansen, and the Holton. Libel dismissed. Cross libel dismissed as to the schooner, and sustained as to the Holton.

Markham & Kerwin and D. G. F. Warner, for libelant.

Phillips & Jenks, for the E. D. Holton.

Smurthwaite & Higgins, for the Alice M. Campbell and Jonathan Penfold.

SEVERENS, District Judge. In the early morning of May 15, 1891, the schooner *Annie O. Hansen* was coming into the harbor of Frankfort, on the eastern shore of Lake Michigan, and signaled for a tug to come out and take her in. The two tugs which are respondents in the original suit were rivals in the towing business at that port, and were lying in the harbor. Hearing the signal, both tugs started on a race to secure the job. There was some wind blowing landward, and the sea was somewhat rough, but there was not enough wind or sea to make navigation perilous or difficult. The *Holton*, coming up, went to the *Hansen*, and tendered her services, which were accepted. She made three unsuccessful attempts to throw her heaving line to the *Hansen*. Why these attempts were not successful does not satisfactorily appear, and the only reasonable inference is that they were not conducted with any reasonable degree of skill. It would seem probable that it was in part due to her eager haste to secure the job, and the want of deliberation in coming up to the *Hansen*. Some 20 minutes were occupied in this fruitless endeavor, and meanwhile the *Hansen* was drifting over by the effect of the wind and slackened speed to the leeward shore. All this time the *Campbell* had been hovering near, watching events. Upon the failure of the *Holton* to get him in tow, and his own ship being in imminent danger of going ashore, the captain of the *Hansen* ordered the *Holton* off, and called on the *Campbell* to come and take him. The *Campbell*, responding, went to his relief, but, as that tug was approaching, the *Holton* backed up in the way, and the *Campbell* was obliged to reverse and stop to prevent collision. Changing her course, the *Campbell* again tried to approach, when the *Holton*, again warned to get out of the way by the captain of the *Hansen*, a second time backed into the course of the *Campbell*, and the latter was compelled, as before, to stop. On a third attempt the *Campbell* squeezed by the *Holton*, and, throwing out her heaving line, got the line of the *Hansen*, and, securing it to her bow, attempted to back out. Meantime the *Hansen* had grounded in shoal water to the leeward of the channel. The *Campbell* was of deeper draught than the *Hansen*, and her maneuvering in that locality was somewhat dangerous. The line which was given out to her by the *Hansen* was about 100 feet in length, and was too short for her to turn about with. Accordingly she was prevented from attaching the line to her stern and going ahead. In attempting to back out, the *Campbell*, on reaching the end of the line given her, was brought up suddenly, and, by the motion of her screw, was thrown to port and grounded. Both the *Hansen* and the *Campbell* suffered serious damage before they could be rescued. There is some conflict in the testimony upon some points, but I am satisfied the foregoing statement represents the facts substantially as they occurred.

The owner of the *Hansen* libels both the tugs, and the owner of the *Campbell* files a cross libel against the *Hansen* and the *Holton*. The court is informed by the proctors that the libellant in the original suit and the *Holton* have settled the matter of the

liability of the Holton between themselves. The particulars of this settlement are not known to me. The questions submitted by the proctors are such as concern—First, the liability of the Campbell to the Hansen, and vice versa; and, second, the liability of the Holton to the Campbell.

First, in regard to the liability of the Campbell to the Hansen. I see nothing in the facts which would warrant the conclusion that the Campbell was in fault, and the original libel should be dismissed as to that vessel.

Then as to the cross libel by the Campbell against the Hansen. The only reason for attributing any fault to the Hansen is one which is said to grow out of the fact that the line she gave to the Campbell was too short, whereby the latter was thrown about into the shoal water. It is shown that the Hansen had two lines, one of which was newer and much longer than the other, and it is claimed that it was negligence to use the shorter one, as was done. The long new line was used only in stormy weather, when the strain was severe. At other times it was not on deck, but down below. But the one used on this occasion was the one which had for some time been used in towing the vessel into this port, and by these same tugs. It does not appear that any inconvenience had been found in its use. Regard should also be had to the fact, which appears from the testimony, that, when the Campbell was invited to come in, she was in such a position that, if she had not been obstructed by the Holton, she would have swung around, quartering to the Hansen's bow, and thence out into safe water, thus presenting her stern to the latter for the towline, in which case the captain of the Campbell admits that the line would have been long enough. Instead of this, the Campbell was crowded further towards the bow of the Hansen by the maneuvers of the Holton, and, when at length she succeeded in getting to the Hansen, she approached her stem on. This must have been wholly unexpected by those managing the Hansen, who had good reason for supposing that the Holton would behave according to her duty, and stand out of the way. The Hansen was not responsible for the wanton and lawless conduct of the Holton, and cannot be charged with fault for not doing what she might or should have done if the situation had not been caused by such interference. Further than this, it was a moment of peril, and the long line was not on deck. Parties acting in extremis are not held to so strict a rule of conduct as when in a situation for cool calculation and forethought. This rule is of most frequent application where a sudden emergency has been caused by the act of the complaining party; but it seems also to be a reasonable one for a case where, without his fault, a party is momentarily confused in a condition of peril, from whatever cause arising, and when the other party understands the situation. My conclusion must be that the cross libel against the Hansen should also be dismissed.

But, secondly, there remains the question of the liability of the Holton to the Campbell. It is quite clear that the conduct of the former was actuated by selfishness and jealousy, passing all rea-

sonable or lawful bounds. The Hansen was perfectly justified in rejecting her further assistance, after the puerile demonstration she had made, and in view of the Hansen's increasing danger. When the captain of the latter requested the Holton to get out of the way, it was her plain duty to comply. Instead of doing this, she remained and obstructed the Campbell in that vessel's endeavor to do what she had failed to do. The consequence was that the peril of both the Hansen and the Campbell was increased, and, in my opinion, the disaster to both occasioned. The only question on this branch of the case involved in any doubt is the one of law whether the conduct of the Holton was the proximate cause of the injury suffered by the Campbell; but, taking all the circumstances into view, I think it was. Upon the request of the Hansen for the Campbell's assistance, and the assent of the latter to undertake it, a contract relation was established, and a duty was cast upon the Campbell. The execution of that duty was rendered more hazardous by the course taken by the Holton. The increase of the danger, and the consequences liable to result therefrom, must, or should have been, foreseen and appreciated by the Holton. The question then is whether one who wantonly increases the peril of another, while the latter is in the performance of a duty such as this was, is responsible for an injury produced thereby, and which might reasonably have been anticipated. I think he is, and that the damages are proximate. The case of *McAfee v. Crofford*, 13 How. 447, seems to illustrate the proposition that a somewhat liberal rule should be applied in favor of a party injured by a willful trespass, in tracing the cause to the consequences. And in cases of mere negligence, decided in the admiralty courts, it has been held that if, by the wrongful act of the respondent, the peril of the vessel of the libellant has been increased, and injury has happened, which probably would not have happened but for the wrongful act, the damages are recoverable. *The W. E. Cheney*, 6 Ben. 178; *The Bordentown*, 40 Fed. Rep. 682. It would doubtless be otherwise if the danger became so great that it was mere foolhardiness to proceed. But that was not the case here. It was a somewhat hazardous undertaking on the part of the Campbell, after being so long foiled; but she took the risk, and I think, under the circumstances, it was not unreasonable that she should do so. It proved unfortunate for her, but that is not the test of reasonableness. The rule is unquestionably that a party may not go on recklessly into a danger created by the unlawful act of another, and hold him liable for the consequences which follow. In such case it would be his duty, to forbear, and he could then hold the wrongdoer for the injury thus far caused. A party cannot wantonly aggravate the consequences of the wrong. *Clayards v. Dethick*, 12 Q. B. 446.

In such circumstances a question often arises something akin to that in cases of alleged contributory negligence, and the inquiry must be whether, notwithstanding what the defendant is found to have done, the plaintiff's own conduct was free from fault.

This is a question of fact, and depends upon the circumstances of the case. If, looking at these, it is fairly to be concluded that the plaintiff was not blameworthy in going on in the increased danger, he is to be justified in doing so, and the defendant will be held responsible for all the consequences following naturally from his own unlawful act. In *Town of Albion v. Hetrick*, 90 Ind. 545, the town had negligently permitted a highway to remain out of repair. A person having the right to travel there, though he knew that the defect existed, yet as there was no other convenient way, and he reasonably thought he could get through, notwithstanding the defect, was held not to be precluded from his right to recover for an injury sustained by the defect of which he had knowledge. In *Wilder v. Railroad Co.*, 65 Me. 332, the plaintiff sued the railroad company for the value of a horse which had been killed on its track. The horse had been turned into the plaintiff's field adjoining the track, which, in disregard of the law, the company had not fenced. It was urged in defense that he was the author of his own wrong, because he knew that the road was not fenced, and took the risk. It was held, however, that he was entitled to the enjoyment of his own rights, and was not necessarily negligent in turning his horse into the field; and he recovered. In *Linnehan v. Sampson*, 126 Mass. 506, the defendant negligently permitted a dangerous bull to be taken along the street. The man leading him was thrown down, and was being gored by the animal, when the plaintiff, coming by, went to see what he could do. He did nothing for the man, but was himself attacked by the bull and injured. The defense was that the plaintiff saw the danger, and might have kept away from it. Upon the ground that he was not in fault in yielding to a call of duty and humanity, in a sudden emergency, it was held that he was not debarred from recovery because he had notice of the danger into which he went.

The result is that the Holton must be held chargeable upon the cross libel for the damages sustained by the Campbell, and it is so adjudged. A reference will be made to a commissioner to take proofs of the damages sustained by the Campbell, and to report the same, with his conclusions thereon, to the court.

THE HELEN F. ROBBINS.

DEMAREST et al. v. THE HELEN F. ROBBINS.

(District Court, E. D. New York. March 3, 1893.)

1. SALVAGE—FIRE—VESSEL IN SLIP—TOWAGE—PUMPING—AWARD.

A lighter loaded with cotton having caught fire in a slip, 2 tugs towed her into the stream, where 15 other tugs joined them, and pumped water on the fire, aided later by the city fire boat, until the flames were extinguished. The value of the saved property was some \$7,000. Held, that \$2,000 should be awarded as salvage,—\$200 each to the tugs which towed the lighter into the river, and \$100 apiece to each of the other tugs.

2. SAME—ASSAULT BY FIRE BOAT—ADDITIONAL AWARD.

When the master of a tug which was assisting in putting out a fire on a lighter was assaulted by means of a stream of water from a fire boat, and injured, *held*, that he should receive an additional award of \$100.

In Admiralty. Various suits by the owners of 17 tugs to recover salvage against the Helen F. Robbins. The suits were consolidated on motion. Decrees for libelants.

Wing, Shoudy & Putnam, for libelants.
Carpenter & Mosher, for claimants.

BENEDICT, District Judge. An examination of the evidence produced in these causes has led me to the following conclusions:

I am of the opinion that the sum of \$2,000 is a proper salvage award to be paid by the lighter and her cargo. This sum should be apportioned as follows: To the tug Sadie E. Ellis and the tug Philip Hoffman,—these two tugs being the first tugs at the fire, and by whose exertion the burning lighter was removed from the slip into the stream, where the other tugs could have access to her,—the sum of \$200 each is awarded. The evidence does not enable me to determine the relative value of the services rendered by the other 15 tugs who threw water upon the lighter and her cargo after she had been towed into the stream. I therefore find it impossible to make any discrimination between these 15 tugs, as to the value of their services. To each of these tugs, therefore, I award the sum of \$100. And I award the sum of \$100 to the master of the James T. Easton, who was assaulted by means of a stream of water from a fire boat, and so injured as to be confined to his house for four weeks, and put to an expense of \$60 for medical attendance. It would seem that attacks of this character are coming to be a peril incident to the rendition of salvage services to vessels on fire in this port, and, if so, must be considered in determining the amount of the award. The sum awarded each vessel will be distributed as usual,—one-half to the owners, and the rest divided among the crew in proportion to their wages; and the costs of the proceeding must be borne by the claimants.

THE THOMAS HILYARD.

TUTTLE et al. v. THE THOMAS HILYARD.

(District Court, E. D. New York. March 7, 1893.)

SALVAGE—TOWING BURNING LIGHTER FROM VESSEL AT WHARF—SERVICE TO
LATTER.

While certain tugs were towing a burning lighter out of a slip, the lighter came in contact with the side of a ship, also lying in the slip. The lighter having been towed away from the slip by the tugs, this suit was brought against the ship on the ground that the removal of the burning lighter from proximity with the ship was a salvage service to the latter. *Held*, that the ship was in no substantial danger, as the lighter was at the time in charge of salvors, who were entirely competent to remove

her before fire could catch on the ship; and also the removal of the lighter was a necessary part of the salvage service which the tugs were rendering to the lighter, and for which they had instituted suits against the lighter. The libel was therefore dismissed.

In Admiralty. Libel for salvage. Dismissed.

Stewart & Macklin, for libelants.

Wing, Shoudy & Putnam, for claimants.

BENEDICT, District Judge. This is an action instituted by the owners and crew of the steamtug Philip Hoffman, and the owners and crew of the steam lighter Josephine B., and the owners and crew of the steamtug Jas. T. Easton, to recover salvage compensation for services rendered to the ship Thomas Hilyard. The facts are these: The Thomas Hilyard was lying at a pier at Harbeck Stores on the south side of the pier, bow in, when a lighter lying at the bulkhead, and having on board over 400 bales of cotton, caught fire. The tug Philip Hoffman and the tug Sadie E. Ellis and the tug Josephine B. commenced to tow the blazing lighter. As the lighter was moving, her guy rope caught upon the ship, and she was held close to the ship for a few moments. After being towed free from that position, the lighter again came in contact with the quarter of the ship. Being towed free from this position, she passed on. The claim of the libelants is that the ship was in great peril of catching fire from the burning lighter while alongside of her, and, inasmuch as the lighter was towed away from the ship by these tugs, they are entitled to be paid a salvage compensation by the ship.

Assuming that it was not by the fault of any of the tugs represented in this proceeding that the lighter came in contact with the ship, and assuming that the ship would have been set on fire by the lighter if the lighter had not been promptly removed from the side of the ship, yet I am of the opinion that the ship was in no substantial danger, because the lighter was at the time in charge of salvors who, as the result shows, were entirely competent to remove the lighter before fire could catch the ship. Moreover, the lighter, at the time she was in contact with the ship, was being towed by these salvors. The removal of the lighter from alongside the ship was a part, and a necessary part, of a salvage service which the tugs were engaged in rendering to the lighter, for which service they have sued the lighter. Under such circumstances, I am of the opinion that they are not entitled to claim salvage from the ship.

Let the libel be dismissed, but without costs.

THE PORTIA.

THE FAIR WIND.

REED v. THE PORTIA.

NEW YORK, N. & H. STEAMSHIP CO. v. THE FAIR WIND.

(District Court, E. D. New York. April 12, 1893.)

COLLISION—STEAM AND SAIL MEETING—CHANGE OF SAILING VESSEL'S COURSE.

A collision occurred in Long Island sound, by night, between the steamer Portia, bound west, and the schooner Fair Wind, sailing east. On the evidence the court rejected the story of the schooner, that the steamship was first seen to windward, afterwards passed to leeward, and then suddenly changed again, throwing herself across the bows of the schooner, which had always held her course; but the court found, on the evidence, that the steamer, having seen the light of the schooner in season, was properly maneuvered to avoid her, when her efforts were thwarted, and the collision occasioned, by a luff on the part of schooner. *Held*, that the latter was in fault for the collision, in failing to hold her course.

In Admiralty. Cross libels for collision.

Butler, Stillman & Hubbard, for The Portia.

Goodrich, Deady & Goodrich, for The Fair Wind.

BENEDICT, District Judge. The collision between the schooner Fair Wind and the steamer Portia, out of which these actions arose, occurred at a point off Eaton's Neck, in the center of Long Island sound, between 10 and 11 o'clock P. M., on July 30, 1892. The night was dark, sky overcast, and at times it was raining. The schooner was bound to the westward; the steamer was bound to the eastward. The wind was about east. The vessels came together at right angles, the schooner's bowsprit bringing up on the port bow of the steamer, then swinging under a port helm. I find it impossible to reconcile the conflicting statements given by the persons on board the respective vessels. Of the two theories put forth, one must be rejected. According to the testimony from the schooner, the steamship when first seen was to windward of the schooner. Afterwards she passed to leeward of the schooner, and then, by a sudden change under her port helm, when she was perhaps two points to leeward of the schooner, and close at hand, she took a course which brought her across the bows of the schooner, the schooner having held her course without change. According to the testimony from the steamship, the steamship was never to leeward of the schooner, but always to windward of the schooner, the courses being nearly opposite. The red light of the schooner was seen by the steamer in time to give abundant room by porting, and the steamer would have cleared the schooner had not the schooner luffed as the vessels drew near each other.

If the steamer was always to the windward, and never to the leeward, of the schooner, the conclusion that the schooner luffed would necessarily follow, for the steamer was swinging to windward. The schooner admits that when first seen the steamer was

to windward, but declares that the steamer afterwards passed to leeward of the schooner, and, if she had held that course, would have passed to leeward of the schooner. It is not easy to see why, if, as the schooner's witnesses say, the steamship gained a position of safety by crossing the schooner's course to leeward, she should afterwards have attempted to recross the schooner's course, at the manifest hazard of a collision. Indeed, it does not seem possible that the collision could have happened in the manner stated by the witnesses from the schooner, for all agree that the vessels struck at right angles, or a little less. In order to bring the vessels together upon such an angle, if the steamer gained two, or even one point to leeward of the schooner, and if the schooner held her course, the steamer would be compelled to change seven points in the time required for the mate of the schooner to run 23 feet. It would be impossible for the steamship in that short time to change seven points. In that time and distance a luff of the schooner would be necessary to bring the vessels together at right angles, or a little less.

I am therefore inclined to accept the account given by the witnesses from the steamer, and hold the schooner responsible, upon the ground that she did not hold her course.

As bearing upon the question whether the schooner held her course, some portions of the testimony from the schooner may be noticed. For example, the mate says, in reply to the question, "What was the schooner's course?" "West by south was the course given." When asked if he was certain that no change in the schooner's course was made up to the time of the collision, he says, "Well, I didn't watch the compass all the time." He says that, when he, the master, and the mate were together on the quarter-deck, the light of the steamer was observed on the port bow. The man at the wheel says that, when the light was observed, it was on the starboard bow. He also says that at the time he observed the steamer's lights the mate of the schooner was forward. He also says: "The schooner was very quick. She would take the wind and swing to very rapidly, over a half, and sometimes three quarters, of a point." The master says that, 10 minutes before he discovered the steamer's lights, he changed the course of the schooner from west to west by south; and, when his attention was called to the steamer's lights, he told the man at the wheel "to keep her as she was; to keep her on the steamer." If the light was kept on the steamer, and the steamer ported, as she says she did, such an order would require the schooner to luff. The man at the wheel says that on his course the jibs were flopping about. The witnesses from the steamship say that at the collision the schooner's jibs were full.

These statements do not seem to me entirely consistent with the theory of the schooner, and furnish some support to the contention of the steamer that the schooner did not hold her course. Much stress has been laid on evidence in the case tending to show that the schooner's light was not seen by those on the steamer as soon as

it might have been; but I do not see how this can affect the decision of the case. If the steamer was to windward of the schooner, as the weight of evidence seems to show, the action taken by the steamship, when she did see the schooner, was a proper action to be taken, and it was taken in time to have avoided collision if the schooner held her course.

The libel against the Portia must be dismissed, with costs. In the action against the Fair Wind, the libelant must have a decree, with an order of reference, to ascertain the amount of the damages.

THE BUFFALO.

CLARK v. THE BUFFALO et al.

(Circuit Court of Appeals, Second Circuit. May 23, 1893.)

1. COLLISION—FOG—SCHOONER AT ANCHOR—EVIDENCE.

A schooner, while lying at anchor in a dense fog in President Roads, Boston harbor, in a proper place, out of the ordinary track of steamers, was struck by a steamer which was moving slowly, and sounding her whistle at proper intervals. The witnesses for the steamer testified that, although they were on the alert for signals, they heard no fog bell on the schooner until a moment before the collision. The schooner's watchman, however, testified that he rang the bell at proper intervals, and her captain swore that after he first heard the bell he went on deck, but shortly returned to the cabin, where he heard the bell sounded every minute or two until the collision. *Held*, that there was no such preponderance of testimony or of probability against the schooner as would warrant reversing a finding in her favor by the district court.

2. SAME—INEVITABLE ACCIDENT.

Under the circumstances the court could not find that the collision was due to inevitable accident, as the schooner was out of the ordinary track of steamers, in a safe place, and was regularly ringing her bell, the sound of which was capable of being heard.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by Benjamin J. Clark against the steamship Buffalo, her engines, etc., for a collision; Thomas Wilson, Sons & Co., Limited, being claimants. In the court below there was a decree for libelant. 50 Fed. Rep. 630. Claimants appeal. Affirmed.

James Thomson, for appellants.

Edward L. Owens, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The owner of the schooner Luther A. Roby filed a libel in the district court for the southern district of New York against the steamship Buffalo, to recover damages which the schooner received about 3 o'clock in the morning of August 23, 1891, while lying at anchor in a dense fog in President Roads, in Boston harbor, from a collision with said steamship. This appeal is from the decree of the district court that the libelant recover of the steamship \$1,602.08, interest, and costs.

The uncontradicted facts were found by the district court as follows: The Buffalo was outward bound. The weather was clear at a little past 2 A. M., when she left her dock, but, in about 20 minutes after she had got around and headed upon her course, she ran into a dense fog when at Castle island, where the channel is narrow, and does not furnish suitable anchorage ground. She therefore continued on slowly in the first of the ebb tide, sounding her fog whistle, and intending soon to come to anchor. No bell was heard from the schooner, nor was the schooner seen until she was within one or two hundred feet of the Buffalo, when her masts appeared first in the lighter fog above a very little on the Buffalo's port bow, and too near to avoid collision. The Buffalo's engines were thereupon put ahead half speed and her helm hard a-port, which probably prevented greater damage by enabling her to clear the schooner's hull. The schooner, on her way from Hoboken to Boston, anchored, about half past 7 o'clock in the evening before the collision, in a usual and proper place, out of the ordinary path of steamers, in $3\frac{1}{2}$ fathoms of water. Her anchor light was properly set, and was properly burning at the time of the collision.

The question chiefly in dispute was one of fact, and was whether, during the fog, a bell was properly rung upon the schooner, and ought to have been heard by the officers of the steamship. The witnesses from the steamship heard no bell, although they say that their ears were open, and that they were intent upon hearing sound, until, one witness says, the steamer was almost touching the schooner, or, as the other important witnesses say, right after the collision. There is no doubt that just before the collision, when the watch on the deck of the schooner caught sight of the steamer, he rang the bell violently, which summoned the schooner's captain and some of the crew from below, who reached the deck before the collision. If this was the only ringing of the bell, or if the previous ringing was an occasional and pretended compliance with the rule of conduct applicable to sailing vessels, when not under way, in a fog, such ringing would have been insufficient. The testimony of the watchman and of the captain of the schooner is sufficiently explicit that the bell was rung at proper intervals, and clearly, from the time the fog set in, which was about 20 minutes past 2 o'clock, and about 20 minutes before the collision, until the steamer was seen, and rapid, violent ringing commenced. The captain went on deck when the bell began to ring, returned to his cabin in a few minutes, sat down, heard the bell "every minute and a half or two minutes or so," until he was summoned on deck again by the quick ringing. The sound was capable of being heard at a distance. He heard, when on deck, the bell of the schooner ahead of him.

Although the witnesses for the steamer are experienced, intelligent, and competent mariners, who undoubtedly intended to be prudent in its management, we cannot find that there is a preponderance of testimony or probability in opposition to the find-

ing of the district court, and that, although they did not hear the bell, it was not in fact regularly rung after the fog enveloped both vessels, and was not capable of being heard. Neither can it be found that the collision was caused by inevitable accident, because the schooner was out of the ordinary track of steamers, was anchored in a safe and proper place, was regularly ringing the bell, the sound of which was capable of being heard, and the conditions were not such as to make the accident or calamity an inevitable one.

The decree of the district court is affirmed, with costs.

THE CLARA and THE RELIANCE.

McCAFFREY et al. v. THE CLARA and THE RELIANCE.

(Circuit Court of Appeals, Second Circuit. May 23, 1893.)

1. COLLISION—STEAMER—TIDE—LOOKOUTS.

The tug C., with a barge lashed to her port side, was going up the East river with a strong flood tide, within 400 feet of the New York shore, and was nearing Corlear's Hook. The steamer R., deeply loaded by the head, was coming down, hugging the New York shore to avoid the tide. When nearly opposite the Hook, and some 75 feet from the shore, she starboarded her helm a little, intending to go over to the Brooklyn shore, and then for the first time discovered the C. some 200 or 300 feet down the river. Seeing that she could not safely cross the C.'s bows, she ported, and attempted to pass between the C. and the New York shore, but was unable to breast the tide, and, losing control of her movements, was swept against the C.'s tow, and sunk it. The C. ported and reversed, but was unable to stop her headway. The R. had no lookout, and her captain at the wheel did not see the C. until he was about to cross her course. *Held*, that the R. was in fault, the collision being due to the absence of a lookout on her. 49 Fed. Rep. 765, affirmed.

2. SAME—CONTRIBUTORY NEGLIGENCE.

The fact that the C. was violating the state statute requiring vessels to navigate as near the middle of the river as possible, was not a contributing cause of the collision, as there was ample room for the R. to avoid her had she seen the C. in time. 49 Fed. Rep. 765, reversed.

3. SAME—REVIEW—MATTERS NOT APPARENT ON RECORD.

The holding of the trial court that the C. was in fault in violating a rule of the supervising inspectors cannot be reviewed on appeal where such rule is not set out in the record or the briefs, for the appellate court cannot take judicial notice of such rules, and will determine the case without regard to any alleged fault based on their violation.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. This was a libel by Charles A. McCaffrey and others against the steam tug Clara and the steam lighter Reliance for damages resulting from a collision. Both vessels were condemned in the lower court, (49 Fed. Rep. 765,) and the claimant of each appeals. Affirmed as to the Reliance, and reversed as to the Clara.

W. W. Goodrich, for the Clara.

Harrington Putnam, for the Reliance.

A. A. Wray, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The libelants sue to recover losses sustained by the sinking of the barge George Adams while in tow of the steam tug Clara in a collision with the steamship Reliance, which took place off Corlear's Hook, in the East river, in the forenoon of October 20, 1891. The libel proceeds against both the Reliance and the Clara, charging each with fault contributory to the collision. Both vessels were condemned by the district court, and the claimant of each has appealed to this court.

At the time of the collision there was a strong flood tide, running about four knots an hour. The Clara, with the barge in tow, lashed to her port side, was proceeding up the river, and, as she neared Corlear's Hook, approached the New York shore, and kept on at a distance from it of about 400 feet. The Reliance was proceeding down the river, hugging the New York shore, to avoid the tide, and as she neared the Hook kept within about 75 to 100 feet from shore. She was deeply loaded by the head. She intended, upon reaching the Hook, where she would encounter the force of the tide, to cross the river, and go down on the Brooklyn side. Accordingly, when nearly opposite the Hook, she starboarded her wheel a little. Very shortly after doing so she discovered the Clara about 200 or 300 feet further down the river, and, seeing that she could not safely cross the course of the Clara, ported her wheel, and attempted to pass between the Clara and the New York shore. In attempting this maneuver she was unable to breast the strong tide at the Hook, which was then bearing upon her starboard bow, lost control of her movements, and was carried by the current across and somewhat down the river until she struck the barge of the Clara on the port bow. The Clara, as soon as she saw that the Reliance was being carried across her path by the current, reversed her engine and ported her helm, but, owing to the force of the tide, she could not wholly stop her headway before the collision took place. She had seen the Reliance some time before the Reliance saw her, but, being 300 feet further out in the river than the Reliance had no apprehension of danger until the Reliance commenced to sheer. The Reliance had no lookout, and her master, who was at the wheel in the pilot house, although he could have seen the Clara before he put his helm to starboard for a considerable distance, did not see her until his vessel had run about 100 feet under her starboard helm.

The learned district judge held both vessels in fault for the collision, because neither gave the signals required by the rules of the supervising inspectors. He also held the Reliance in fault because she did not keep a proper lookout, and the Clara in fault because she was navigating the river in violation of the state statute which requires steamboats at the part of the river where the collision took place to be navigated as near as possible in the center of the river.

The rules of the supervising inspectors do not seem to have been introduced in evidence. They are not in the record, nor are there any statements in the briefs of counsel which can be taken as admitting the existence of any particular rule. According to

the doctrine of *The E. A. Packer*, 140 U. S. 360, 11 Sup. Ct. Rep. 794, we cannot take notice of them. In that case the court said: "No such rule is incorporated in the record or in the briefs, and it is not a regulation of which we can take judicial notice." We must, therefore, in disposing of the case, disregard any alleged faults based upon the violation of such rules.

The *Reliance* was clearly in fault for her neglect to observe the *Clara*. The absence of a lookout cannot be deemed inconsequential. Her master, when asked why he did not see the *Clara* earlier, could only say: "I don't know. I didn't happen to notice her." If he had observed her before he put his vessel on her course to port, or at any time before the *Reliance* had encountered the full force of the tide on her starboard bow, there is no reason to doubt that he could and would have gradually brought his vessel to starboard, and passed safely between the *Clara* and the New York shore. The collision is directly attributable to this neglect. When he did see the *Clara*, it was too late to attempt to go to starboard without serious risk. He doubtless supposed that he could make the maneuver safely. Under ordinary circumstances, there was ample room between his vessel and the *Clara* to do so. But, deeply loaded by the head as his vessel was, the attempt to turn her sharply against a four-knot tide bearing upon her starboard bow was one of difficulty, and, as the event proved, could not be accomplished.

The more difficult question in the case is whether the *Clara* is also to be deemed in fault for the collision. The only fault which can be imputed to her is that of navigating too near the New York shore, in disregard of the state statute which required her to be navigated as near as possible in the center of the river. But she is not to be condemned if her fault was a remote one, and not a proximate cause of the disaster; and the real question as regards her liability is whether her fault was not one of that description. Although she was improperly beyond mid-river, she was not so near the shore as to embarrass the *Reliance* in rounding the Hook if the latter had been properly navigated. We do not overlook the rule that it is to be presumed against a vessel which at the time of a collision is in violation of a statutory regulation intended to prevent collisions that her fault was at least a contributory cause of the disaster, and that the burden rests upon her of showing not merely that it probably was not one of the causes, but that, under the circumstances, it unquestionably was not. But, as was said in *The Britannia*, 34 Fed. Rep. 557, by the learned district judge who decided the present cause, in a case where a breach of the same statute was under consideration:

"The mere transgression of such a statute will not make the vessel liable where the disobedience of it did not contribute to the collision; and, inasmuch as only the proximate causes of collision are deemed material, the mere fact that the vessel is on the wrong side of the river does not make her liable if there was ample time and space for the vessels to avoid each other by the use of ordinary care. In such cases the cause of the collision is deemed not the simple presence of the vessel in one part of the river, rather than in another part, but the bad navigation of the vessel that, having ample time and space, might easily have avoided the collision, but did not do so."

A finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, is not warranted unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. The Clara was under no obligation to anticipate that the Reliance would not see her, would take a course across the course of the Clara, and then, instead of backing and reversing, would attempt to make the hazardous movement which resulted in the collision. We conclude that the Reliance was wholly responsible for the collision, and that the Clara's fault did not contribute to it.

The decree of the district court is reversed, and the cause remanded, with instructions to dismiss the libel as against the Clara, but without costs, and to decree against the Reliance in favor of the claimant of the Clara for the costs of this court, and for the libelants against the Reliance for the losses sustained by the collision and the costs of the district court.

END OF VOLUME 55.